

WILLFULLY BLINDED: ON DATE RAPE AND SELF-DECEPTION

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I. INTRODUCTION: SEX AND SELF-DECEPTION

A. *Kobe's Story: An Illustration*

Basketball star Kobe Bryant, as virtually every national newspaper and news broadcast station prominently reported, was charged last year with raping a nineteen-year-old female employee at a Colorado mountain resort.¹ Although the prosecution ultimately withdrew the criminal charges—apparently for reasons having nothing to do with their credibility²—the alleged victim is, as of this writing, still proceeding with a civil suit against Bryant.³ More importantly, this high-profile case offers a vivid illustration of

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¹ See, e.g., Steve Henson, *Judge Rejects Bryant Motion*, L.A. TIMES, June 11, 2004, at S7; Elaine D'Aurizio, *Kobe Bryant Rape Case Seen Having a Chilling Effect; Some Fear Fewer Women Will Report Assaults*, REC. N. N.J., June 15, 2004, at A01. I am writing this Article long before Kobe Bryant's civil case has proceeded to trial or been otherwise resolved. Should the facts at trial prove to be different from those articulated here, that will not affect the usefulness of the version presented in this Article for illustrating the problem of self-deception. Precisely for purposes of illustration, I assume for argument's sake the version of the facts above. But I do not mean to express an opinion on whether Bryant is guilty, whether the state could have proven its case, or whether the civil plaintiff can still prove Bryant's liability.

² See Anthony J. Sebok, *Why Did Bryant's Accuser Become Uncooperative?* (Sept. 7, 2004) (arguing that Bryant's alleged victim ceased cooperating in the case because she justifiably lost faith in the criminal justice system) available at <http://www.cnn.com/2004/LAW/09/07/sebok.bryant/index.html> (last visited May 15, 2005); Peggy Lowe, *Prosecutor: Bryant's Alleged Victim Faced "Awful Anticipation"*, ROCKY MOUNTAIN NEWS, Sept. 8, 2004, at 4A (recounting interview with prosecutor, who insisted that the complainant was credible and the case strong but that she reluctantly dropped the case because of the victim's decision not to proceed further in the criminal courts).

³ T. R. Reid, *Kobe Bryant Case Charge Is Dropped; Accuser Tells Court that She Doesn't Want To Participate in Prosecution, but Civil Case Will Go on*, NEWSDAY, Sept. 2,

one important psychological mechanism by which date rape can happen, namely, by male “self-deception.” Self-deception occurs when the alleged rapist consciously, but incorrectly, believes that he has the woman’s consent when, at some less-than-fully conscious level,⁴ he knows otherwise.

Investigative reporter Jeffrey Scott Shapiro, in his new book, *Kobe Bryant: The Game of His Life*, reports that Bryant and his alleged victim—whom Shapiro identifies by the pseudonym “Lilly Fuller”—told the police virtually identical stories, with one major exception: Bryant insists that Lilly never told him “no,” while Lilly equally insists that she said “no” firmly and indicated her lack of consent in other ways as well.⁵

Shapiro describes the detectives’ interview with Bryant on whether Lilly consented, saying:

When one of the detectives asked . . . [Bryant] whether or not Lilly had ever said “no,” Bryant hesitated and said nothing. The detectives in the room sat motionless.

“You’re not answering the question,” one of them said.

“I’m thinking,” Bryant said, slightly annoyed.

Exhaling a deep breath and looking down at his sneakers, Bryant made a variety of frustrated facial expressions and then, after [a full] 30 seconds of pondering the question, he responded.

“It was consensual,” he said.

“What’s that mean?” one of the detectives asked, getting frustrated.

Bryant said nothing, looking at the two men before him.

The detective firmly reiterated the question. “Did she ever say ‘no’?”

Bryant paused. “No,” he said quietly.⁶

On the one hand, Bryant’s defenders have argued for one version of the truth: Lilly lied. She had consented but saw a chance for fame, money, or

2004, at A05.

⁴ See *infra* text accompanying notes 37–91 (elaborating on and illustrating self-deception).

⁵ See JEFFREY SCOTT SHAPIRO & JENNIFER STEVENS, *KOBE BRYANT: THE GAME OF HIS LIFE* 13–18 (2004) (summarizing and comparing the stories of Bryant and his accuser). Bryant might have told the police, however, that Lilly said “no” five minutes into the act when he asked for permission to ejaculate. See *Bryant’s Statements to Detectives—Recording and Transcript of Interview*, VAIL DAILY (Sept. 15, 2004), available at <http://www.vaildaily.com/article/20040915/NEWS/109160001&SearchID=73198551072706> (last visited May 15, 2005). The article reprinted a purported transcript of Bryant’s interview by the police, though it conceded that the paper’s staff could not tell whether the recording and transcript had been altered in any way and that the paper had deleted some of the graphic details. *Id.* The transcript was sent to the paper while it and the recording on which it was based were under seal by court order. *Id.* The transcript is consistent with, though not identical to, Shapiro’s account, though the transcript version reprinted in the paper does not indicate the length of pauses or awkward silences. Compare *id.*, with SHAPIRO & STEVENS, *supra*, at 15.

⁶ SHAPIRO & STEVENS, *supra* note 5, at 15.

feeding her ego by crying rape.⁷ On the other hand, Bryant's critics interpret his lengthy delay in responding to the detectives' questions to support the very different inference that Bryant, not Lilly, was lying: Lilly had said "no," and Bryant understood that this meant she did not consent, but he proceeded with the sexual encounter nonetheless.⁸

The detectives had yet another interpretation of the interaction between Bryant and Fuller. Explains Shapiro: "For Bryant to have waited that long and still not flatly deny the allegation, instead saying, 'it was consensual,' told investigators that Lilly had likely said 'no,' but that in Bryant's mind, 'no' could have meant 'yes.'"⁹ In other words, Bryant told the truth when he said that he honestly believed that Lilly had consented. But he lied about whether she said "no" because he feared, in retrospect, that no one would believe him if he admitted to Lilly's protests.¹⁰ If the detectives are right, the only basis for prosecuting Bryant for the rape would be that Lilly did not in fact consent, and Bryant *reasonably should have known* that he proceeded against her will—assuming, of course, that negligence about whether a woman consented is sufficient culpability to prove rape under Colorado law.¹¹

Bryant himself recently came close to admitting that he should have, or at least could have, known that Lilly was not consenting. After a series

⁷ See *id.* at 51, 58, 59, 60–61, 140–41 (noting press reports that Lilly suffered "emotional problems"; had attempted suicide two months earlier; "crave[d] attention like no other"; bragged about pinning blame on Bryant; lied to gain the attention of her ex-boyfriend; and took "anti-psychotic" medication).

⁸ Cf. D'Aurizio, *supra* note 1, at A01 (quoting prosecutors, in the context of the Kobe Bryant rape case, saying that women rarely lie about rape, and summarizing the views of rape law reformers in a way that suggests their belief in Bryant's guilt).

⁹ SHAPIRO & STEVENS, *supra* note 5, at 16. Shapiro described the detectives' immediate reaction to Bryant's thirty-second delay in answering the question about whether Lilly said "no" as follows: "A dead silence fell over the room and the investigators looked at one another. To them, Bryant's evasiveness was deeply troubling. Two or three seconds of silence was perhaps normal, but 30 seconds of silence was deafening under the circumstances." *Id.* at 15–16. Prosecutors later repeatedly timed the delay, and one became "convinced that Bryant's silence spoke volumes about what had really happened and he was optimistic that a jury would feel the same way." *Id.* at 16.

¹⁰ This last point was not made by the police but is my informed speculation about why Bryant would lie—informed by the nature of human self-deception to be discussed in the coming pages.

¹¹ It is, however, not Colorado law that matters for my purposes; rather, I concentrate on the prevailing law in many states, for I use Bryant merely as a useful example for understanding the dominant paradigm. See STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 258 (1998) (discussing the prevailing negligence liability approach to mens rea in rape cases). Under Colorado criminal law, liability for rape turns on whether the defendant *actually believed* that he had consented; the reasonableness of that belief is immaterial. See Sebok, *supra* note 2. But see Martha Chamallas, *Lucky: A Sequel*, 80 IND. L.J. (forthcoming 2005) (noting that the prosecution in the Bryant case nevertheless argued that Colorado law dispenses with a mens rea requirement while the defense argued that the rape statute required proof of Bryant's knowing of his alleged victim's nonconsent). "[The civil negligent belief] standard is different from the standard that would have applied at the criminal trial. There, Bryant could have been acquitted of rape if he genuinely but unreasonably thought she had consented." *Id.*

of technical mishaps resulted in the inadvertent revelation by the court of information that had been ordered sealed,¹² Lilly, expressing a loss of confidence in the fairness of the criminal process, refused to cooperate with that process further.¹³ When the criminal case was dismissed, Bryant made the following public statements:

Although I truly believe this encounter between us was consensual, I recognize now that she did not and does not view this incident the same way I did. After months of reviewing discovery, listening to her attorney, and even her testimony in person, I now understand how she feels that she did not consent to this encounter.¹⁴

I believe that this quote reveals that Bryant's behavior can be explained by male self-deception. The remainder of this Article focuses on defining and explaining self-deception, particularly in the context of rape. I return occasionally to the Kobe Bryant example to illustrate this psychological phenomenon and its implications for rape law. Before turning to the topic of self-deception, it is worthwhile to examine in greater depth the concept of negligence liability and its relation to rape law.

B. Negligence Liability and Date Rape

Negligence is the mens rea requirement for rape liability imposed by the majority of American jurisdictions since the mid-1970s.¹⁵ The courts seem to do so because "[t]he injury of an unwanted sexual intrusion is great, and there is a clear need to give the man some reason to pay attention to the woman's wishes."¹⁶ But how a "reasonable person" in the man's shoes

¹² See, e.g., Editorial, *A Costly Case*, ST. PETERSBURG TIMES, Aug. 5, 2004, at 2 (noting that "Colorado's court system . . . mistakenly released personal details about the accuser three times, despite rape-shield laws that should have guaranteed her anonymity," and reporting that "the judge in the case has blamed budget cuts and staffing shortages for the lapses").

¹³ See Sebok, *supra* note 2. Columnist and law professor Anthony Sebok notes several advantages to Lilly proceeding civilly rather than criminally: (1) "She may reasonably expect that her hand-picked civil lawyers will do better than the Eagle County prosecutors, who have been unimpressive"; (2) she may benefit from the lower civil preponderance of the evidence burden of persuasion; (3) only lack of consent, not force, need be proven in the civil case; (4) she may entirely avoid the pain of testifying because the civil case is likely to settle; and (5) there is at least the possibility that the civil judge will interpret the relevant rule of evidence in the civil case to limit inquiries into Lilly's prior sex life, whereas the judge in the criminal case ruled that the defense could present some evidence relating to her sexual history. *Id.*; see also Lowe, *supra* note 2, at 4A (reporting that the alleged victim backed out of the case due to her trepidation over the criminal trial process).

¹⁴ *Judge Dismisses Kobe Bryant Rape Case* (Sept. 1, 2004), available at <http://www.courttv.com/trials/bryant/090104ctv.html> (last visited May 15, 2005).

¹⁵ See SCHULHOFER, *supra* note 11, at 258.

¹⁶ See *id.*

should think or behave is generally undefined, leaving to the jury the task of giving the term meaning.¹⁷ Doing so requires jurors to draw on the teachings of what many feminists believe to be the “rape culture,” a culture that implicitly sanctions frequent male indifference to a woman’s desires and a significant degree of male violence in sexual encounters.¹⁸ Empirical research shows that even university students, who are generally exposed to rape awareness programs and tend to hold more progressive views about rape than the less educated, may very well make arguments and credibility judgments reflecting deeply gendered biases that make rape—especially date rape—particularly hard to prove.¹⁹ This suggests that the law in action may contradict the stated intentions of legislators in passing laws that at least partly reflected the aspirations of the rape law reformers of the past few decades to create a system for trying date rape cases that treats all parties with equal respect.²⁰ Professor Stephen Schulhofer, one of the leading advocates of continued rape law reform, points out that, given current social mores, a jury might readily decide that a man’s ignoring a “no” was consistent with his reasonable belief that she consented.²¹ The reasonableness standard, as currently articulated, he maintains, “produces a sound result only if the jury itself is reasonable—which is to say, ‘like us.’ If it isn’t, the reasonableness standard simply invites the worst abuses of cultural stereotyping and ingrained sex bias that rape reformers have tried for so long to escape.”²² The reasonableness formula can succeed, Schulhofer concludes, only if “concrete reforms . . . move beyond that formula to specify *which* beliefs about consent count as reasonable.”²³ Schulhofer, I, and others have elsewhere sought to accomplish just that task.²⁴

¹⁷ See Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN’S STUD. 387, 419–24 (1996) [hereinafter Taslitz, *Patriarchal Stories*] (stipulating that juries rely on personal and culturally pervasive contexts and values to interpret ambiguous or abstract legal terminology).

¹⁸ See generally TRANSFORMING A RAPE CULTURE (Emilie Buchwald et al. eds., 1993) (reasoning that no individual member of the public can escape the negative ramifications of living in a society dominated by a rape culture construing children, females, and some males to be sexual prey).

¹⁹ See Taslitz, *Patriarchal Stories*, *supra* note 17, at 465–75 (citing a 1991 survey conducted of university students that found that almost a quarter of the students believed that women often “cry rape” and could prevent rape if they so desired).

²⁰ See generally CASSIA SPOHN & JULIE HORNEY, RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT (1992) (summarizing goals of the rape law reform movement, legislation enacted, and the limited success of even the most aggressive legislative schemes to achieve the reformers’ stated goals); NANCY A. MATTHEWS, CONFRONTING RAPE: THE FEMINIST ANTI-RAPE MOVEMENT AND THE STATE (1994) (documenting the critical history of the anti-rape movement, the broader social phenomenon of which the anti-rape law reform movement was but a part).

²¹ See SCHULHOFER, *supra* note 11, at 259.

²² *Id.*

²³ *Id.*

²⁴ See *id.* at 254–73 (insisting that the legal standard must move toward affirmative indications of consent); Lois Pineau, *Date Rape: A Feminist Analysis*, in DATE RAPE: FEMINISM, PHILOSOPHY, AND THE LAW 25–26 (Leslie Francis ed., 1996) [hereinafter DATE RAPE] (arguing that even if a man genuinely thought a woman was consenting to sexual

Yet giving meaning to the term “reasonableness” in the date rape context creates its own conceptual problem. Rape is a serious felony, carrying substantial social stigma and a potentially lengthy term of imprisonment.²⁵ The law ordinarily punishes negligence relatively lightly, whereas penalties for crimes committed with particular subjective mental states (for example, intent or premeditation) are usually far more severe.²⁶ There are many justifications for this state of affairs, but they can be reduced to the idea that one desiring to harm another is more culpable than one causing harm accidentally.²⁷ The spectrum of criminal penalties increasing with the wickedness of the actor’s mental state is fundamental to the criminal law.²⁸ As Schulhofer explains:

intercourse, his failure to establish a woman’s voluntary consent through affirmative evidence would substantiate his guilt of date rape). *See generally* Andrew E. Taslitz, *Race and Two Concepts of the Emotions in Date Rape*, 15 WIS. WOMEN’S L.J. 3 (2000) [hereinafter Taslitz, *Two Concepts*] (building on Pineau’s theory regarding communicative sexuality and negligence liability, reasoning that men and women are capable beings responsible for their individual actions, so interactions between them should be regarded as such).

²⁵ *See, e.g.*, MODEL PENAL CODE § 213.1 (making stranger rape and rape between companions where the actor inflicts serious bodily injury felonies of the first degree and other rapes felonies of the second degree); Taslitz, *Two Concepts*, *supra* note 24, at 58–64 (discussing the indignation, resentment, and moral hatred society directs at convicted rapists).

²⁶ *See* Andrew E. Taslitz, *Myself Alone: Individualizing Justice Through Psychological Character Evidence*, 52 MD. L. REV. 1, 14–17 (1993) [hereinafter Taslitz, *Myself Alone*] (explaining the “rule logics” behind social accountability for criminal acts).

²⁷ Indeed, any sort of negligence liability is controversial in criminal law. Critics complain “that it breaks the normal link between personal conduct and criminality,” namely, *mens rea*. LARRY MAY, SHARING RESPONSIBILITY 95 (1992) (describing, but not espousing, the critics’ arguments pertaining to criminal liability). These critics argue that only awareness of our wrongdoing creates a full sense of our personal guilt for the crime. *See id.* They maintain that negligence is not a mental state, but rather the *absence* of a mental state or the mere failure to notice or to think about something. *See id.* at 95–96. Furthermore, they argue, there are an unlimited number of such failures to notice, so one failure is not any more culpable than another. *See id.* at 96.

However, a contrary view reconceives negligence as more than the mere absence of a mental state. Instead, criminal negligence is viewed as embodying or reflecting attitudes of carelessness, thoughtlessness, and insensitivity. *See id.* at 96–98. Such attitudes are often responsible for a person’s failure to act reasonably. Condemning someone who acts based upon these traits appropriately strengthens the defendant’s sense of moral urgency and realization that “it was truly *oneself* that made choices that played a causal role in given harm.” *Id.* at 97. We cause much evil by our inaction as well as our action, so we should be encouraged to be aware of the morally relevant demands on our cognitive and emotive energies. *See id.* at 96–98.

Current law does indeed recognize criminal liability for negligence but still places it near the bottom of the culpability and severity of punishment ladder, just above strict liability. *See* Taslitz, *Myself Alone*, *supra* note 26, at 14–17 (laying out the hierarchical liability levels); Kenneth W. Simons, *When Is Strict Criminal Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1093–96 (1997) (highlighting the presence and potential function of a negligence standard of liability); John L. Diamond, *The Myth of Morality and Fault in Criminal Law Doctrine*, 34 AM. CRIM. L. REV. 111, 120–27 (1996) (summarizing additional arguments concerning the wisdom and severity of liability for negligence in criminal cases).

²⁸ *See, e.g.*, Taslitz, *Myself Alone*, *supra* note 26, at 14–16 (providing the rule logics’ spectrum of *mens rea*).

The argument for expanding liability in rape cases from deliberate wrongdoing to carelessness remains controversial. Most serious felonies, from murder to ordinary theft, require proof that the defendant knew he was causing injury or was aware of a substantial risk. Yet extreme carelessness (“criminal negligence”) is sometimes accepted as a basis of criminal liability, for example in homicide prosecutions based on drunk driving or on the use of unreasonable force in self-defense.²⁹

It may be argued that, where “extreme carelessness” is permitted as the basis for criminal liability, penalties are, and *should be*, lower than for more intentional misconduct.³⁰ Schulhofer seems to agree with this perspective, seeing no difference between negligent date rape cases and other sorts of criminal negligence cases that justify special treatment for the former. In his view, negligence liability can be fair to criminal defendants only if “the penalty . . . [is] substantially lower than that which applies to intentional misconduct.”³¹ Yet in practice, negligence liability in the case of rape can result in penalties as severe as those for other kinds of offenses involving intentional criminality.³² Even looking at the penalties for rape in isolation from the penalties for other categories of offenses, negligently raping someone does not usually mean a lesser maximum sentence than intentional or knowing rape.³³ This Article argues that, with regard to sentencing date rapists, Schulhofer is wrong. Rape is different from other crimes in a way that justifies severe potential penalties even when liability is based solely upon negligent conduct.³⁴

²⁹ SCHULHOFER, *supra* note 11, at 258.

³⁰ See Taslitz, *Myself Alone*, *supra* note 26, at 14–17 (basing this scenario upon the moral responsibility element guiding criminal prosecution).

³¹ SCHULHOFER, *supra* note 11, at 258–59.

³² See MODEL PENAL CODE §§ 6.06, 213.1 (suggesting one year to life imprisonment for violent or stranger rapes and one to ten years for date rape where there are no serious injuries). See generally RICHARD A. POSNER & KATHARINE B. SILBAUGH, A GUIDE TO AMERICA’S SEX LAWS (1996) (summarizing the various laws pertaining to individual and personal sexual regulation while highlighting seeming inconsistencies and anomalies).

³³ See POSNER & SILBAUGH, *supra* note 32, at 7 (noting that common rape reform statutes, such as those in New York, are moving away from considering rape cases lacking serious physical injury or involving individuals who are social companions to be lesser offenses); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 155–56 (3d ed. 2001). Professor Dressler explains that a reasonable mistake of fact is a defense to general intent common law crimes like rape, and thus an unreasonable mistake of fact, that is, negligence concerning whether a woman consented, renders a man guilty of rape under basic common law principles. *Id.* Proving a greater mental state does not result in common law liability for any additional, more serious offense. *Id.* But see MODEL PENAL CODE § 213.1 (providing that it is no crime to rape negligently and instead defining rape as sexual intercourse between a male and female if (a) he compels her to submit by force, (b) has drugged her to impair her judgment, (c) he proceeds with intercourse when she is unconscious, or (d) the female is less than ten-years-old).

³⁴ To be precise, Schulhofer proposes that reckless, knowing, or purposeful rape should be a felony of the second degree and negligent rape should be a felony of the third degree. See SCHULHOFER, *supra* note 11, at 283–84. He also proposes a new offense of “sexual

What distinguishes rape turns on the justification for imposing negligence liability for the crime. Most commentators favoring negligence liability for rape advocate treating rape like other crimes, arguing that rape has been too lightly treated in our culture because it has been viewed as less serious than, for example, robbery or murder.³⁵ But rape *is* different from other crimes if we understand the criminal law's reliance on negligence liability for rape as serving the important social purpose of discouraging male self-deception about women's desires. Although further research is needed, I will argue in the following Sections that male self-deception about whether a woman has consented to sexual intercourse is plausibly widespread and is morally worse than ordinary forms of criminal negligence.³⁶

C. The "Parts" of the Mind: The Conscious, Unconscious, and Semiconscious

To understand how someone can deceive himself requires at least a cursory understanding of the metaphorical "parts" of the mind to which I will refer. But even to speak of "parts" of the mind is somewhat misleading because "modern neuroscientific research has revealed a . . . fluid and dynamic relationship between conscious and unconscious processes. . . . [H]uman behavior is not always conscious or voluntary in the 'either/or' way. . . . Rather, consciousness manifests itself in degrees that represent varying levels of awareness."³⁷ In other words, the mind consists of a spec-

abuse," which is essentially rape without force, that is, someone engaging in an act of sexual penetration "knowing" (a word that he defines as including recklessness) that he does not have the other person's consent to do so. Again, however, he would lower that offense to a felony of the fourth degree where it is committed negligently. *Id.* Even if Schulhofer is right, however, why should "mere" negligence result in any sort of felony conviction? It is true that crimes of negligence, such as negligent homicide, may be punished as felonies of a similar degree, *see, e.g.*, MODEL PENAL CODE § 210.4 (making negligent homicide a felony of the third degree), but what about a rape in which there may be no physical injuries beyond the act of penetration itself? Does that merit the same punishment as a crime inflicting the ultimate physical injury: death? On the other hand, why set the punishment for negligent rape as low as a third degree felony? Some readers might view the arguments to come as still justifying different degrees of rape based on different sorts of mental states, but even if that is so, why not make the most serious sort of rape a felony of the first degree and the allegedly "lesser" sort a felony of the second degree, recognizing a small spectrum of punishments of increasing severity but ratcheting them up from the thresholds set by Schulhofer? These are the sorts of questions that Schulhofer does not answer in his nevertheless excellent, indeed groundbreaking, book. This Article should thus help to fill these gaps by explaining why negligence liability in this area merits serious punishment of some sort, even for readers who might disagree with my precise conclusions.

³⁵ *See, e.g.*, Margaret A. Clemens, *Elimination of the Resistance Requirement and Other Rape Law Reforms: The New York Experience*, 47 ALB. L. REV. 871, 871 (1983) (making this point in a particularly stark fashion by discussing the original conceptions surrounding rape and comparing it to the conceptions surrounding nonsexual crimes).

³⁶ *See infra* Parts II–IV. My goal in this Article, therefore, is simply to prompt debate, starting a new conversation from a new perspective rather than providing a comprehensive or definitive scheme for addressing the problem of self-deception in the criminal law generally, much less in the area of date rape specifically.

³⁷ Deborah W. Denno, *Crime and Consciousness: Science and Involuntary Acts*, 87

trum or continuum of varying degrees of consciousness so that, to cognitive scientists, it is erroneous to speak of a simple, sharp dichotomy between the “conscious” and “unconscious” minds.³⁸ Moreover, the degrees of consciousness are interactive so that unconscious thoughts affect conscious ones and vice versa.³⁹ Indeed, much conscious thought begins in the unconscious, though we are unaware of that source or its influence on our conscious mind and behavior.⁴⁰ However, as Professor Deborah Denno notes in her pathbreaking work on involuntary acts, “a degree of consciousness continuum may be workable for cognitive scientists,”⁴¹ but such a continuum:

is an impractical way of ordering a legal roadmap for assessing voluntariness. There is enormous diversity in the ways that people can become unconscious as well as the situations and acts they may experience. The law must draw lines. A legal standard must also allow room for social mores and an assessment of the defendant’s particular situation. A defendant’s volitional capacity cannot be evaluated in a vacuum.⁴²

Accordingly, Denno suggests what is in some ways a modest, and in other ways a radical, approach to voluntary acts: replacing the current voluntary/involuntary dichotomy (for example, bodily movements while having an epileptic fit would be involuntary) with a workable but more scientifically informed voluntary/involuntary/semi-voluntary trichotomy.⁴³ Denno’s work

MINN. L. REV. 269, 272, 308–37 (2002) (summarizing further the empirical data supporting this statement).

³⁸ See *id.* at 308.

³⁹ See *id.* (“One idea garners consensus: The boundaries between our conscious and unconscious are permeable, dynamic, and interactive, and there is no valid scientific support for a sharp dichotomy.”).

⁴⁰ “Consciousness arises from nonconscious and unconscious mental activities.” *Id.* at 312. The “nonconscious” activities are those “that never directly enter awareness [because of] their primitive level in the processing hierarchy.” JOHN G. TAYLOR, *THE RACE FOR CONSCIOUSNESS* 15 (1999). By contrast, these commentators use the term “unconscious” to mean brain activities of which individuals are “presently unaware but that may have been repressed at an earlier time and still influence [their] actions.” *Id.* Both sorts of less-than-conscious thought are critical contributors to what may ultimately be conscious awareness; even the “nonconscious” is described as “the gateway to consciousness.” *Id.* at 16–17. Because both nonconscious and unconscious mental activities interact with consciousness, I make no effort to distinguish between “nonconscious” and “unconscious” processes, using the latter term to subsume both. One major point of this Article, however, is that less-than-fully conscious mental states are relevant to crafting criminal liability rules, and, in the case of rape, *all* less-than-fully conscious states lead to the same policy recommendation: a revised negligence standard raising the prospect of significant criminal penalties. Gross distinctions among categories of mental state are therefore sufficient for my purposes, though, for the sake of clarity, this Introduction will elaborate briefly on my use of some additional terminology.

⁴¹ Denno, *supra* note 37, at 357.

⁴² *Id.*

⁴³ *Id.* at 360.

concerns modernizing the law's understanding of the actus reus element of every crime—the requirement that someone can be punished only for actions, that is, voluntary bodily movements, or for omissions to act where there is the rare duty to do something to protect another.⁴⁴ The task in this Article is instead to reconceptualize the law's mens rea requirement to account for the problem of self-deception—a problem with particular relevance to the crime of rape.⁴⁵ This different task requires somewhat different terminology. Nevertheless, mens rea, like actus reus, is governed by Denno's logic: science requires a more complex analysis of human thoughts and behavior than the criminal law now embraces, while the practical needs of the justice system mandate some still workable level of simplicity, a goal achieved by slightly more fine-grained categorization.⁴⁶ Like Denno's actus reus analysis, therefore, I find a trichotomy of categories—the conscious, the semiconscious, and the unconscious—most useful to integrating the concept of self-deception into the criminal law.⁴⁷

Any terminological system is fraught with risk where, as here, there is dispute both among the relevant professional groups (philosophers, social scientists, and lawyers) and within members of each group about the proper choice of terms, their meaning, and their scientific significance.⁴⁸ An extended review of this debate is not necessary for achieving either clarity or accuracy for the purposes of this Article. What is necessary, however, is that I define my terms and briefly explain why I have chosen them.

1. *The Conscious Mind Defined*

The conscious mind is not strictly unitary; rather, there are different areas of the brain and levels of neural processing involved in conscious thought.⁴⁹ One useful perspective, though the definition of “consciousness” is widely debated, includes in the conscious mind the senses of self and of others, the intention to act, the experience of emotions, and phenome-

⁴⁴ See DRESSLER, *supra* note 33, at 101–02.

⁴⁵ See *infra* Parts II–IV.

⁴⁶ See Denno, *supra* note 37, at 356–58.

⁴⁷ See *infra* text accompanying notes 49–70 (defining further this terminology and why I chose it).

⁴⁸ See, e.g., FRANK TALLIS, HIDDEN MINDS: A HISTORY OF THE UNCONSCIOUS 45, 91–109 (2002) (tracing history of the evolution of cognitive terminology); Denno, *supra* note 37, at 308–51 (noting a variety of terminological variations among philosophers, lawyers, and cognitive scientists). Denno also notes that apart from agreement on certain basic concepts (such as the permeable, dynamic, and interactive nature of the various levels of consciousness and unconsciousness), on many matters research has produced a “bewildering number of theories and hypotheses about the ‘mystery’ of the mind.” *Id.* at 320. Nevertheless, like Denno, I find enough agreement on a number of matters to construct a tentative theory of the mental processes involved in self-deception sufficient to support my working hypotheses.

⁴⁹ See KEITH E. STANOVICH, THE ROBOT'S REBELLION: FINDING MEANING IN THE AGE OF DARWIN 47 (2004) (stipulating that cognitive processing is not confined to a unitary neural location); Denno, *supra* note 37, at 311 (listing the different neural areas of various brain processing levels).

nal qualities or “qualia,” such as the conscious experience of pain.⁵⁰ Internal self-conversations likewise fall into the “conscious” realm of experience.⁵¹ Despite the diversity of mental states and their biological sources subsumed within the term “consciousness,” there is a real sense in which conscious thought is best viewed as more unitary than is subconscious thought, justifying “a language of executive or central control.”⁵² Philosophers often scoff at this use of language suggesting a unitary conscious mind or a “central processor” as involving a “homunculus” or “little person in the head,” because we still need to explain how the mind of that “little person” makes decisions and gives “us” orders.⁵³ As leading cognitive scientist Steven Pinker explains, however, language connoting a unitary conscious mind captures something important about its nature:

The society of mind is a wonderful metaphor, and I will use it with gusto when explaining the emotions. But the theory can be taken too far if it outlaws any [unitary master] system in the brain charged with giving the reins or the floor to one of the agents at a time. The agents of the brain might very well be organized hierarchically into nested subroutines with a set of master decision rules . . . or agent or good-kind-of-homunculus, sitting at the top of the chain of command. It would not be a ghost in the machine, just another set of if-then rules or a neural network that shunts control to the loudest, fastest or strongest agent one level down.⁵⁴

The conscious mind, because it is effectively unitary and includes self-conversation and a range of familiar states of awareness, is closest to folk or everyday notions of who we are and what it means for us to “think.”⁵⁵ Consciousness as involving clear states of awareness and a sense of control over our actions also reflects the law’s and many commentators’ current sense of the sorts of subjective mental states most often required to impose legal liability.⁵⁶

⁵⁰ See Denno, *supra* note 37, at 311–12.

⁵¹ See, e.g., THOMAS SZASZ, THE MEANING OF MIND 28 (1996) (defining conscious thought as internal conversation).

⁵² STANOVICH, *supra* note 49, at 47.

⁵³ See *id.* at 46–47 (stipulating that such language is necessary for communicative ease and conceptual and empirical grounding).

⁵⁴ STEVEN PINKER, HOW THE MIND WORKS 144 (1997).

⁵⁵ Cf. MERLIN DONALD, A MIND SO RARE: THE EVOLUTION OF HUMAN CONSCIOUSNESS, at xii (2001) (“Commonsense theories of mind are . . . reassuring, but they demonstrate our avoidance of the fact of our own strangeness to ourselves.”).

⁵⁶ See MODEL PENAL CODE § 2.02 (defining all mens rea terms other than negligence and strict liability in terms of conscious thought); RONALD A. ANDERSON, WHARTON’S CRIMINAL LAW AND PROCEDURE § 50 (1987) (noting that “[i]f a person is . . . unconscious at the time he commits an act . . . he is not responsible therefore”); Denno, *supra* note 37, at 283, 308 (explaining that some courts use the term “unconsciousness” to mean the ab-

2. *The Unconscious Mind Defined*

At the other end of the spectrum is the unconscious, those “mental processes that are inaccessible to consciousness but that influence judgments, feelings, or behavior.”⁵⁷ Although we often are not consciously aware of our unconscious thoughts, unconscious thinking constitutes most of our mental activity. The unconscious mind is not so much a single entity, but rather a collection of modules (for example, one to process language, another to recognize faces) that expresses itself in habits that constitute much of what it means to have a personality.⁵⁸ Unconscious thinking is generally rapid and automatic relative to conscious thought.⁵⁹ Moreover, because much conscious thought and action is initiated by the unconscious, the unconscious can filter information and bias our interpretations of it before reaching conscious awareness, thus often biasing and distorting our conscious “choices” as well.⁶⁰ There can be no conscious mind without the

sence of the mental state required for the crime and questioning the Model Penal Code’s binary conscious/unconscious scheme).

⁵⁷ TIMOTHY D. WILSON, *STRANGERS TO OURSELVES: DISCOVERING THE ADAPTIVE UNCONSCIOUS* 23 (2002) (emphasis omitted).

⁵⁸ *See id.* at 6–7, 22. Wilson explains,

According to the modern perspective, Freud’s view of the unconscious was far too limited. When he said . . . that consciousness is the tip of the mental iceberg, he was short of the mark by quite a bit—it may be more the size of a snowball on top of that iceberg. The mind operates most efficiently by relegating a good deal of high-level, sophisticated thinking to the unconscious, just as a modern jumbo jetliner is able to fly on automatic pilot with little or no input from the human, “conscious” pilot. The adaptive unconscious does an excellent job of sizing up the world, warning people of danger, setting goals, and initiating action in a sophisticated and efficient manner. It is a necessary and extensive part of a highly efficient mind and not just the demanding child of the mental family and the defenses that have developed to keep this child in check.

Id. at 6–7.

⁵⁹ *See id.* at 50–51 (stipulating that one’s nonconscious pattern detector reacts very quickly to elements available to conscious perception, such as environment, patterns, and dangers); TALLIS, *supra* note 48, at 103 (noting how “[t]he old distinction between conscious and unconscious domains was subsequently reformulated in terms of *controlled* and *automatic* processing”).

⁶⁰ *See, e.g.,* Taslitz, *Patriarchal Stories*, *supra* note 17, at 404–33 (describing these processes in detail and how they affect jury decisionmaking in rape cases). I do not in this Article address the ultimate question whether “free will” exists. The criminal law assumes that it does, at least for most conscious choices. *See, e.g.,* Klaus Günther, *Voluntary Action and Criminal Responsibility*, in *VOLUNTARY ACTION: BRAINS, MINDS, AND SOCIALITY* 263–64 (Sabine Maasen et al. eds., 2003) (attempting to reconcile the idea of free will in the criminal law with the teachings of cognitive science); Dan W. Brock & Allen E. Buchanan, *The Genetics of Behavior and Concepts of Free Will and Determinism*, in *GENETICS AND CRIMINALITY: THE POTENTIAL MISUSE OF SCIENTIFIC INFORMATION IN COURT* 67–69 (Jeffrey R. Botkin et al. eds., 1999) (addressing similar issues of free will versus determinism raised by recent findings in genetics). This Article is not the place to challenge that assumption, though a corollary of the arguments that I make here is that unconscious processes do not necessarily compromise free will and must be understood if we are to have a more accurate picture of the nature of human choice.

unconscious one, and though much of the unconscious mind will never be directly accessible to our consciousness, some unconscious thoughts can eventually be accessed by the conscious mind through sustained effort.⁶¹ Other times, “dynamic forces” can also “repress” mental activity that once was conscious.⁶² Both purely unconscious processes—those never accessible to the conscious mind—and processes accessible only with extended effort (and possibly professional assistance) raise similar moral questions within criminal law. Legislatures, courts, and many commentators are loathe to inquire into the unconscious, in part because of proof problems: how can we know what lies in the unconscious? In addition, they avoid confronting questions about free will: how can we control thoughts and emotions of which we are unaware?⁶³ These concerns arise to differing degrees with both the forever-inaccessible-to-awareness and the accessible-to-awareness-only-over-the-long-term types of less-than-fully conscious thinking.⁶⁴ But the law’s assumption that even purely unconscious thoughts are beyond conscious control is often wrong, as Parts II, III, and IV of this Article will explore. And the proof problems, though exaggerated, can be circumvented by using objective standards of liability (“How *should* you think in a given situation?”) drawing on our knowledge of the unconscious rather than subjective standards of liability (“How *did you actually think* on this occasion?”).⁶⁵

⁶¹ Tactics which enable such access to the unconscious will be discussed later in this Article. See *infra* text accompanying notes 245–265, 312–352; see also Denno, *supra* note 37, at 328 (noting that “[t]he stronger and now accepted argument is that consciousness evolves gradually, starting from the unconscious and moving to pre-conscious states on the way to becoming a settled state of consciousness”); WILSON, *supra* note 57, at 23 (comparing the “unconscious” to the “preconscious,” which pertains to those thoughts that are more easily accessed by consciousness); SIGMUND FREUD, A GENERAL INTRODUCTION TO PSYCHOANALYSIS 306 (Joan Riviere trans., Washington Square Press 1968) (1924) (describing the “preconscious” as the “mental anteroom” where thoughts hide until they “succeed in attracting the eye of consciousness”).

⁶² WILSON, *supra* note 57, at 14.

⁶³ See generally Michael S. Moore, *Responsibility and the Unconscious*, 53 S. CAL. L. REV. 1563 (1980) (discussing whether the existence of unconscious mental states alters the moral and legal assessments of one’s responsibility).

⁶⁴ See *infra* text accompanying notes 177–236 (explaining difficulties involved in consciously accessing the various forms of less-than-fully conscious mental processes).

⁶⁵ See *infra* text accompanying notes 266–288. The proof problem is exaggerated because: (1) neither conscious nor unconscious mental states are directly accessible to investigators; both must be inferred from behavior; (2) conscious thought is accessed by an actor’s internal self-conversation, that is, by language, and all language requires interpretation; and (3) determining both conscious and unconscious mental states are thus equally interpretive acts, requiring interpretation both by the actor and by observers, such as by juries. Cf. Andrew E. Taslitz, *A Feminist Approach to Social Scientific Evidence: Foundations*, 5 MICH. J. GENDER & L. 1, 1–26 (1998) [hereinafter Taslitz, *A Feminist Approach*] (explaining the interpretive, linguistic nature of conscious thought and comparing it to the process of accessing unconscious thought). The proof problem is real, but it is more one of degree than of fundamental distinction—a problem complicated by the greater difficulty for the actor of direct access to his unconscious than his conscious thoughts.

3. *The Semiconscious Mind Defined*

The middle category—the “semiconscious”—is my own term and is used to capture those aspects of self-deception that require some capacity for fairly ready accessibility of certain thoughts and feelings to our conscious minds.⁶⁶ The semiconscious can be distinguished from the unconscious in two ways. First, we are, at least briefly, dimly consciously aware of semiconscious thoughts and feelings.⁶⁷ Second, semiconscious thoughts are akin to what some commentators have called the “preconscious”: those thoughts that can “easily be made conscious by directing attention to . . . [them].”⁶⁸ This ease is relative to the far greater difficulty of, and frequent impossibility of, accessing our unconscious thoughts. Accessing the semiconscious still takes some deliberate effort but much less than that needed to access the unconscious.⁶⁹ Moreover, in principle, individuals can access semiconscious thoughts and feelings over a shorter time horizon than unconscious thoughts and feelings for reasons that will become clear shortly.⁷⁰

D. What Is “Self-Deception,” and How Does It Work?

Now we are in a position to see how self-deception works. The common thread in all the relevant types of self-deception is that semiconscious or unconscious processes, motivated by serving an overriding self-interest, suppress from the conscious mind certain thoughts and feelings that might work against that interest, thereby permitting us to act contrary to our sincerely professed conscious principles.⁷¹ Techniques of distraction, avoidance, detachment, and rationalization, among others, can be used to drive conscious glimmerings of unwanted thoughts into the semiconscious realm.⁷² In this way, it is possible for one “part” of the mind to deceive another.⁷³ One

⁶⁶ See *infra* text accompanying notes 177–191 (elaborating on semiconscious processes).

⁶⁷ Cf. MIKE W. MARTIN, SELF-DECEPTION AND MORALITY 15–16 (1986) (discussing self-deception as the “evasion” of self-acknowledgement, where “evasion” implies purposefulness and hence excludes unintentional forms of self-deception, such as motivated biased thinking, which are discussed later in this Article).

⁶⁸ WILSON, *supra* note 57, at 6.

⁶⁹ See *infra* text accompanying notes 177–191 (discussing the potential strategies for unlocking the thoughts within an individual’s semiconscious).

⁷⁰ See *infra* text accompanying notes 177–236 (illuminating the qualities and processes which uniquely distinguish an individual’s semiconscious and comparing those with the unconscious).

⁷¹ See *infra* text accompanying notes 289–306 (discussing the inner and outward hypocrisy necessarily involved in self-deception).

⁷² See *infra* text accompanying notes 177–191 (exploring the strategies one employs to circumvent conscious awareness of existing affairs).

⁷³ I do not here enter into the debate whether self-deception is even possible; I assume that it is. Others have already made the convincing case for this position and have persuasively countered arguments that “self-deception” involves an inherent paradox—how can a single person be both “fooled by” someone and be the one doing the fooling? See MARTIN,

well-known literary effort to illustrate this sort of self-deception is in George Orwell's novel *1984*.⁷⁴ There, the "thought police" roam for evidence of citizens harboring unpatriotic or dissenting thoughts in a world of near boundless state surveillance. Citizens, fearing the totalitarian state's brutal punishment if they are proven to have committed "thought crime," work hard to serve their greatest self-interest—physical survival—by purging dangerous thoughts from their minds. The sheer implausibility of some of what the state asks its citizens to believe, and the necessity of submerging other, less pressing, self-interested goals—such as a sense of individuality and the quest for the private intimacies needed to foster romantic love—requires difficult mental gymnastics. Nevertheless, the citizens of the fictional Oceania are usually up to the task, engaging in a mixture of conscious and less-conscious cognitive processes that Orwell called "double-think":

To use logic against logic, to repudiate morality while laying claim to it, to believe that democracy was impossible and that the Party was the guardian of democracy, to forget, whatever it was necessary to forget, then to draw it back into memory again at the moment when it was needed, and then promptly to forget it again, and above all, to apply the same process to the process itself.⁷⁵

An analogous self-interested form of internal deceit can take place in the unconscious mind as well. Remember that many conscious thoughts have their origin in the unconscious.⁷⁶ The unconscious can therefore play an important role in filtering what information reaches the conscious mind and can bias the conscious interpretation given to that data. The unconscious may keep certain information out of consciousness entirely, or limit or alter its effect on consciousness in ways that serve some overriding self-interest.⁷⁷ If, for example, we are consciously committed to helping the "deserving" poor, but we have an even stronger anxiety about our financial security, our unconscious mind might routinely encourage awareness of instances in which the condition of the poor seems to be due to their own lack of initiative and ignore contradicting information.⁷⁸ This information-gathering bias enables us to limit our charitable contributions or oppose raising taxes to help the poor without experiencing a discomfort-

supra note 67, at 12 (summarizing many of the theories of self-deception); HERBERT FIGARETTE, *SELF-DECEPTION* 161–76 (rev. ed. 2000) (offering an alternative defense of the idea that self-deception exists and is not paradoxical).

⁷⁴ See generally GEORGE ORWELL, 1984 (New American Library 1961) (1949).

⁷⁵ *Id.* at 32–33.

⁷⁶ See *supra* text accompanying notes 40, 61.

⁷⁷ See *infra* text accompanying notes 191–236 (detailing the cognitive processes by which this happens).

⁷⁸ This selective information processing is one form of cognitive bias called the "confirmation bias." See *infra* Part III.A.2.c for a more detailed discussion of the confirmation bias.

ing cognitive dissonance between our professed love for those less fortunate than ourselves and our own stinginess.⁷⁹ The process by which this bias occurs happens outside our awareness, though it is not beyond our control. We *could* choose to look for information contradicting our conscious beliefs to test their accuracy. We *could* seek to meet and work with poor people from various walks of life, perhaps through charitable organizations, to gain a more concrete and empathic understanding of their lives. We *could* force ourselves to give as much to some charities as our household budgets could handle, thus helping to avoid simple stinginess or fear of destitution, rather than the rational application of our professed moral rules, being the real reason for our behavior.⁸⁰ Perhaps after doing all of these things, we will reach the same conclusion that the poor are generally undeserving, perhaps not. But whatever decision we reach, it will be based on a more accurate, complete, deliberative process in which our actions and our aspirations are consistent.⁸¹ Our refusal to do so thus contains an element of intention, though that does not mean that we unconsciously “intend” to lie to ourselves in the same sense that we use the word when referring to conscious thoughts.⁸² Rather, the intention element here means only that motivationally biased beliefs smack of moral wrong closer to that involved in inflicting conscious, intentional, undeserved harm than is the case for unmotivated biases, that is, those not stemming from some overriding self-interest.⁸³

By “self-interest” I do not mean what is in some “objective” sense good for us; self-deception may in fact do us much harm. Rather, I refer to desires that are better fulfilled by lying to ourselves, thus motivating our deceit. One commentator explains that one of the ways that the motivated or self-interested “adaptive unconscious” (his terminology for what I have simply called the “unconscious”) works is to “[s]elect, interpret,

⁷⁹ See Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1, 107–08 (2004) (defining “cognitive dissonance,” exploring its significance, and citing relevant psychological literature). I am not arguing that anyone who endorses conservative economic policies is by definition self-deceiving, but only that some conservatives’ views may be so explained, just as some liberals’ views on similar matters may likewise involve self-deception. See, e.g., Taslitz, *Patriarchal Stories*, *supra* note 17, at 466–68 (explaining why many seemingly racially biased conservatives treat individual African Americans favorably).

⁸⁰ Cf. Andrew E. Taslitz, *Condemning the Racist Personality: Why the Critics of Hate Crimes Legislation Are Wrong*, 40 B.C. L. REV. 739, 758–67 (1999) (explaining how even persons raised as racists can work to understand and purge such racism from their personalities).

⁸¹ See generally ANDREW E. TASLITZ, RAPE AND THE CULTURE OF THE COURTROOM (1999) (discussing the importance of deliberative decisionmaking at the institutional level); Taslitz, *A Feminist Approach*, *supra* note 65, at 51–68 (describing the importance of stereotype challenging in aiding deliberative juries).

⁸² See ALFRED R. MELE, SELF-DECEPTION UNMASKED 13–18 (Harry Frankfurt ed., 2001).

⁸³ See *id.* at 29–30 (regarding self-deception as subconsciously motivated bias); *infra* Part IV (discussing the moral evils of self-deception).

and evaluate information in ways that make [people] feel good,” while “keeping us blind to the fact that any distortion is going on.”⁸⁴ Motivated, unconscious self-deception and semiconscious self-deception, though involving some different processes, share a similar moral failing: the inflicting of undeserved harm on others based upon insufficient reflection when such reflection is within one’s control yet is avoided to serve some narrowly defined self-interest that would not be served and could not be justified were the choice better informed.⁸⁵

This background suggests a fourth plausible explanation for Kobe Bryant’s behavior. Bryant might have sincerely and consciously, but incorrectly, believed that his alleged victim, Lilly, had consented to sexual intercourse. Yet Bryant may have known at a semiconscious or unconscious level either that Lilly was not consenting or that his forceful actions were at least creating a substantial and unjustifiable risk of her nonconsent. Bryant’s self-esteem may have been so tied to sexual conquest that he distracted himself from evidence of Lilly’s resistance or did not interpret her actions as nonconsent because to do otherwise would have denied Bryant the conquest that he wanted. Note that this interpretation, if correct, says something positive about Bryant: he would not derive adequate self-esteem from forcible, nonconsensual sexual intercourse, and he would not have proceeded had he believed with full consciousness that she did not consent. But it also says something negative about Bryant: his need to feel desired by the opposite sex is so great that he is unwilling to attend to evidence that might harm his self-esteem, even at the cost of raping a woman.⁸⁶ There is something chilling about someone who is so self-absorbed as to banish from his consciousness the recognition of knowledge, albeit at some lower cognitive level, that he has caused another person grave harm because, absent such banishment, he would not get what he wants.⁸⁷ Finally, there is something offensive about claiming to live by one set of principles (here, respecting a woman’s choice about her sexual partners) but not expending the effort to live up to them. This results in a life in fact governed by a contrary set of principles (here, a woman forced into intercourse against her will).⁸⁸ Part III of this Article will further elaborate on what makes this egoism and inconsistency so abhorrent.

⁸⁴ See WILSON, *supra* note 57, at 39.

⁸⁵ See *infra* Part IV (explaining the evils of moral self-deception).

⁸⁶ See Taslitz, *Two Concepts*, *supra* note 24, at 52–55 (discussing indifference to another’s indications of sexual nonconsent as a form of “evil,” a grievous moral wrong).

⁸⁷ See *id.* at 48–58 (discussing ways in which aggressor self-esteem is bolstered by various forms of indifference, especially in date rape cases).

⁸⁸ See *infra* text accompanying notes 289–306 (discussing self-deception as a form of hypocrisy); Andrew E. Taslitz, *Racial Auditors and the Fourth Amendment: Data with the Power To Inspire Political Action*, 66 LAW & CONTEMP. PROBS. 221, 284–89 (2003) (discussing the psychological and political importance of living lives of “honor,” that is, living lives consistent with a basic ethical code, including affirmatively expending personal and political capital to live up to one’s ideals).

From media reports alone I have no way of knowing with any confidence which of these four interpretations of the Kobe Bryant case, if any, is correct. But this last interpretation focuses attention on the most difficult question in a rape case: should a man who consciously believed that he had consent nevertheless sometimes still be liable for rape?⁸⁹ Moreover, if the answer is tentatively “yes” when less-than-fully conscious awareness of nonconsent is involved, there can be difficult proof problems in establishing beyond a reasonable doubt what subconscious distractions or biases were at work. These problems, however, might not be insuperable over time. If I am right, then most men who engage in forcible, nonconsensual sexual intercourse either do so with full knowledge of what they are doing or by engaging in self-deception. And if I am further correct that serious harms stemming from self-deception must be seen as particularly grievous and that the offender must be seen as deeply culpable, then proof problems can be avoided by adhering to an objective mens rea requirement: would the reasonable—meaning in part the non-self-deceiving—male have known that he acted without his partner’s consent? Where the answer to this question is “yes,” most men convicted of rape under this standard will indeed have been self-deceivers. All legal rules are necessarily overly broad to some extent, catching in their wake some cases outside the paradigm ones that led to adoption of the rules.⁹⁰ But even if some non-self-deceivers are caught, this new standard will encourage men to avoid self-deception and foster careful, deliberate attention to female sexual desires.⁹¹ Because self-deceptive sexual force is particularly reprehensible and encouraging non-deceptive, sensitive sexual behavior is an especially important social goal, self-deceptive negligence is worse than other kinds of ordinary non-self-deceptive negligence. As such, self-deceptive sexual force merits harsher penalties than those meted out for the latter sorts of crimes. At the same time, the objective nature of the self-deceptive negligence standard means that a man who takes all reasonable steps to avoid deceiving himself will not be liable.

E. The “Stupidity Defense”

The objective nature of this liability standard also addresses the problem of what I call the “stupidity defense.” The stupidity defense consists of the argument that a particular man was not aware of his partner’s non-consent, and thus he should not be liable for rape, even if most men, or the fictional “reasonable” man, would have been so aware.⁹² The most ex-

⁸⁹ See sources cited *supra* notes 25–34.

⁹⁰ See *infra* text accompanying notes 354–376.

⁹¹ Cf. Taslitz, *Two Concepts*, *supra* note 24, at 70–73 (discussing the importance of crafting rape law to foster a “sexually sensitive” male personality).

⁹² See *infra* text accompanying notes 100–122. Whether what I am calling the “stupidity defense” suffices to bar liability turns on whether a defendant’s subjective state of mind,

treme illustration of this defense is *Director of Public Prosecutions v. Morgan*,⁹³ a British case routinely taught in American law schools in the first-year Criminal Law class.⁹⁴ In *Morgan*, Mrs. Morgan was gang-raped by her husband, Mr. Morgan, a senior-ranking member of the Royal Air Force, and by three of his junior Air Force compatriots. These three younger defendants testified at trial that Mr. Morgan had suggested that the whole gang come to his home to have sexual intercourse with his wife, telling the younger men not to be surprised if his wife struggled because she was “kinky,” and struggling “turned [her] on.”⁹⁵ They admitted that Mrs. Morgan indeed struggled, but maintained that they honestly believed that she “not merely consented to but actively cooperated with and enjoyed what was being done”⁹⁶ The trial judge instructed the jury, however, that the men’s belief in Mrs. Morgan’s consent must be not only honest but “reasonable,” and all were convicted. Mr. Morgan’s conviction was based on a theory of aiding and abetting, given the then-governing rule that a man cannot be convicted as a principal for raping his own wife.⁹⁷ The Court of Appeals affirmed the conviction, certifying this question to the House of Lords: “Whether in rape the defendant can properly be convicted, notwithstanding that he in fact believed that the woman consented, if such belief was not based on reasonable grounds.”⁹⁸ Three of the five Lords considering the question answered in the negative: no conviction was appropriate.

This holding outrages most of my students, many of whom find it impossible to believe that the men honestly thought that Morgan’s wife consented. Even if the men were not fully consciously aware of Mrs. Morgan’s nonconsent, my students are suspicious that the men knew *at some level* that they were violating her desires. They chose not to confront their lurking suspicions of nonconsent, both because it would have spoiled their orgy and because they did not want to challenge the credibility or authority of their superior officer. Even if these men were so stupid or gullible that the wrongness of their actions never even momentarily crossed their minds, however, the students remain equally offended, for such gullibility can be dangerous. Barring some mental impairment, it was easily within the power of these men to have more sharply honed their moral sensibilities. Their ignorance was thus in some sense “willful,” a stupidity chosen or allowed to fester to serve a variety of less-than-laudable personal goals.

when not objectively reasonable, is relevant to his liability for rape.

⁹³ Dir. of Pub. Prosecutions v. Morgan, A.C. 182 (1976).

⁹⁴ See, e.g., STEPHEN SALZTBURG ET AL., CRIMINAL LAW: CASES AND MATERIALS 399–404 (2d ed. 2000) (reproducing the *Morgan* case).

⁹⁵ *Id.* at 401.

⁹⁶ *Id.*

⁹⁷ See *id.* at 399–400.

⁹⁸ *Id.* at 401.

In more modern cases, the stupidity defense is likely made implicitly and under more subtle circumstances than those in the *Morgan* case. In the typical date rape case—one in which the defendant effectively concedes that he and not someone else engaged in intercourse with the victim⁹⁹—the defense seeks to tell a narrative that roughly embraces these implicit arguments: (1) the woman was a “slut” who “wanted it” but then lied to cover up her shame before a father or boyfriend or to retaliate against the defendant for insufficiently reciprocal affection after the act was completed; (2) even if she did not consent, no man could have known that, and the defendant certainly did not know it, given the signals sent by her sluttish behavior; and (3) as a final back-up, even if inquiring, sensitive men might have seen the problem, the defendant did not, and it is not fair to hold him to any higher standard than his subjective state of mind. Indeed, given the well-known fact that most men are not sufficiently sensitive, the burden was on the woman to make her nonconsent crystal clear.¹⁰⁰

The term “stupid” is an admittedly vague one taken from everyday folk psychology. Nevertheless, cognitive psychologist Robert Sternberg thought that the term represented something important enough to be addressed in an anthology on the subject.¹⁰¹ Although the contributors define the term in somewhat different ways, one contributor, Ray Hyman, notes several critical generally shared themes, several of which are relevant here.¹⁰² First, “some behaviors seem to be so irresponsible, so heedless, thoughtless,

⁹⁹ By “date rape,” I mean what the Model Penal Code calls rape by a “voluntary social companion.” See MODEL PENAL CODE § 213.1 (1962) (defining rape by a “voluntary social companion” as a second degree felony). These terms are generally used in contradistinction to “stranger rape,” the classic image of an unknown man leaping from the bushes to assault a woman. See Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 684–90 (1999) (defining date rape) [hereinafter Baker, *Rape and Shame*]. In stranger rapes, the primary issue is usually (though not always) the identity of the attacker: was it the defendant or someone else? In date rape, identity is clear; the sole question is generally whether the woman consented and whether the man knew or should have known that she did not consent. Most rapes are likely date rapes in the sense used here and do not result in physical injuries beyond the act of penetration itself. Because this Article focuses on the proper mental state to be required concerning consent and on the consequences of having such a mental state, that is, the appropriate punishment, the practical implications of the analysis here will be greatest for date rape cases, even though technically the legal rules suggested here will indeed govern all forcible rape cases.

¹⁰⁰ This three-part logic of the defense in a date rape case is a sketch and synthesis drawn from the empirical data and other sources about which I have written elsewhere. See, e.g., Taslitz, *Patriarchal Stories*, *supra* note 17, at 440–48, 466–71 (discussing psychological and cultural processes that reinforce the presumption that, in a date rape case, a woman whose behavior was either sexually open or aggressive consented); Taslitz, *Two Concepts*, *supra* note 24, at 24–27 (describing the cultural willingness to hold women responsible for the clear, specific, and firm articulation of the sexual ground rules in a romantic relationship and for enforcing those rules); Taslitz, *Patriarchal Stories*, *supra* note 17, at 438–39 (discussing the reluctance of jurors to convict men who did not know that the woman had not consented).

¹⁰¹ WHY SMART PEOPLE CAN BE SO STUPID (Robert J. Sternberg ed., 2002) [hereinafter *SO STUPID*].

¹⁰² Ray Hyman, *Why and When Are Smart People Stupid?*, in *SO STUPID*, *supra* note 101, at 4–5, 19–22.

negligent, or outrageous that they invite the label ‘stupid.’”¹⁰³ The label is useful because “we . . . need some . . . way to identify those acts that go beyond mere mindlessness. Not all goofs are created equal.”¹⁰⁴ Second, “stupidity contains both cognitive and moral implications.”¹⁰⁵ Thus, “stupid behavior is somehow morally wrong because the actor is failing to use . . . existing abilities to full advantage. The failure or departure for [sic] optimal behavior is inexcusable given the knowledge and cognitive capacities of the actor.”¹⁰⁶ The word “knowledge” here might suggest, as it does to a few of the contributors, withholding the “stupidity” label from actions resulting from limited or inadequate information.¹⁰⁷ But Hyman cautions against such a reading, concluding: “Many people today might falsely believe psychics because they lack the necessary information—but such information is available and, at least in some cases, we might argue that they should know about it.”¹⁰⁸

Of the three-part defense that I have articulated in a date rape case, the first part (“the woman was a slut”) argues that there was indeed consent, so the offender’s mental state is not central to the case, for, if the woman consented, there is no crime, regardless of what the defendant believed or should have believed. The second part (“she seemed like a slut”) implicitly argues that, given social conventions, a man could not be expected to know that the woman withheld consent. Or, more strongly, it implies that most men are cognitively incapable of understanding a woman’s too-subtle protests and are, therefore, *not* stupid, because “stupidity” means not living up to one’s capacities. But this argument rests on the empirically unsupportable position that men, when they try, are *incapable* of knowing a woman’s wishes, on the normatively unsupportable view that only women are responsible for what happens during sex, and on the sexist, conventional understanding that proper gendered behavior is both desirable and reasonable, all positions that feminist literature widely and ably condemns.¹⁰⁹

The third part of the date rape defense argues that *some* men are capable of doing better, but those “supermen” cannot fairly set the standard for other, more ordinary, men. This third part is a softer articulation of the second part; both turn on various debated degrees of male cognitive incapacity. Parts two and three of this defense thus involve a claim of male cognitive and moral inferiority to women *as an excuse for male error*. Were this implicit claim so starkly posed, I doubt that it would be

¹⁰³ *Id.* at 4.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 19.

¹⁰⁶ *Id.* at 20.

¹⁰⁷ *Id.* at 20–21.

¹⁰⁸ *Id.* at 21.

¹⁰⁹ See Taslitz, *Two Concepts*, *supra* note 24, at 12–31 (discussing the development of sexist social behavioral conventions).

openly, consciously endorsed by judges or most jurors. The last two elements of the defense—that all, or at least most, men are incapable of doing better—thus seem to be an admission of offender stupidity. These defenses accept the offender's failure to use the cognitive resources at his disposal in a normatively wise way, despite the fact that it is widely declared that men in fact have the cognitive power necessary to understand whether and when a woman consents. The claim is never so starkly posed, I suspect, for just this reason and because defense lawyers recognize that, when left implicit, the claim has substantial unconscious juror appeal.¹¹⁰ This Article will argue that in most cases a man's claim of sexual weak-mindedness is a sort of lie because men generally do "know" the truth at a less-than-fully conscious level but choose to deceive their conscious minds in pursuit of their narrow self-interest.

Feminists have long recognized these implicit arguments at work in rape cases and have railed against them for letting men define who is rapeable and who is not, that is, for allowing male beliefs about the meaning of female sexual behavior to determine liability for the crime.¹¹¹ From the perspective of these feminists, the law thus countenances male stupidity, sexism, and indifference.¹¹² A focus on male conduct as self-deceiving suggests that the more subtle, everyday date rape cases are more like *Mor-*

¹¹⁰ See Taslitz, *Patriarchal Stories*, *supra* note 17, at 440–65 (recounting the sorts of themes lawyers rely on in date rape trials).

¹¹¹ Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, in *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* 190 (Katherine T. Bartlett & Rosanne Kennedy eds., 1991) (noting that "the injury of rape lies in the meaning of the act to its victim, but the standard for its criminality [mens rea] lies in the meaning of the same act to the assailants"); KEITH BURGESS-JACKSON, *RAPE: A PHILOSOPHICAL INVESTIGATION* 144–55 (1996) (arguing against determining the "reasonableness" of men's belief about women's consent in rape cases according to social convention because social convention almost routinely favors the man); Larry May & Robert Strikwerda, *Men in Groups: Collective Responsibility for Rape*, *HYPATIA*, Spring 1994, at 134, 137 (describing how males in contemporary American society are socialized to ignore women's desires and what would ordinarily be signs of nonconsent, and thus "boys are given a license to misbehave"); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 175 (1989) (noting that society distinguishes between "rapable/unvirtuous" and "unrapable/virtuous" women).

¹¹² See, for example, SUSAN ESTRICH, *REAL RAPE* 97–98 (1987), where she notes:

If inaccuracy or indifference to consent is "the best that this man can do" because he lacks the capacity to act reasonably, then it might well be unjust and ineffective to punish him for it. But such men will be rare, at least so long as voluntary drunkenness is not equated with inherent lack of capacity. More common is the case of the man who could have done better but did not; could have paid attention, but did not; heard her refusal or saw her tears, *but* decided to ignore them. The man who has the inherent capacity to act reasonably but fails to do so, through that failure, made a blameworthy choice for which he justly can be punished.

But see Glanville Williams, *Lord's Decision on the Law of Rape*, *TIMES*, May 8, 1975, at 15. Williams writes that "[t]o convict the stupid man would be to convict him for what lawyers call inadvertent negligence Rape carries a possible sentence of imprisonment for life, and it would be wrong to have a law of negligent rape." *Id.*

gan than they seem at first blush and that the particularly reprehensible nature of self-deception justifies the anger evident in much of the feminist writing on this subject.¹¹³ A focus on self-deception also suggests a way to give substance to the “reasonable belief” standard. The reasonable man actively works to avoid self-deception in sexual matters. Such avoidance requires reasonable, affirmative communicative efforts to determine what a woman wants. Variations on this affirmative consent standard and how to make it practicable have been articulated and defended by me and by others, and I will not repeat the lengthy details of those analyses here.¹¹⁴ What this Article adds to the debate is the avoidance of self-deception about sexual consent as a new and critical justification for the affirmative consent standard.

Part II explains why most men sincerely claiming to be unaware of a woman’s nonconsent probably know at a less-than-conscious level more about the woman’s protests than they think. Part III.A reviews some of the primary cognitive strategies by which men engage in semiconscious self-deception, and Part III.B does the same for unconscious self-deception. Part IV explains why self-deception is worse than ordinary, non-self-deceiving forms of negligence. Part V explains what strategies the law can use to help men minimize self-deception about sexual consent. Part VI explains why the generality of the resulting negligence standard, and the likelihood that it will result in punishing some non-self-deceivers, nevertheless meets sound standards of fairness. The Article concludes that the availability of male control over such deception and the grave character defects revealed by its absence justify both the imposition of a new duty of adequate male inquiry into a woman’s desires and severe punishment for breach of that duty.

II. WHY MEN WHO SINCERELY CLAIM THAT THEY DID NOT KNOW OF THE WOMAN’S NONCONSENT KNOW MORE THAN THEY THINK

I want to offer several preliminary explanations for why men who sincerely deny knowing that their partner did not consent, in fact, at a less-than-fully conscious level, know more than they think—likely at least an awareness of a substantial risk that, without greater inquiry on their part, they may be engaging in sexual intercourse with a woman who simply does not want it.

Notably, the idea that “no means no” is widely discussed today in college courses, orientation sessions, and campus activities.¹¹⁵ Some colleges

¹¹³ See sources cited *supra* notes 92–102.

¹¹⁴ See, e.g., SCHULHOFER, *supra* note 24, at 99–113, 274–82 (discussing the need for autonomous decision-making in sexual matters); Pineau, *supra* note 24, at 1–27, 63–68 (discussing an affirmative consent standard); Taslitz, *Two Concepts*, *supra* note 24, at 45–76 (discussing Pineau’s idea of affirmative consent and attempting to help define “reasonable communicative efforts”).

¹¹⁵ See Admin. Council of Antioch Coll., *The Antioch College Sexual Offense Policy*, in

and universities even have codes requiring express verbal consent by both parties to each stage of a sexual encounter.¹¹⁶ Even in high schools and still lower grades there are discussions in sex education courses, student groups, and civics classes about when it is safe to believe that sexual activity is consensual.¹¹⁷ Anthropologist Peggy Reeves Sanday sees these educational efforts as the latest manifestation of the anti-rape movement that began in the early 1970s and that led to important changes in the substantive and procedural law of rape, as well as to “Take Back the Night” marches and anti-sexual-violence media campaigns:

[T]he anti-rape movement continues to grow. Some call it the new sexual revolution. On campuses and in secondary schools the focus is on peer counseling and education. Unlike the feminism of the sixties, both sexes are involved. In the new movement, women learn to respect their sexuality so that they feel safe in saying yes and confident in making a no stick. Men teach each other to respect a woman’s no. For the first time, same-sex acquaintance rape is also becoming part of the common discourse around sexuality.¹¹⁸

Furthermore, despite continuing retrograde messages about human sexuality in the mass media, feminist messages about sexual assault have also made their way into television shows, feature films, and popular novels.¹¹⁹ Films like *The Accused* with Jody Foster,¹²⁰ lectures on rape law given

DATE RAPE, *supra* note 24, at 135; Alan E. Guskin, *The Antioch Response: Sex, You Just Don’t Talk About It*, in DATE RAPE, *supra* note 24, at 155.

¹¹⁶ See, e.g., Admin. Council of Antioch Coll., *supra* note 115; Guskin, *supra* note 115, at 158–65 (defending the Antioch policy and expressing confidence that, “[policies] of mutual sexual consent will become, in one form or another, part of the behavioral standards in most colleges and universities”).

¹¹⁷ Such discussions are, at any rate, common at least in the states where many of my friends with children live, as they and their children have often explained to me.

¹¹⁸ PEGGY REEVES SANDAY, *A WOMAN SCORNED: ACQUAINTANCE RAPE ON TRIAL* 264 (1996); see also *id.* at 161–84, 239–64 (tracing the rise of the anti-rape movement and the backlash against it). See generally CASSIA SPOHN & JULIE HORNEY, *RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT* (1992) (tracing the successes and failures of rape law reform).

¹¹⁹ See, e.g., SARAH PROJANSKY, *WATCHING RAPE: FILM AND TELEVISION IN A POST-FEMINIST CULTURE* 90–120 (2001) (describing film and television rape narratives that intersect with and reflect feminist insights about rape); Sujata Moori, *Screening Sexuality: The Democratic Sphere and Television Representations of Rape* (1995) (unpublished Ph.D. dissertation, University of Maryland) (on file with author) (arguing that television talk shows have generally served as a relatively reliable source for expression of feminist ideas about sexual assault and experiences of rape victims); LISA M. CUKLANZ, *RAPE ON PRIME TIME: TELEVISION, MASCULINITY, AND SEXUAL VIOLENCE* 61, 153 (2000) [hereinafter *PRIME TIME*] (noting that by the late 1980s, prime time fictional rapists’ behavior was attributed to “[t]heir unenlightened and insensitive attitudes and beliefs . . .,” and some unusual episodes offered particularly thoughtful treatments of rape while “back[ing] away from an expression of confidence in the legal and social structures that are in place to deal with rape . . .”).

¹²⁰ *THE ACCUSED* (Paramount Pictures 1988).

by characters on primetime television series, and a host of other well-known media events and stories at least place the feminist perspective on rape onto the public debate.¹²¹ Professor Liza Cuklanz again sees an impact of the anti-rape movement on popular culture:

The rape reform movement in the United States since the early 1970s has involved thousands of people working in numerous areas in every state to help survivors work through their trauma, to change laws, to produce knowledge about the crime in contemporary society, and to educate people in hospitals, police stations, and courts according to this new knowledge. Ultimately their work is designed to counteract powerful myths about sexuality, violence, and gender that have been passed down to us through centuries, and to replace old ways of thinking with new ones more in line with contemporary reality. The study of how rape is represented in . . . mass media is an essential means of understanding the extent to which this reeducation has been successful, since television serves as an expression of mainstream ideas to a mass audience.¹²²

There is reason to believe that these changes in popular culture and in officially stated norms by legislatures and the judiciary have, however, at best had only a modest impact, if any, on the unconscious social norms

¹²¹ See LISA M. CUKLANZ, RAPE ON TRIAL: HOW THE MASS MEDIA CONSTRUCT LEGAL REFORM AND SOCIAL CHANGE 99–106 (1996) (discussing many positive feminist messages in the movie *The Accused* as well as the ways that those messages were also limited); PROJANSKY, *supra* note 119, at 95–118 (reviewing popular film and television narratives). See generally CUKLANZ, PRIME TIME, *supra* note 119 (discussing prime time representations of sexual violence).

¹²² See CUKLANZ, PRIME TIME, *supra* note 119, at 160. On the impact of mass media images on popular views of crime and criminality generally, and on social policy on those subjects, see Andrew E. Taslitz, Report of the Subcommittee on Media and Education to the American Bar Association Ad Hoc Committee on Innocence and the Integrity of the Criminal Justice System (2004) (unpublished draft) (on file with author) (summarizing research and its implications). Professor Lichter concludes that the media have a powerful effect on public images of crime and of criminal justice policy:

Thus the media affects elections not so much by changing votes as by molding the images of reality that lead to vote decisions. They affect public policy not by forcing change but by channeling information that stimulates or stymies the efforts of political elites. They affect opinion not by changing minds but by shaping the political culture that makes certain opinions seem reasonable or defensible. They affect our social institutions not by calling for their preservation or destruction but by influencing our expectations and evaluations of their performance.

S. Lichter, *The Influence of Media on Politics and Business*, 4 FLA. POL'Y REV. 35, 40 (1988). See generally RAY SURETTE, MEDIA, CRIME, AND CRIMINAL JUSTICE: IMAGES AND REALITIES (1998) (describing the media's influence on the criminal justice system); Taslitz, *Patriarchal Stories*, *supra* note 17, at 440–75 (1996) (discussing the psychological processes by which the media shape public and jury attitudes toward rape).

actually at work in rape cases.¹²³ Nevertheless, what matters here is that the information is so widely available and discussed in so many media that it is hard to believe that most men are not at least unconsciously aware of it.¹²⁴ That they may nevertheless choose not to alter their behavior is irrelevant to whether they have the necessary information.

Moreover, it is unlikely that a man could reasonably continue to err in his judgment about a woman's nonconsent after having been confronted by past errors in comparable situations. In the infamous William Kennedy Smith trial, evidence was excluded from trial of three women who came forward to say that they too had been raped by the defendant in a way similar to that alleged by the woman in that case.¹²⁵ In a case increasingly used in law school classrooms, that of Eric Carlson, a teenage young woman did not say "no" to each request for intercourse that Carlson made, and he insisted that the subsequent sex was consensual.¹²⁶ Several female students then revealed that they too had been raped by Carlson under similar circumstances.¹²⁷ Kennedy Smith and Carlson are likely not isolated cases.¹²⁸ How many times can a man hear such complaints and be thoroughly unaware at least of a risk that perhaps his latest companion means it when she protests "no"?

This analysis embodies the "doctrine of objective chances." This doctrine permits evidence of prior sexual assaults to be used to prove a current mental state—for instance, the defendant's awareness of the woman's nonconsent—in the case at hand under Federal Rule of Evidence 404(b).¹²⁹ The evidence is not considered evidence of character offered to prove conduct, and thus is not barred by the character evidence prohibition of Rule 404(a):

The doctrine of objective chances expresses the idea that the repeated occurrence of certain unusual events is so unlikely as to render improbable the claim that any one of those events happened mistakenly or accidentally. In other words, the "objective chances" of mistake or accident are slim. Thus, it is simply not credible that

¹²³ See Taslitz, *Patriarchal Stories*, *supra* note 17, at 389–94.

¹²⁴ See generally CUKLANZ, *RAPE ON TRIAL*, *supra* note 121; CUKLANZ, *PRIME TIME*, *supra* note 119.

¹²⁵ For a fascinating summary of the facts in the William Kennedy Smith case and an analysis of the lawyering tactics and trial ideologies there, see generally GREGORY MATOESIAN, *LAW AND THE LANGUAGE OF IDENTITY: DISCOURSE IN THE WILLIAM KENNEDY SMITH RAPE TRIAL* (2001).

¹²⁶ See *State v. Carlson*, 644 N.W.2d 704, 705 (Mich. 2002).

¹²⁷ See PAUL ROBINSON, *CRIMINAL LAW CASE STUDIES* 799, 800 (2d ed. 2002) (reporting unpublished Michigan Court of Appeals decision which recounts these facts).

¹²⁸ See, e.g., Baker, *Rape and Shame*, *supra* note 99, at 670–79 (1999) (explaining motivational forces which lead rapists to offend repeatedly).

¹²⁹ See FED. R. EVID. 404(a), 404(b), Advisory Committee Note (outlining the admissibility of character evidence).

a man can be innocently mistaken time after time about whether a woman consented.¹³⁰

Additionally, though the term is rarely used, there is ample empirical evidence of a powerful “chivalry” norm continuing in modern American culture.¹³¹ By “chivalry,” I mean the three interrelated ideas that women are vulnerable and need men’s protection; that they must in some respects be put on a pedestal and treated with special courtesy; and that they are the physically weaker sex so that violence against them by men is especially awful.¹³² All three ideas contribute to a vision of women as presumptively both without strength, thus needing male care, and special, thus worthy of such care.¹³³ Chivalry enhances male power by encouraging female dependence on men and reinforcing stereotypes about female weakness.¹³⁴ There is certainly also a common understanding that, in sexual matters, men should pursue and press for as much sex as quickly as possible, while women should receive and seek to go forward sexually more slowly than men.¹³⁵ The chivalry norm suggests that such sexual pursuit should not include force nor conduct that could be perceived as demonstrating an utter indifference to a female partner’s expressions of distress.¹³⁶ Although I view the chivalry norm as pernicious because it suggests that women are too weak

¹³⁰ See FRIEDLAND ET AL., *supra* note 117, at 129–30. Federal Rule of Evidence 413 would also allow admissibility of this evidence on a variety of theories, but it is Rule 404’s objective chances theory that best illustrates the idea that men know more than they admit. Although the theory was aimed at showing conscious awareness, its logic—how many times can you commit a wrong and not know it is a wrong?—applies at a less-than-fully conscious level too.

This relates to the Bryant case because there is some evidence, in the view of at least one leading author on sexual assault in professional sports, that Bryant is in the company of numerous other NBA players, who are also repeat sexual offenders. See generally JEFF BENEDICT, *OUT OF BOUNDS: INSIDE THE NBA’S CULTURE OF RAPE, VIOLENCE, AND CRIME* (2004) (detailing incidences of and explaining the reasons behind sexual assaults committed by NBA players). It would be worthwhile to explore whether NBA players and certain other professional athletes and high-powered individuals might share particular traits that make them more prone to self-deception and thus repeated sexual offenses.

¹³¹ See RICHARD B. FELSON, *VIOLENCE AND GENDER REEXAMINED* 67–82, 214–15 (2002) (discussing the chivalry norm).

¹³² See *id.* at 68–69 (discussing the underlying norms of chivalry).

¹³³ See *id.* at 67–82, 214–15 (making this point implicitly).

¹³⁴ See *id.* at 82, 216 (noting that feminists consider the chivalry norm to be paternalistic and insulting to women—though the author believes that the norm also reduces violence against women—and speculating, based on empirical data, that a more egalitarian society would have less chivalry and therefore *more* anti-female violence). In the short-run, Felson may be right that declining chivalry will raise violence against women *if all else is held constant*, but, in the long run, there are better ways of reducing male sexual violence and irresponsibility. This Article will defend some of these alternatives.

¹³⁵ See Taslitz, *Two Concepts*, *supra* note 24, at 24–27 (summarizing the empirical evidence for and contours of courtship and dating models).

¹³⁶ See FELSON, *supra* note 24, at 70–76 (summarizing empirical evidence that the chivalry norm includes a reluctance to harm women—especially in public settings—and a sense that women are entitled to special courtesy and consideration).

to compete with men in many fields, the norm exists and is relevant in gauging what information is currently available to guide male behavior.

I do not argue that rapists accept the chivalry norm but only that it is so widespread that they must at some level be aware of it.¹³⁷ Indeed, it may partly explain why most men do not rape.¹³⁸ It would certainly explain why Kobe Bryant hesitated to admit that Lilly said “no,” yet he continued to pursue sex with her anyway. At the very least, Bryant knew that third parties would view that behavior as unchivalrous and inappropriate for a gentleman, thereby at a minimum casting an unfavorable light on his actions and, at a maximum, raising doubts about the truthfulness of his version of events.¹³⁹ If he understood that others might perceive his behavior as wrong, there is a good chance that he was at some level aware of the risk that Lilly did not consent, yet he chose to be heedless of that risk.

There is also a countervailing status norm in some male subcultures, such as some fraternities, that, for men, greater frequency of sexual encounters and diversity of partners bring greater prestige in other men’s eyes.¹⁴⁰ This is true regardless of whether the sex was consensual or not.¹⁴¹ Men in those subcultures may, but also often may not, consciously “know” that some of their sexual partners do not consent. They simply do not care.¹⁴² The point is that these men may have sexual intercourse with women whom they incorrectly believe *are* consenting, with women whom they believe are *not consenting*, and with women for whom *they have no idea* whether consent is present or not. The reasons for this are complex.

Much research suggests that most date rapists view their actions instrumentally, that is, as ways to obtain sex rather than to express hostility or to degrade another human being.¹⁴³ The motivation for frequent sex for

¹³⁷ See *id.* (finding that the evidence for a widespread chivalry norm is “overwhelming”).

¹³⁸ Cf. *id.* at 215 (stating that “[t]he evidence is clear that . . . [chivalry’s] inhibitory effect is strong and pervasive, countering the lower costs that promote the use of violence against those who are physically weaker” and that “[p]eople are less likely to harm women than men inside and outside the experimental laboratory”).

¹³⁹ See *supra* text accompanying notes 1–9 (discussing Bryant’s statements to the police); FELSON, *supra* note 24, at 73 (noting that the chivalry norm is strongest when others are observing the male’s behavior, though the norm is nevertheless generally strongly internalized).

¹⁴⁰ See Baker, *Rape and Shame*, *supra* note 99, at 670–79 (describing date rapists and self-esteem). See generally PEGGY REEVES SANDAY, *FRATERNITY GANG RAPE: SEX, BROTHERHOOD, AND PRIVILEGE ON CAMPUS* (1990) (discussing the self-centered culture of fraternities).

¹⁴¹ Baker, *Rape and Shame*, *supra* note 99, at 670–79.

¹⁴² See sources cited *supra* note 140.

¹⁴³ See Baker, *Rape and Shame*, *supra* note 99, at 666–68 (detailing empirical evidence about date rapists motivations); Margaret Hamilton & Jack Yee, *Rape Knowledge and Propensity to Rape*, 24 J. RES. PERSONALITY 111, 119 (1990) (noting that rape is “more often a form of instrumental aggression rather than a means of expressing hostility or anger towards women”). However, not all rapists have instrumental goals, and the instrumental model is particularly ill-suited to explain physically brutal rapes—precisely one of the sorts of rapes not addressed by this Article. See *id.* at 121.

these men is not only biological, but, more importantly, a quest for self-esteem via peer approval.¹⁴⁴ Peer approval for frequent sex, in turn, is likely to be highest in predominantly male environments and among large percentages of college-age men.¹⁴⁵ As law professor Katharine Baker explains:

Having sex, as much and as obviously as possible, is an esteem-enforced behavior-specific norm for many young men. Date rapists rape to gain, or at least not lose, the esteem of others. Demonstrating one's masculinity, "being a man," is the abstract, internalized norm that gives meaning to the act of having sex. Thus, just as one proves oneself a good neighbor by mowing one's lawn, one proves oneself masculine by getting as much sex as possible. The norm of frequent sex supports the masculinity norm. The act of having sex means one is demonstrating one's masculinity.¹⁴⁶

Most men, even in the college-age population, do not rape, much less gain esteem from the number of "rapes" committed.¹⁴⁷ Other men, however, particularly when they congregate together, wear a set of moral blinders, finding esteem in frequent sexual activity, even if force is sometimes used to obtain it.¹⁴⁸ But these men also often see no moral wrong in the force that they use. Thus one study found low sex guilt, not low aggression guilt, linked to sexually aggressive behavior,¹⁴⁹ while another study found almost one-quarter of college-age men admitting to being in situations where they were so sexually aroused that they "could not stop" themselves from having intercourse "though the woman didn't want to."¹⁵⁰ Although date rapists may acknowledge their "technical" criminality,¹⁵¹ "they reject their own moral culpability."¹⁵² They do not define forced sex as rape.¹⁵³ In

¹⁴⁴ See Baker, *Rape and Shame*, *supra* note 99, at 670–72.

¹⁴⁵ See *id.* at 673–74.

¹⁴⁶ *Id.* at 673.

¹⁴⁷ See *id.* at 667–79.

¹⁴⁸ See *id.* at 676–77.

¹⁴⁹ See James Porter et al., *Sexual and Aggressive Motives in Sexually Aggressive College Males*, 21 ARCHIVES SEXUAL BEHAV. 457, 464 (1992) (finding minimal support for the role of aggression, but finding more support for the rape-as-sex hypothesis).

¹⁵⁰ See Mary Koss & Cheryl J. Oros, *Sexual Experiences Survey: A Research Instrument Investigating Sexual Aggression and Victimization*, 50 J. CONSULTING & CLINICAL PSYCHOL. 455, 455–56 (1982).

¹⁵¹ See, e.g., Eugene Kanin, *Date Rape: Unofficial Criminals and Victims*, 9 VICTIMOLOGY 95, 96 (1984) (reporting a study in which self-disclosed rapists offered rationalizations for their actions).

¹⁵² See Baker, *Rape and Shame*, *supra* note 99, at 688; *id.* at 680 n.88 (noting that "[t]he men interviewed by Kanin thought that fines, not imprisonment, might be the appropriate penalty for their actions.>").

¹⁵³ See Neil M. Malamuth & Karol Dean, *Attraction to Sexual Aggression*, in ACQUAINTANCE RAPE: THE HIDDEN CRIME 229, 234 (Andrea Parrott & Laurie Bechhofer eds., 1991) [hereinafter ACQUAINTANCE RAPE] (noting that men indicated greater willingness to engage in "forced sex" than rape); Jacqueline W. White & John A. Humphrey, *Young People's Attitudes Toward Acquaintance Rape*, in ACQUAINTANCE RAPE, *supra*, at 46 (citing Jacque-

one set of interviews with *convicted* rapists, only eight percent felt guilt about their act,¹⁵⁴ while a study of unconvicted rapists found no negative effect on their self-esteem.¹⁵⁵ Moreover, date rapists tend strongly to adhere to the most traditional sex-role notions. As one academic put it, “young rapists in the college-student surveys are demonstrably sexist but not demonstrably sick.”¹⁵⁶ Explains another commentator:

Date rapists tend to believe that men must be in charge in sexual encounters, that women are devious, and that nice women do not (but nice men can) engage in premarital sex. These sex-role paradigms make it particularly easy for men to assume or simply ignore the question of consent because the paradigms assign to men the role of Aggressor and to women the role of passive Recipient.¹⁵⁷

Rephrased, these men are aware that they are using force, the necessity of their doing so arising from their observation of signs of the woman’s resistance, but at least some of them dismiss from their conscious minds any worry that the woman is not consenting. They prefer to presume consent or ignore it in their narrow quest for one thing: the esteem they derive from frequent sex. Many young men lack confidence in their masculinity, an insecurity magnified by involvement in competitive male environments—such as fraternities and sports teams—in which their masculinity is subject to challenge.¹⁵⁸ It is in precisely such environments that men blot the question of consent out of full conscious awareness and deliberation.¹⁵⁹

line D. Goodchids et al., *Adolescents and Their Perceptions of Sexual Interactions*, in 2 RAPE AND SEXUAL ASSAULT 245, 268 (Ann Wolbert Burgess ed., 1988) (study finding that “teenagers understood the difference between consensual and nonconsensual sex, [but] they were frequently reluctant to apply the label ‘rape’ to the examples of forced sexual relations . . .”); Chris O’Sullivan, *Acquaintance Gang Rape on Campus*, in ACQUAINTANCE RAPE, *supra*, at 140 (noting the observer of a gang rape trial’s impressions: “I don’t believe she was raped, . . . I believe they ran a train on her.”).

¹⁵⁴ See Diana Scully & Joseph Marolla, “*Riding the Bull at Gilleys*”: *Convicted Rapists Describe the Rewards of Rape*, in RAPE AND SOCIETY 58–70 (Patricia Searles & Ronald J. Berger eds., 1995).

¹⁵⁵ See *id.* at 70 (citing S. Smithyman, *The Undetected Rapist* (1978) (unpublished Ph.D. dissertation, Claremont Graduate School) (on file with author)).

¹⁵⁶ Judith Lewis Herman, *Considering Sex Offenders: A Model of Addiction*, in RAPE AND SOCIETY, *supra* note 154, at 77. See also James V. P. Check & Neil Malamuth, *An Empirical Assessment of Some Feminist Hypotheses About Rape*, 8 INT’L J. WOMEN’S ST. 414, 415 (1985) (citing research relating to hypotheses about the normality of rape); Mary P. Koss, *Hidden Rape: Sexual Aggression and Victimization in a National Sample of Students in Higher Education*, in 2 RAPE AND SEXUAL ASSAULT, *supra* note 153, at 17–19 (reporting that college men felt few negative emotions as a result of their reported sexual aggression).

¹⁵⁷ Baker, *Rape and Shame*, *supra* note 99, at 674.

¹⁵⁸ See *id.* at 676–77.

¹⁵⁹ Cf. Joy Garrett-Gooding & Richard Senter, *Attitudes and Acts of Sexual Aggression on a University Campus*, 57 SOC. INQUIRY 348, 366 (1987) (citing that fraternity men report having forced intercourse more than men in student government or men unaffiliated

An analogy to the phenomenon of organizational resistance to whistleblowers clarifies the point. Organizations create their own codes of behavior, ignoring, as much as possible—indeed, “delegalizing”—all other criteria for proper conduct.¹⁶⁰ Workers who bring other, outside criteria to bear on their decisionmaking and actions, for example, relying on broader social values, are viewed as “unpredictable and potentially destabilizing.”¹⁶¹ The apparent obsession of some major corporations such as Enron with the instrumental goal of maximizing stock value as more important than honesty and clarity in financial reporting is a powerful illustration of this principle.¹⁶² Indeed, studies of whistleblowers—those who face retaliation for speaking out in the name of the public good—reveal that colleagues and superiors even try not to hear or read what the whistleblower says because a mere exposure to his words taints organizational members and smacks of disloyalty.¹⁶³ Colleagues often regard a whistleblower “as though he were a space-walking astronaut who had cut his lifeline to the mother ship.”¹⁶⁴ The “organization person” is skilled at “doubling,” treating the organizational part of the self as if it were her whole self while on the job.¹⁶⁵ Whistleblowers lack this skill and by their mere words remind the organization people of their everyday selves and of the social world beyond the organization.¹⁶⁶ But this reminder is perceived as an “insidious disease, a boundary violator.”¹⁶⁷ That sense of infection explains why even purely “internal” whistleblowers—those complaining entirely within the organization but going over their superior’s heads—still face equally severe retaliation to that visited upon “external” whistleblowers.¹⁶⁸ The sin of the purely internal whistleblower is that he represents “the presence of the outside on the inside: not just the unassimilated individual but the unassimilated citizen.”¹⁶⁹ The central point here is that organization members are aware of broader societal rules and practices but engage in a variety of mental gymnastics to “forget” them while on the job. Esteem in the organization comes from the employee’s ability to

with any organization); R. Hofmann, *Rape and the College Athlete: Part One*, PHILA. DAILY NEWS, Mar. 17, 1986, at 104 (noting that athletes at NCAA-affiliated schools reported to the police as rapists 38% more often than was true for non-athletes). See generally BENEDICT, *supra* note 130 (arguing that the National Basketball Association fosters a culture of “rape, violence, and crime”).

¹⁶⁰ See C. FRED ALFORD, WHISTLEBLOWERS: BROKEN LIVES AND ORGANIZATIONAL POWER 21 (2001).

¹⁶¹ See *id.* at 99 (quoting ZYGMUNT BAUMAN, MODERNITY AND THE HOLOCAUST 213–15 (1989)).

¹⁶² See Andrew E. Taslitz, *Racial Auditors and the Fourth Amendment: Data with the Power to Inspire Political Action*, 66 LAW & CONTEMP. PROBS. 221, 221–22 (2003).

¹⁶³ See ALFORD, *supra* note 160, at 20–22, 32.

¹⁶⁴ *Id.* at 5.

¹⁶⁵ See *id.* at 72–73, 115–17.

¹⁶⁶ See *id.* at 12, 21–22.

¹⁶⁷ *Id.* at 99.

¹⁶⁸ See *id.* at 20.

¹⁶⁹ *Id.* at 23–24.

engage effectively in this selective amnesia, much like the admired Party members engaging in “doublethink” in Orwell’s *1984*.¹⁷⁰ So too may the date rapist in some college fraternities be skilled at “doubling,” by replacing society’s norms and interpretations with those of the brotherhood while simultaneously remaining aware of the broader culture’s contrary norms and understandings.¹⁷¹

Law professor Robert Garcia conducted an informal experiment that further suggests men are not deaf or blind to female nonconsent.¹⁷² He had actors read aloud to his law school class the transcript of a sex scene in the movie *Last Tango in Paris*.¹⁷³ Most of the student jurors concluded from this testimony that the admittedly rough and frantic sex described was consensual. But when shown the movie, both male and female jurors now believed that the woman had been raped.¹⁷⁴ At least in this one instance, men were readily able to discern nonconsent from demeanor, tone of voice, and context even where the plain text of the words spoken was more ambiguous.¹⁷⁵ In other words, even when sexual stereotypes led men to favor interpreting a woman’s words taken in isolation as indicating consent to intercourse, in the context of actually seeing the woman as she spoke the words, the men were able to detect and understand the *physical cues* indicating lack of consent. This observation suggests that many men are, if they choose to pay attention, perfectly capable of observing and understanding when a woman means “no,” even if her words are less clear.

That most men do not rape likewise suggests that they are fully capable, at least at some level, of understanding women’s desires correctly. That men and women may often have different views of sexuality and about how to communicate does not mean, contrary to popular wisdom, that they are so incapable of understanding one another that they might as well be from different planets.¹⁷⁶

¹⁷⁰ See *supra* text accompanying notes 72–77.

¹⁷¹ See *supra* text accompanying notes 165–166 (discussing “doubling”).

¹⁷² See Robert Garcia, *Rape, Lies and Videotape*, 25 LOY. L.A. L. REV. 711, 711–12 (1992).

¹⁷³ *LAST TANGO IN PARIS* (MGM/UA Studios 1973).

¹⁷⁴ See *id.* at 733–37.

¹⁷⁵ That men are likely capable of discerning nonconsent from demeanor, context, and tone of voice does not, however, mean that they always exercise that capacity. See Taslitz, *Two Concepts*, *supra* note 24, at 52–58 (discussing men’s frequent indifference about whether women are consenting to sexual advances or not).

¹⁷⁶ See FELSON, *supra* note 131, at 131–32 (describing miscommunication between men and women concerning consent to intercourse and the causes of such miscommunication, including male overestimation of women’s interest in sex in a particular sexual encounter). *But cf.* JOHN GRAY, *MEN ARE FROM MARS, WOMEN ARE FROM VENUS: THE CLASSIC GUIDE TO UNDERSTANDING THE OPPOSITE SEX* (1992) (popularizing the idea that men and women speak different languages). Miscommunication does sometimes, perhaps often, occur at the *conscious* level. Whether this is true at the *unconscious* level too is an assumption I challenge, as is any claim that men cannot improve their ability to be sensitive to their partner’s desires.

This is just a sampling of arguments that men are at *some level* aware of sexual nonconsent, even if we believe their claims that they are not fully aware, and even if we believe their further claims that they in fact consciously believed that their partner gave affirmative consent. If this is right, we still need to consider precisely what self-deception is and how and why it occurs. Part III will address these issues.

III. HOW AND WHY RAPISTS SELF-DECEIVE

A. *Two Types of Self-Deception*

There are many types of self-deception, but here I want to focus on two types: the semiconscious and the unconscious. It is necessary to focus on these two broad types because they involve slightly different cognitive processes. Understanding those processes clarifies how and why rapists deceive themselves about consent. Although self-deception at the semiconscious and unconscious levels may involve different processes, the moral implications of both types of processes are similar, as Part IV will demonstrate.

1. *Semiconscious Self-Deception*

As explained in this Article's Introduction, with semiconscious self-deception, we are at some level dimly aware of the true state of affairs or of our true motivations, but we engage in a variety of strategies to distract ourselves from the truth.¹⁷⁷ Each of these strategies will prove relevant to date rape. These strategies include willful ignorance, systematic ignoring, emotional detachment, and rationalization, each of which will be discussed below.

a. *Willful Ignorance*

The term "willful ignorance" is used by some philosophers to mean not gathering information because we fear that it will confirm what we suspect to be the truth.¹⁷⁸ The idea here is analogous to the willful blindness doctrine in criminal law, which treats an individual's choosing not to confirm strong suspicions of his wrongdoing—such as carrying a package across the border believing it contains illegal drugs—as equivalent to "knowing" about the wrongdoing where her self-created ignorance was motivated by her hope to claim plausible deniability if caught by the police.¹⁷⁹

¹⁷⁷ See, e.g., MIKE W. MARTIN, SELF-DECEPTION AND MORALITY 15–16 (1986); *supra* text accompanying notes 66–70.

¹⁷⁸ See MARTIN, *supra* note 177, at 7.

¹⁷⁹ See STEPHEN A. SALTZBURG ET AL., CRIMINAL LAW: CASES AND MATERIALS 198 (2d ed. 2000). According to a number of federal courts, a defendant "acted knowingly if he

b. Systematic Ignoring

“Systematic ignoring” occurs when one is consciously aware of the truth but thinks about other things to avoid paying attention to the moral implications of the truth.¹⁸⁰ An example might be a parent who momentarily believes that she sees her child smoking marijuana, but starts thinking about her need to do the laundry rather than focusing on a disturbing truth.¹⁸¹

c. Emotional Detachment

“Emotional detachment” involves blocking, freezing, or otherwise detaching the self from the emotions that recognition of the truth would ordinarily entail.¹⁸² For example, maintaining a cultivated aloofness in the face of another’s apparent suffering is one way to deny that suffering to yourself, as many ordinary Germans arguably did concerning the Holocaust in Nazi Germany.¹⁸³ Since in a person’s self-image she is not cold, she tries to convince herself that her lack of worry about another shows that she cannot be in real pain.¹⁸⁴

or she was aware of a high probability that a certain fact existed but deliberately avoided finding out for sure in order to escape criminal liability—unless [the] defendant actually believed that the fact did not exist.” *Id.* In addition, “[s]ubsection 7 [of the Model Penal Code] deals with the situation that British commentators have denominated ‘wilful blindness’ or ‘connivance,’ the case of the actor who is aware of the probable existence of a material fact but does not determine whether it exists or does not exist,” a state of mind that the Model Penal Code drafters viewed as morally equivalent to true knowledge. *Id.* at 199. *See also* MARTIN, *supra* note 177, at 7 (offering example of Jack, a low-level manager, who suspected that some people in his company were engaged in illegal activities but, to avoid making waves and hurting his career mobility, he refused to question his colleagues about his suspicions and fleetingly considered but rejected consulting a lawyer, decisions done “purposefully” but “never reflected upon sufficiently to be called deliberate”).

¹⁸⁰ *See* MARTIN, *supra* note 177, at 7–8.

¹⁸¹ The example in the text is drawn from observation of some of my friends’ efforts to cope with their teenage children’s behavior. Martin gives the example of an employee with full knowledge of corporate wrongdoing who distracts herself from focusing on this knowledge or deliberating about its moral implications because to do otherwise would undermine her desire to be a team player in the corporation. *See id.* at 7–8.

¹⁸² *See id.* at 8 (defining the self-deceptive strategy of emotional detachment). Martin continues his corporate example, positing an employee with full awareness of corporate wrongdoing, his complicity in it, and its morally evil nature, and who “‘intellectually believed’ that what he was doing was wrong, but who avoided emotional recognition and heartfelt conviction about his wrong-doing.” *Id.* at 8.

¹⁸³ On the refusal to feel another’s suffering, see Andrew E. Taslitz, *Hate Crimes, Free Speech, and the Contract of Mutual Indifference*, 80 B.U. L. REV. 1283, 1284–1303 (2000) (discussing psychological processes by which we ignore others’ pain and evidence supporting the example of Nazi Germany).

¹⁸⁴ *See id.* at 1284–1303.

d. Rationalization

A person who is looking for a reason to convince herself that what is usually bad or what looks bad is in fact affirmatively good in a particular case is engaging in “rationalization.” For example, believing that price-fixing, while technically illegal, was necessary *in this case* to preserve jobs and that the anti-price-fixing law is in any event a bad law and damaging to the economy, is a classic use of a rationalization strategy.¹⁸⁵ Such beliefs arise in “an effort to silence an otherwise anguished conscience.”¹⁸⁶

Each of these strategies can be involved in a date rape case. For example, a man who gets increasingly intimate with a woman to the point where she says “no!” may choose to investigate no further, to ask no questions, and to avoid slowing down to gauge her reactions. As such, he employs willful ignorance. He may also think about other things—such as the smell of the woman’s hair or his own irresistible good looks—as a way to distract himself from the moral implications arising if “no” really meant “no.” This is a form of systematic ignoring.¹⁸⁷ Additionally, he will focus single-mindedly on the goal before him—having sex—as a way of numbing any creeping feelings of concern for the woman that might arise from confronting the suspicion that she is distressed by his behavior.¹⁸⁸ This

¹⁸⁵ See MARTIN, *supra* note 177, at 8–9 (defining “rationalization” and using an analogous example). Martin distinguishes between “self-pretense”—struggling (without complete success) to convince yourself that your actions are right—and “rationalization”—succeeding in so convincing yourself. See *id.* I encompass both strategies in the term “rationalization” since in both cases an individual is consciously aware of the true state of affairs in the world and the resulting moral reprobation that society would heap upon her actions, but she uses a strategy of attempted self-persuasion motivated by self-interest, a level of awareness and ill-motive that makes both strategies psychologically similar and morally reprehensible.

¹⁸⁶ *Id.* at 9. Martin reminds his readers that this list of strategies is illustrative, not exhaustive, and that sometimes these strategies can be used without serving self-deception, that is, without furthering the evasion of self-acknowledgement. For example, he notes that not learning more about a free, interesting, fun evening computer skills course offered by your employer might involve not so much an effort to evade one’s true self as a deliberate, conscious decision that you would just rather watch television. That choice would constitute “willful ignorance” but not “self-deception.” *Id.* at 16. He offers six evidentiary criteria to aid in distinguishing self-deceptive uses of these strategies from other uses: (1) taking account of—that is, attending to, however briefly—what it is that you are evading, though, more rarely, a tacit or unconscious accounting may be involved; (2) what is evaded must be of real personal concern rather than, for example, a simple lack of interest; (3) the “sheer number of reinforcing patterns” as opposed to isolated tactics; (4) the extensiveness and duration of the evasion tactics, more extensive and durable tactics counting toward self-deception (though this is evidentiary only, for self-deception can be short-lived and non-repetitive); (5) systematic, careful selectiveness to what you afford your attention, even if it is not complete—that is, skill “in knowing when to ignore a topic in order to foreclose a possible revelation”; and (6) using self-deceptive strategies to blind yourself to the fact that you are already using self-deceptive strategies to hide some ultimate truth from yourself. *Id.* at 16–18.

¹⁸⁷ Cf. Baker, *Rape and Shame*, *supra* note 99, at 670–72 (discussing motivations for men to focus on things other than a woman’s consent).

¹⁸⁸ See *id.* at 670–72 (describing the phenomenon in cases where men pursue their goal

strategy of emotional detachment is likely what was at work with the fraternity rapists motivated by peer esteem, discussed above. Finally, he may tell himself that her words say “no,” but her body says “yes.” He may reason that she is too inhibited by her own fears, her overly religious upbringing, and her worry about not appearing sluttish to reveal her true desires in words.¹⁸⁹ Such an effort to rationalize behavior might help to explain how some college-age date rapists mentioned earlier viewed their conduct as only “technically” illegal but not immoral.¹⁹⁰

The point of this hypothetical is that the truth is accessible to this man’s conscious mind, but he engages in a variety of strategies to render it temporarily absent from his consciousness. He tries to hide from his full consciousness the very fact that he is using self-deceptive strategies. The possible reasons for doing so include fear of the consequences of recog-

for esteem and group acceptance reasons); *supra* text accompanying notes 143–159.

¹⁸⁹ See William E. Nelson, *Criminality and Sexual Morality in New York, 1920–1980*, 5 YALE J.L. & HUMAN. 265, 310 (1993) (quoting Cliff Friend, “*There’s Yes! Yes! In Your Eyes*,” in SING ALONG WITH MITCH: THE MITCH MILLER FAMILY SONGFEST, A TREASURY OF FUNTIME FAVORITES (Mitch Miller ed., 1961) (popular 1950s song, proclaiming “Your lips tell me No! No! but there’s Yes! Yes! In your eyes.”)); SCHULHOFER, *supra* note 11, at 254–73 (offering his views and others’ on the frequent problem of a verbal “no” to sexual intercourse articulated by a woman being nevertheless taken as a “yes” by her male partner). Schulhofer acknowledges that in some substantial minority of cases, a woman’s “no” does mean “yes,” but rightly argues that, given the threat a mistake poses to female sexual autonomy, a “no” ought to impose on the man a duty to pause and inquire further. *See id.* at 260–67. Schulhofer also rightly argues that silence in response to sexual advances should not constitute consent, though certain *unambiguous* body language by a woman—such as responding with passionate hugging, kissing, and sexual touching—should usually constitute a “yes,” even if no spoken words are exchanged. *See id.* at 272. Philosopher Lois Pineau makes a similar point:

To those more in the know, communication also takes place at the level of sexual responses related to levels of arousal, and people who are good at reading the signs make good lovers So that even where things have proceeded in silence, to initiate the usual foreplay is to invite both a positive physiological response and to rule out negative verbal and physical responses. But then, where no physical response is forthcoming, a verbal inquiry is in order, even where initial consent has been obtained. Where a woman does not kiss back, makes no return caress, and shows no signs of physiological arousal, the usual requirements of reciprocal sexual enjoyment are apparently not, from her point of view at least, being met. Where her partner does not care, does not take the trouble to notice, and makes no inquiry as to the motivation for this unusual behavior, this failure is even more evident. It is in this situation where a negative response on her part, or a failure to take positive steps to determine her consent on his part, makes the encounter look like assault.

Lois Pineau, *A Response to My Critics*, in DATE RAPE, *supra* note 24, at 97–98. In summary, the regime defended by Pineau and Schulhofer states a few basic rules: (1) “no means no” until reasonable further verbal inquiries reveal it to mean “yes”; (2) silence means “no” unless accompanied by *unambiguous* body language expressing consent or until reasonable further verbal inquiries reveal that silence indeed means “yes.” For my own defense of a similar regime and of ways to overcome practical obstacles to its implementation, see generally Taslitz, *Two Concepts*, *supra* note 24.

¹⁹⁰ See *supra* text accompanying notes 151–154.

nizing the truth, laziness and seeking the easy way out of a potential moral dilemma, avoiding an onerous task, callousness about obligations, vanity, pride, a desire for power over others, an unwillingness to contend with painful emotions like guilt, shame, remorse, and self-contempt, and, most importantly, a desire to maintain self-esteem.¹⁹¹

2. *Unconscious Self-Deception*

The second type of self-deception involves an awareness of the truth entirely at an unconscious level—a level that is hard to make readily accessible to consciousness.¹⁹² Strategies of selectively attending to information, limiting evidence gathering, and so on still take place, but they are thoroughly out of our conscious awareness.¹⁹³ However, there is still an element of intention, in that these unconsciously occurring strategies for biasing our beliefs are motivated by our self-interest.¹⁹⁴

For example, there are three common sorts of everyday, ordinary, unmotivated cognitive biases: the vividness heuristic, the availability heuristic, and the confirmation bias. Once their ordinary forms are understood, they can more effectively be compared to their more reprehensible, self-deceptive variations.

a. *The Vividness Heuristic*

Vivid data are more likely to be recognized, attended to, and thus recalled than pallid data and have a stronger influence on the formation and retention of beliefs. We remember the earthquake better than the bump in the road.¹⁹⁵

¹⁹¹ See MARTIN, *supra* note 67, at 17 (reciting a similar list of potential motivations for self-deception); cf. SIMON BLACKBURN, LUST 98 (2004) (noting that “[t]oo many men conceive of their sexuality like their mountaineering, in terms of domination and conquest . . .”); Martha Nussbaum, *Objectification*, 24 PHIL. & PUB. AFF. 249, 257 (1995) (including “violability” as her fifth form of objectification, noting that “[t]he objectifier treats the object as lacking in boundary integrity, or as something it is permissible to break-up, smash, break into”).

¹⁹² See *supra* text accompanying notes 57–65 (defining the unconscious and its role in self-deception); WILSON, *supra* note 57, at 6, 14–23 (describing self-deception and the unconscious and the implications for self-insight).

¹⁹³ See MELE, *supra* note 82, at 25–28 (2001) (describing how these processes can work at both conscious and subconscious levels and defining “self-deception” as *motivated* biased belief); WILSON, *supra* note 57, at 24–35 (noting that the adaptive unconscious acts as a rapid pattern detector, a gatekeeper filtering what information gets admitted to consciousness, a “spin doctor that interprets information outside of awareness,” and a goal-setter).

¹⁹⁴ See *supra* text accompanying notes 82–85 (describing in further detail the “element of intention”).

¹⁹⁵ See MELE, *supra* note 82, at 28.

b. The Availability Heuristic

We rely most heavily on the most easily accessible information in forming our beliefs rather than investing the time, energy, and money in locating less accessible, but potentially more reliable, data.¹⁹⁶ Although much of the original work in this area focused on how we wrongly estimate the probabilities of events by assuming that what comes most easily to mind must be most probable, a similar concept has been applied more broadly under the same rubric.¹⁹⁷ “Most people reason dramatically, not quantitatively,” said Oliver Wendell Holmes,¹⁹⁸ a point that applies to the workings of the availability heuristic.¹⁹⁹ Thus “[f]ictional happenings in novels, television, and films also leave images that later penetrate our judgments,” leading us to remember them more easily than we would the hard data of statistics,²⁰⁰ therefore making them more readily available to our memories. The result is that we give these vivid images greater weight than they deserve in our understanding of the world.²⁰¹ Similarly, popular culture, personal experience, and other cognitive influences and sources of narratives may affect what we can most easily *imagine* happening, and what we can more easily imagine again becomes more readily available and weighty in our thinking.²⁰² Indeed, our willingness to rely on what is most available may lead us to make quick judgments and overgeneralize from specific available instances without gathering the necessary information that logic would suggest is required for judging their typicality.²⁰³ As one well-known cognitive psychologist recounted: “After hearing and reading news stories of rapes, robberies, and beatings (but without any data to indi-

¹⁹⁶ *See id.* at 28.

¹⁹⁷ *See, e.g.*, RICHARD E. NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 18 (1980) (discussing errors of simple judgments that minds make); Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 163, 178 (D. Kahneman et al. eds., 1982) [hereinafter JUDGMENT UNDER UNCERTAINTY]; Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in JUDGMENT UNDER UNCERTAINTY, *supra*, at 3–21 (describing that people rely on heuristic principles which reduce the complex task of assessing probabilities but noting that the reliance on heuristics leads to “severe and systematic errors”).

¹⁹⁸ DAVID G. MYERS, INTUITION: ITS POWERS AND PERILS 124 (2002).

¹⁹⁹ *See id.* at 123–25.

²⁰⁰ *Id.* at 124.

²⁰¹ *See id.* at 124–25.

²⁰² *See id.* at 123–25 (citing the importance of popular cultural and personal experiences); Taslitz, *Patriarchal Stories*, *supra* note 17, at 395–401 (detailing cognitive forces that make some information more salient and available than others, though not always using the language of “heuristics”); NEIL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS 47–48 (2000) (noting importance of item accessibility to perception, memory, and *imagination*, that the “media play a major role in providing information about events beyond one’s personal experience,” and that “[c]ertain events may also be more accessible if less mental effort is required to retrieve them”).

²⁰³ *See* MYERS, *supra* note 198, at 123–24 (reiterating that easy to imagine events seem more likely than harder to imagine events, even when the easier picture is an atypical case).

cate whether these were atypical or not), nine out of ten Canadians overestimated—usually by a considerable margin—the percentage of crimes that involve violence.”²⁰⁴

c. The Confirmation Bias

We tend to search more enthusiastically for data confirming rather than disconfirming our beliefs.²⁰⁵ If we think that redheads are smart, we take note of the bright redheads we meet while ignoring or minimizing or explaining away the less intelligent ones.²⁰⁶ A related phenomenon is “belief perseverance”:²⁰⁷

In one experiment, students in favor of and opposed to capital punishment were shown the findings of two research studies, one confirming and the other disconfirming their preexisting beliefs about capital punishment’s supposed deterrent effect. Both groups readily accepted the evidence that confirmed their view but sharply criticized the evidence that challenged it. The result: showing the two sides an *identical* body of mixed evidence increased their *disagreement*. In a follow-up study, pleas to be as “*objective and unbiased as possible*” did nothing to reduce the biased evaluation of evidence. Once a belief forms, we filter information in ways that sustain it.²⁰⁸

Even if an initial belief is “disconfirmed, even shown to be utterly groundless . . . the belief may survive.”²⁰⁹ People will often reject powerful disconfirming data by crafting explanations for why their original theory *might* nevertheless be true.²¹⁰ “Once beliefs form, it can take more compelling evidence to change them than it did to create them.”²¹¹

d. Information Heuristics and Unconscious Self-Deception

When these three heuristics are motivated by self-interest, they constitute self-deception. Thus if information furthers our self-interest, it becomes both more vivid and more salient and is given far more attention

²⁰⁴ *Id.* at 124. See also Anthony N. Doob & Julian Roberts, *Public Punitiveness and Public Knowledge of the Facts: Some Canadian Surveys*, in PUBLIC ATTITUDES TO SENTENCING: SURVEYS FROM FIVE COUNTRIES, 113–16 (Nigel Walker & Mike Hough eds., 1988) (showing charts that indicate how Canadians view crime).

²⁰⁵ See MYERS, *supra* note 198, at 116–17.

²⁰⁶ *Cf. id.* at 29 (describing reactions to people we meet based on screening and stereotypes as opposed to deliberate reasoning).

²⁰⁷ See *id.* at 115–19.

²⁰⁸ *Id.* at 115–16.

²⁰⁹ *Id.* at 117–18.

²¹⁰ See *id.* at 118.

²¹¹ *Id.*

than information contrary to our own needs.²¹² The operation of such unconscious biases when *motivated* by self-interest constitutes “self-deception” in part because there is, at least metaphorically, an element of intention, of a desire to serve our own goals, even at another’s expense.²¹³ Not all self-deception is undesirable, for there may be benefits to fooling oneself that exceed the costs.²¹⁴ Professor David Livingstone Smith, director of the Institute for Cognitive Science and Evolutionary Psychology at the University of New England, explains that there were evolutionary advantages to unconscious self-deception that deepen our understanding of the motivational bases for self-deception:

Why did self-deception take root in the human mind? As we will see, the propensity for self-deception probably became part of our nature because it was so helpful to us in our dealings with one another. Not only does lying to oneself soothe many of the stresses of life, but, more importantly, it also helps one lie to others. One of the most important insights of modern sociobiology is that self-deception is the handmaiden of deceit: in hiding the truth from ourselves, we are able to hide it more fully from others.²¹⁵

Despite these evolutionary benefits to self-deception, when it does far more social harm than good, or when it violates important moral principles, it should be condemned.²¹⁶

The evolution of language enhanced the ability both to lie to others and to ourselves.²¹⁷ Language created the opportunity to convey misinformation, with the likely result that a “portion of the brain devoted to verbal functions must become specialized for the manufacture and maintenance of falsehoods.”²¹⁸ But it is hard for many people to lie effectively, to remain straight-faced while playing “social poker.”²¹⁹ We are better liars when we believe that our falsehoods are true.²²⁰ As unconscious “poker players,” Professor Smith explains, “we can manipulate the others while remaining

²¹² See *id.* at 29–30.

²¹³ See *supra* text accompanying notes 80–83.

²¹⁴ See DAVID LIVINGSTON SMITH, WHY WE LIE: THE EVOLUTIONARY ROOTS OF DECEPTION AND THE UNCONSCIOUS MIND 27–28 (2004) (noting that self-deception may be essential to avoiding serious emotional depression).

²¹⁵ *Id.* at 3.

²¹⁶ See *infra* Part IV; cf. MYERS, *supra* note 198, at 128 (listing intuition’s “dozen deadly sins,” ill consequences that may follow from intuitive unconscious biases, including many that, when motivated by self-interest, match the biases involved in self-deception).

²¹⁷ See SMITH, *supra* note 214, at 110–11.

²¹⁸ Robert L. Trivers, *Sociobiology and Politics*, in SOCIOBIOLOGY AND HUMAN POLITICS 35 (Elliott White ed., 1981).

²¹⁹ See SMITH, *supra* note 214, at 104–11 (explaining the value of the “social poker” metaphor).

²²⁰ See *id.* at 104 (noting that “[t]he mirror of consciousness distracts us by projecting a flattering self-portrait, leaving us free to pursue self-serving social machinations unconsciously in the dark, undisturbed by conscience and unburdened by guilt”).

innocent of many of our own self-serving intentions. If accused, we can sincerely take offense and claim that it is all in the paranoid eye of the beholder.”²²¹ Accomplishing this feat requires “biased perceptions, biased memory, and biased logic; and these processes are ideally kept partly unconscious.”²²² It also requires using language internally, holding self-conversations by which we explain our behavior in ways that hide from ourselves and others the biased cognitive processes at work.²²³

Moreover, because most of our interpretations of the meaning of events begin in the unconscious, these biases may combine to constitute a positive *misinterpretation* of events.²²⁴ This skewed unconscious understanding then enters our consciousness to justify our actions to ourselves.²²⁵ Exploring the general biological functions of the unconscious may make this clearer. The adaptive unconscious aids human thriving by promoting a number of sometimes inconsistent goals. These goals include achieving a relatively accurate understanding of our physical and social worlds, improving cognitive processing efficiency by aiding in selecting what information needs to have a high activation potential in memory, and promoting status and self-esteem.²²⁶ The problem is that the last of these goals can distort the first two in ways that can be harmful both to the individual and to others.²²⁷ Thus blaming a lost promotion on an ox of a boss helps to preserve self-esteem, but at the cost of not identifying and correcting our problem behavior, if we do really have some flaws in our work habits.²²⁸ “Negative misinterpretation” occurs when our desire that *p* exist “lead[s] us to misinterpret as not counting (or not counting strongly) data against *p* that we would easily recognize to count (or count strongly) against *p* in the desire’s absence.”²²⁹ “Positive misinterpretation” occurs when our desire for *p* “lead[s] us to interpret as supporting *p* data that we would easily rec-

²²¹ *Id.* at 111 (describing how the often low social intelligence of our conscious mind allows our unconscious to figure out others’ mental states “so as to manipulate their behavior in ways that serve our own interests,” all the while hiding from them and from ourselves our “wily, Machiavellian intelligence”).

²²² Trivers, *supra* note 218, at 35; *see also* SMITH, *supra* note 214, at 110 (interpreting Trivers’s and related thinkers’ work).

²²³

The “gift of gab” allowed our ancestors to paint false portraits of the world, including their own motives, at absurdly little cost. *It also enabled them to deceive themselves*, or at least to deceive themselves more effectively than they had been able until then, and therefore to do a better job at deceiving others.

SMITH, *supra* note 214, at 110–11 (emphasis added); *see also supra* text accompanying notes 51–55 (discussing internal self-conversation), 185–191 (discussing rationalization).

²²⁴ *See* MELE, *supra* note 82, at 26.

²²⁵ *See* WILSON, *supra* note 57, at 20, 35–40.

²²⁶ *See id.* at 35–39.

²²⁷ *See id.* at 38–39.

²²⁸ *See id.* at 39.

²²⁹ MELE, *supra* note 82, at 26.

ognize to count against *p* in the desire's absence."²³⁰ It is this latter sort of misinterpretation that can be particularly dangerous in sexual encounters. Philosophy professor Alfred R. Mele gives this example:

Sid is very fond of Roz, a college classmate with whom he often studies. Wanting it to be true that Roz loves him, he may interpret her refusing to date him and her reminding him that she has a steady boyfriend as an effort on her part to "play hard to get" in order to encourage Sid to continue to pursue her and prove that his love for her approximates hers for him. As Sid interprets Roz's behavior, not only does it fail to count against the hypothesis that she loves him; it is evidence *for* the truth of that hypothesis.²³¹

Spelling out Mele's implicit logic may better emphasize how motivated unconscious biases are at work in the example above.²³² Sid, Mele suggests, so strongly wants to believe that Roz loves him—it is so essential to his self-esteem—that he focuses his attention on those aspects of Roz's behavior that most readily lend themselves to affirm his belief that she has a strong affection for him. For example, Roz studies with Sid, not just sometimes, but *frequently*—something she surely would do, Sid believes, only if he were *more* than a platonic friend. Sid has also probably found movie narratives about female coyishness in budding romances particularly gripping, a way to explain to himself what might otherwise seem to be a less-than-ideal romantic life. To serve his need for self-esteem, he is motivated to turn to these tales, to make them readily available to explain his relationship with Roz. When Roz refuses to date him, he interprets the combination of her continued willingness to study with him with cultural preconceptions of "good women" being slow to enter into sexual relationships as evidence confirming his belief that she cares for him.²³³ When Roz combines her refusal to date him with a *reason*—she already has a steady boyfriend—he sees that reason as pretextual. He views her justification not as a lie meant to drive him away but rather to encourage his advances because claiming a nonexistent romantic partner is a standard ploy in fiction for a woman to signal her worthiness by playing "hard to get." Thus, what others would likely view as evidence of Roz's rejection of him, Sid sees as indications of her love.

It is a short step from this example to understanding how a man can consciously and sincerely believe that "no" means "yes" while unconsciously "knowing" otherwise. Suppose that Sid, now seeing strong evi-

²³⁰ See *id.* at 26.

²³¹ *Id.* at 26.

²³² See *id.* at 26–27.

²³³ On how "good women" behave with reticence about sex, see Taslitz, *Two Concepts*, *supra* note 24, at 18–31; Taslitz, *Patriarchal Stories*, *supra* note 17, at 439–65.

dence that Roz loved him, decided that he had to play her game. He would become more energetic in his advances, including becoming more physically aggressive, to overcome her “feigned” resistance. He may even expect that she will initially continue to pretend to be unavailable, though he will know otherwise.²³⁴ But Roz may interpret Sid’s ignoring her refusals as expressing a determined intention to force her to have sex. She may be afraid of him or too timid to keep up her protests.²³⁵ Sid in turn interprets Roz’s lack of resistance as an open expression of her love for him at last. He completes the act of intercourse, his self-esteem soaring, but Roz sees the incident as a rape, reporting it to the police. When the police confront Sid, he is, at a conscious level, sincerely hurt and shocked, denying any wrongdoing and confused by the apparent perfidy of women. His “shock” is possible, however, only because his own need for self-esteem activated unconscious biases designed to keep an unpleasant truth from his conscious mind, even at the risk of Roz being raped. More often, though, as discussed earlier, unconscious male self-deception may be motivated more by the increase in self-esteem produced by peer approval of frequent sex than from the purported need for a specific woman’s love.²³⁶

None of these unconscious motives for self-deception, as we will see shortly, renders the unconscious beyond our control or eliminates our responsibility for the workings of our unconscious mind.

IV. WHY SELF-DECEPTION IS WORSE THAN ORDINARY CRIMINAL NEGLIGENCE

Here I discuss a sampling of some of the many important reasons why self-deception, whether semiconscious or unconscious, is worse than ordinary criminal negligence. I offer three reasons: (1) self-deception involves the same wrongs as ordinary negligence but to a greater degree; (2) self-deceivers are hypocrites; and (3) self-deceivers are inauthentic persons.

A. Self-Deception Involves Similar Moral Wrongs to Negligence but to a Greater Degree

1. Failure To Take Action To Avert Grave Harm

First, self-deception involves some of the same moral evils as ordinary criminal negligence but to a heightened degree. Thus, feminists often

²³⁴ This is a variation of the frequent date rapist claim that “she wanted it.” See Taslitz, *Patriarchal Stories*, *supra* note 17, at 439–65.

²³⁵ See Jack M., *Confessions of a Date Rapist*, MANHATTAN SPIRIT (Aug. 31, 1991) (illustrating such timidity and fear in a confession by a date rapist who came to see the light), available at <http://www.survivingtothriving.org/confessions> (last visited May 15, 2005).

²³⁶ See *supra* text accompanying notes 143–159.

condemn the stupid man who is unaware of a rape victim's nonconsent.²³⁷ They do so given the grave resulting psychological harm to the victim that easily could have been avoided by clearly and directly asking the woman whether his actions were permissible.²³⁸ Certainly the rapist who engages in semiconscious self-deception is worse on this score than is the purely unconscious rapist, for the former sort of self-deceiver has at least some pre-conscious awareness of his wrongdoing, making it easier for him than for the unconscious rapist to avoid the harm to his victim.²³⁹ However, this argument still holds for unconscious self-deception (albeit to a lesser degree), because some portion of even the unconsciously self-deceiving male's self remains aware of the impending wrong. The offender is thus not entirely incapable of understanding or controlling his actions. To be sure, it may take more work for the self-deceiving rapist to gain access to, or come to understand, his own motivations than for the rapist who consciously knows that he acts without the woman's consent.²⁴⁰ Nevertheless, if we embrace egalitarianism—understood as obliging each of us to treat one another as of equal worth, regardless of immutable class-based characteristics like gender—as a value, it is a fair moral expectation that the self-deceiver can and should do the psychological work necessary to avoid causing grave harms to the women that will stem from his not doing such work.²⁴¹ Evelin Sullivan thus argues that the one who knowingly suppresses the truth

²³⁷ See MAYO MORAN, *RETHINKING THE REASONABLE PERSON: AN EGALITARIAN RECONSTRUCTION OF THE OBJECTIVE STANDARD* 220–31 (2003) (reviewing and analyzing the feminist debates).

²³⁸ See *id.* at 220–31; Taslitz, *Two Concepts*, *supra* note 24, at 58–64.

²³⁹ Cf. MORAN, *supra* note 237, at 241–44 (summarizing the “avoidability account” of punishment for negligence). Moran notes, however, that any avoidability account that is too easily subjectivized—that looks too readily to whether *this individual* was capable of avoiding the harm—can wrongly lead to privileging the male's point of view, particularly if “prudential or normative shortcomings” of the individual offender, rather than only those shortcomings (like cognitive ones, such as from brain damage, or physical ones) not reflecting upon the agent's character, are taken into consideration. See *id.* at 243–44; cf. H. L. A. HART, *Legal Responsibility and Excuses*, in *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* 157 (1970) (explaining how criminal negligence liability is justified because it involves “a failure to exercise the capacity to advert to, and to think about and control, conduct and its risks”).

²⁴⁰ Cf. HART, *supra* note 239, at 220–30 (discussing questions of legal liability, responsibility, and moral blame); SCHULHOFER, *supra* note 24, at 258–59 (noting that negligence liability, such as for negligent homicide, is perfectly appropriate in the criminal law where the defendant's conduct involves a gross departure from the level of care reasonably expected, though also adding his view that the penalty for negligence must be substantially lower than that for intentional misconduct). Any reader who rejects egalitarian values, such as promoting equal respect for men and women, will of course reject my entire argument here and my arguments made elsewhere concerning the appropriate legal regime for the substantive and procedural law of sexual assault. See TASLITZ, *RAPE AND CULTURE*, *supra* note 79, at 101–51 (defending an egalitarian vision of the procedural law of sexual assault); CAROLINE A. FORELL & DONNA M. MATTHEWS, *A LAW OF HER OWN* 8–22 (2000) (defending an egalitarian vision of the substantive criminal law of sexual assault). See generally MORAN, *supra* note 237 (defending an egalitarian vision of the reasonable person standard in all of the law).

²⁴¹ See EVELIN SULLIVAN, *THE CONCISE BOOK OF LYING* 169 (2001).

and the rationalizing self-deceiver are equally culpable: “Both are being dishonest with themselves because although they *somewhere* know the truth, and also somewhere know that they know the truth, they have learned to manipulate their conscious thinking in a way that makes life less painful or more convenient.”²⁴² Sullivan’s observation about rationalization applies equally to semiconscious and unconscious processes, for in both cases individuals hide the truth from themselves to serve petty motives. That the self-deceiver is already aware, *at some level*, of his wrongdoing arguably may make it easier for him to change than it is for the hypothetical thoroughly deluded male who is entirely blind even at the unconscious level to any risk of error about whether his partner is consenting.²⁴³ Denno, of course, rightly rejects this sharp conscious/subconscious mind dichotomy and its simple assumption of nonresponsibility for one’s unconscious mental states.²⁴⁴ Nevertheless, an analogous argument can be made that those with unconscious awareness of a risk have culpable awareness at some level, and they have the option of working to float that awareness in some way into the conscious mind, that the purely stupid person—lacking any glimmer of subconscious awareness of a problem—does not.

2. *The Ability To Access Feelings and Attitudes More Readily than Other Unconscious States*

In the case of rape, self-deception stems more from feelings (for example, the need for self-esteem in other male peer group members’ eyes) and attitudes (for example, no matter what clues a man receives that suggest that this woman is not consenting, women “like her” must always really “want it”)²⁴⁵ than from mental phenomena more fairly classified as simple “cognitions.” Feelings and attitudes—as opposed to cognitions—are the sorts of subconscious phenomena that can most readily be made accessible to consciousness.²⁴⁶ As cognitive psychologist Timothy Wilson explains: “Whereas feelings and attitudes can reside out of sight, they appear to have a greater potential to reach awareness—if people can succeed in finding them through the smoke screen of their conscious theories about how they feel.”²⁴⁷ The mental processes that produce unconscious feelings and attitudes may still be inaccessible, argues Wilson, but the feelings and attitudes themselves can be brought into awareness.²⁴⁸ Wilson even theorizes that the default state may be for unconscious feelings and attitudes to emerge into conscious awareness unless special circum-

²⁴² *Id.*

²⁴³ *Cf.* Denno, *supra* note 37, at 283–84 (summarizing traditional view that unconscious actors are not culpable because they cannot control their behavior).

²⁴⁴ *See id.* at 310–37; *supra* text accompanying note 43.

²⁴⁵ *See supra* text accompanying notes 224–236.

²⁴⁶ *See WILSON, supra* note 57, at 133.

²⁴⁷ *Id.*

²⁴⁸ *See id.* at 134.

stances prevent them from doing so.²⁴⁹ Such circumstances include repression, inattention, and the obscuring of true feelings by conscious theories about what we should or must be feeling.²⁵⁰ Of course, we are consciously aware of any physical concomitants of an emotion, such as shortness of breath and quickness of heartbeat. But the evaluation of what leads to the short breath and thumping heart can occur unconsciously.²⁵¹ For example, a person might unconsciously associate African American males with danger, thus experiencing fear in their presence, but consciously despise racial stereotyping and thus attribute the heightened physiological responses to some other cause.²⁵²

This last example highlights, however, that there is no sharp dividing line among emotions or feelings,²⁵³ attitudes, and cognitive assessments.²⁵⁴ Philosopher Martha Nussbaum defines “emotions” as involving “judgments about important things, judgments in which, appraising an external object as salient for our own well-being, we acknowledge our own neediness and incompleteness before parts of the world that we do not fully control.”²⁵⁵ Emotions are thus a particular kind of judgment, one often (though not always or necessarily) accompanied by certain physiological reactions; frequently involving concrete imaginings of a particular object (for example, the face of the spouse whom we love); generally carrying heat and urgency because they involve evaluations of things important to our goals and projects; often feeling out of our control because they involve objects over which we lack much control (such as whether our ill parent dies); and often stemming from a past that we “imperfectly comprehend,” involving numerous sub-judgments and the potential for conflict among them.²⁵⁶ It is some or all of these features of emotions that may make their unconscious versions more accessible to conscious awareness than other unconscious mental processes. Thus, if we look for patterns in when we experience certain physiological states, if we search for those circumstances in which we seem to have complex evaluative reactions, and if we search relatedly for those things that our behavior suggests are important to us, we may be able to identify the nonconscious emotions involved. The same sort of analysis may be true for attitudes. “Attitudes” also involve evaluations of

²⁴⁹ *See id.*

²⁵⁰ *See id.*

²⁵¹ *See id.* at 127.

²⁵² *Cf. id.* at 133–34, 189–94 (describing more generally how white, liberal individuals may have low explicit biases toward African Americans but still harbor implicit prejudices attributing negative qualities to them).

²⁵³ Here I use the terms interchangeably, though some define “feelings” as our perceptions of our own physiological reactions.

²⁵⁴ *See* Taslitz, *A Feminist Approach*, *supra* note 65, at 20 n.79 (1998) (discussing evidence that emotions have cognitive, physiological, social, experiential, and cultural components).

²⁵⁵ MARTHA NUSSBAUM, *UPHEAVALS OF THOUGHT: THE INTELLIGENCE OF EMOTIONS* 19 (2001).

²⁵⁶ *See id.* at 56–67, 77–79.

worth on matters of importance, such as physiological reactions, and may motivate particular types of conduct. Additionally, like emotions, attitudes may occur at the conscious or unconscious level.²⁵⁷ Attitudes differ from emotions in the sense that this latter term is used by Nussbaum in that attitudes are more general in nature, though a concrete object can activate an attitude in a way that produces more concrete emotions.²⁵⁸ Wilson explains that identifying one's attitudes and emotions requires the discipline to be a good observer, "e.g., how one responds in the presence of African Americans. . . ."²⁵⁹ Therefore, identifying an unconscious emotion or attitude does not require conscious awareness of the cognitive strategies by which the emotion or attitude has been generated or the cognitive processes that long enabled self-deception.²⁶⁰

In particular, close attention to how others respond to one's behavior is often a better guide to real motivations than is self-deceiving introspection.²⁶¹ It follows that attention to how others would likely perceive one's own behavior can be a helpful guide to what is really going on in one's own head.²⁶² Consequently, if a man feels unconscious discomfort about a sexual

²⁵⁷ See GEORGE W. MARCUS ET AL., AFFECTIVE INTELLIGENCE AND POLITICAL JUDGMENT 48–49 (2000) (defining attitudes).

²⁵⁸ See, e.g., Taslitz, *Patriarchal Stories*, *supra* note 17, at 468–75 (explaining how gendered attitudes toward proper female behavior can activate emotions of indignation that lead a jury to disbelieve a particular alleged rape victim in an individual case).

²⁵⁹ WILSON, *supra* note 57, at 133–34.

²⁶⁰ See, e.g., STANLEY COHEN, STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING 42–75 (2001) (analyzing cognitive strategies involved in self-deception, though denying that these mechanical, inward-looking processes give a complete description of self-deception as a phenomenon); Taslitz, *Patriarchal Stories*, *supra* note 17, at 405–33 (summarizing cognitive processes in the formation of gendered ideologies and attitudes and in juries' resulting evaluations of evidence in rape cases).

²⁶¹ See WILSON, *supra* note 57, at 107–10 (explaining why others who know us fairly well, and sometimes even complete strangers, may often be more accurate judges of our motivations than we are). Of course, there are cognitive biases that can interfere with our ability to learn from how others think of us and how they react to us, and others will often be reluctant to be truthful about what they think of us. See *id.* at 196–98. But introspection, while sometimes healthy in achieving a sense of peace and in striving to become a better person, is often a highly flawed way of achieving accurate self-knowledge. See *id.* at 159–81. Because much of our unconscious life is not directly accessible to consciousness, we must interpret our own emotions and behaviors, and our own personal theories or cultural theories of behavioral meaning and desirable thoughts and character traits can lead us to skewed, ill-informed interpretations, although we sometimes later recognize our error. See *id.* at 160–68. On the other hand, research suggests that the more information our unconscious has, the better job it can do so that the "gut feelings" generated by a well-informed unconscious can be helpful guides to how to live our lives. See *id.* at 171–72. Reading and learning more about psychological processes can also aid self-understanding in a more conscious way, "as can becoming careful observers of our own actions." See *id.* at 183–86, 203–11.

²⁶² Research reveals that exposing individuals to a detailed description of a particular situation and taking them through a related guided imagery exercise better enables them to get in touch with their fairly accurate (if based on adequate information) intuitive sense of how they would feel and react to a particular situation. See *id.* at 174. Some researchers believe that this observation suggests that "if people took the time to imagine future situations in great detail (e.g., 'How would I feel if my housekeeper rushed in with the news

situation, by choosing to give credence to a woman's repeated articulation of "no" and to her struggles, he can get in touch with the fact and the sources of his discomfort. For example, if Kobe Bryant lied, he lied about whether Lilly said "no" because he understood that third parties would take that "no" as a warning sign that he was aware of Lilly's nonconsent.²⁶³ By asking himself at the time of the alleged crime what others would think of his actions, he could have helped to identify his own suspicions, using them to avoid the harm of nonconsensual sex.

Philosophical thought and social science research concerning shame further support this approach. Notably, one leading theorist has argued that because many date rapists gain peer group status by maximizing the amount of sex that they have—whether consensual or not—shaming penalties will be particularly effective in discouraging date rape.²⁶⁴ There is a lively debate about when, if ever, shaming penalties are both moral and effective.²⁶⁵ I need not take sides in this debate, however, for I am not arguing here that shaming penalties should necessarily be imposed on date rapists. Rather, I am arguing that if potential date rapists pause to imagine whether they would feel shame if their actions were revealed to the broader society, an affirmative answer to that inquiry is a warning sign that the actions are unacceptable. That men are likely *capable* of such imaginings, not that they actually engage in them, demonstrates both their awareness at some level of women's nonconsent and their resulting moral culpability.

3. *Character Morality and the Sexually Insensitive Personality*

Another account of the wrong of criminal negligence holds that it reflects a culpable character trait of indifference to others' suffering.²⁶⁶ In the case of rape, a man who forces sex on a partner without any inquiry into, or even momentary concern about, the woman's choices is a cold person indeed.²⁶⁷ This conclusion stems from embrace of a "character morality,"

that Albertine has left me?"), they might be better able to recognize the feelings generated by their adaptive unconscious . . ." *Id.* at 175. That would give them better data for distinguishing culturally biased interpretations of their feelings from more accurate ones. *See id.* at 175. My suggestion here is that, since we can learn so much about ourselves from observing others' reactions to us, and since concrete guided imagery improves our understanding about ourselves, concrete guided imagery about how others likely would perceive our actions and intentions in particular situations is also likely to be helpful.

²⁶³ *See supra* text accompanying notes 1–9 (describing the facts of the Kobe Bryant case).

²⁶⁴ *See Baker, Rape and Shame, supra* note 99, at 695–716.

²⁶⁵ *See Nussbaum, supra* note 255, at 228–29 (summarizing the debate and taking a stance generally opposed to shaming penalties).

²⁶⁶ For the best such account, see Moran, *supra* note 237, at 257–73.

²⁶⁷ *See Taslitz, Two Concepts, supra* note 24, at 52–64 (analyzing forms of moral evil and their implications for date rape cases, including the evil of indifference to another's suffering).

one that holds that we should be punished for causing certain harms that stem from who we are rather than merely for what we do. Specifically, character moralities seek to condemn and deter evil character.²⁶⁸ “Character” is an enduring disposition to behave in particular ways in particular situations. A disposition consists of *both* thoughts and acts.²⁶⁹

Character morality has both utilitarian and retributive justifications.²⁷⁰ Retributivists conclude that an alleged criminal should be punished only to the degree that he freely chooses to do harm *because of* his character.²⁷¹ If the suspect is a kind person and did wrong accidentally, he does not ordinarily merit criminal punishment. There are, however, degrees of evil. The amount and probability of the harm a person risks is a measure of the extent of his evil nature.²⁷² One kind of evil character is a person who does not care sufficiently about others in the pursuit of his own goals.²⁷³ One negligently willing to risk a five percent chance of a single death is less uncaring, thus less evil, than one willing to risk a one hundred percent chance of death (the intentional killer).²⁷⁴

Utilitarians punish evil characters because they are most likely to cause harm in the future.²⁷⁵ Indeed, those with good motivations do not generally need to be deterred from evil. It is more efficient and effective to identify evil characters, as they are most in need of additional incentives for proper behavior.²⁷⁶

Instrumental date rapists, those who focus their conscious attention entirely on having sex and receiving the psychic benefits that result,²⁷⁷ if

²⁶⁸ See LAWRIE REZNEK, *EVIL OR ILL: JUSTIFYING THE INSANITY DEFENSE* 12–13, 41–60 (1997). There are complex variations on, and challenges to the wisdom of, character moralities. For an extended review of these variations and a defense of the sort of character morality articulated here in the context of date rape, see generally Taslitz, *Two Concepts*, *supra* note 24.

²⁶⁹ See REZNEK, *supra* note 268, at 12–13, 42; Taslitz, *Myself Alone*, *supra* note 26, at 6–14.

²⁷⁰ See REZNEK, *supra* note 268, at 115–34.

²⁷¹ See *id.* at 115–16, 129–31. Reznick says that one justification for why we should punish persons who cause harm is that they “deserve it,” but “desert,” to a character retributivist, turns on the kind of person one is. See *id.*

²⁷² See *id.* at 62–64, 66–68, 115–16.

²⁷³ See *id.* at 13, 63.

²⁷⁴ See *id.* at 66–68.

²⁷⁵ See *id.* at 116–20; see also JOHN KEKES, *FACING EVIL* 93–103 (1990) (arguing that our actions stem from the interaction of choice and character, that we most often act because of our character rather than because of any choice about our circumstances, and that tradition and education play a key role in molding our character).

²⁷⁶ See REZNEK, *supra* note 268, at 116–17, 131–33. Ultimately, however, Reznick argues for a hybrid theory, mixing elements of both retributivism and utilitarianism. See *id.* at 116–20. To character moralists, remember, evil character must be shown both by thoughts (including emotions and attitudes) and acts. Excuses are thus defenses because, by examining the moral circumstances surrounding the act, they show that the agent’s internal life was not evil. See *id.* at 41–43. “[T]he best way to make sense of excuses is that these are features which show that even though the person did a harmful thing, he is nonetheless a good character.” *Id.* at 12.

²⁷⁷ See Baker, *Rape and Shame*, *supra* note 99, at 670–72, 674; Katharine K. Baker,

assumed to be unaware at any level of the woman's nonconsent, are extraordinarily insensitive persons. An insensitive person both lacks awareness of the effects his actions have on others and does not care about these effects.²⁷⁸ The sensitive person, by contrast, displays four traits: (1) perspectiveness, a vigilant awareness about ascertaining whether anyone will be adversely affected by her conduct; (2) caring about, and often acting to advance, the well-being of others, while trying to avoid conduct harmful or offensive to them; (3) critical appreciation, the ability to distinguish what is morally relevant about the situation to those who are affected by his behavior; and (4) strong motivation to act to minimize harms that might result from his conduct.²⁷⁹ The sensitive person need not always put others' needs above his own, but he is aware of their needs and is motivated to value them and try to accommodate them along with his own.²⁸⁰ A person is insensitive to the degree that he lacks one or more of these traits.²⁸¹ Insensitive people are more likely to cause evil, while sensitive people are more likely to avert evil.²⁸² A person who engages in instrumental sexual intercourse without taking reasonable care to determine whether his partner has consented demonstrates a core insensitivity to others' sexual choices.²⁸³ By engaging in sexual activity, he creates a risk of nonconsent.²⁸⁴ When his only concern is his own self-esteem, he shows himself to be coldly indif-

Once a Rapist: Motivational Evidence and Relevancy in Rape Law, 110 HARV. L. REV. 563, 597–612 (1997) [hereinafter Baker, *Once a Rapist*] (concluding that some men rape to get sex; others rape to impress or disgrace other men; some rape out of anger at their victim; other men rape because raping is what they do to express their anger, fear, or frustration). Although seeking esteem in other men's eyes is likely the most common instrumental goal, see Baker, *Rape and Shame*, *supra* note 99, at 671–74, and thus the one that I emphasize in the text, rapists seeking any of the other instrumental goals listed by Professor Baker would seem to be at least as culpable as the esteem-hound. Broadly understood, an "instrumental" rapist does not rape for the purpose of harming the woman but rather to achieve some other goal. Harming the woman is an incidental byproduct of the goal-directed conduct. See *id.* at 670–74; Baker, *Once a Rapist*, *supra*, at 597–612. Raping someone as a way to release anger, for example, would seem to indicate the same or even worse moral dangers as those of esteem-focused raping.

²⁷⁸ See MAY, *supra* note 27, at 56–64 (1992).

²⁷⁹ See *id.* at 57. "Sensitivity" and "sympathy" differ, the latter being the capacity to be affected by others' suffering. See *id.* at 58. "Sensitivity," by contrast, typically involves the critical distance necessary to make a judgment about the moral legitimacy or worth of others' wants and needs. See *id.* The idea of the "sensitive personality" has some commonalities with the feminist ethic of care. See, e.g., Nel Noddings, *Caring*, in JUSTICE AND CARE: ESSENTIAL READINGS IN FEMINIST ETHICS 7, 18 (Virginia Held ed., 1995) (noting that "[w]e are not primarily interested in judging but, rather, in heightening moral perception and sensitivity").

²⁸⁰ See MAY, *supra* note 27, at 57.

²⁸¹ See *id.* at 55–64.

²⁸² See *id.* at 55–70.

²⁸³ Cf. KEKES, *supra* note 275, at 75–76 (listing "expediency"—doing whatever is necessary to achieve your goals, regardless of the impact on others—as a personality trait particularly dangerous to others).

²⁸⁴ Cf. MAY, *supra* note 27, at 42–46 (stating that conduct that raises the risk of harm is morally condemnable).

ferent to the woman's well-being in a morally significant way, and he deserves punishment.²⁸⁵

It is worse still when the man is at some level actually aware of the woman's pain, yet thoroughly indifferent to it or to his responsibility for causing it, as is the case for the self-deceiving rapist. "Recklessness," defined as conscious awareness of a substantial and unjustifiable risk of harm, is more culpable than ordinary criminal negligence in which the offender should have been, but was not, so aware.²⁸⁶ Analogously, I argue here that preconscious or unconscious awareness of a risk that a woman is not consenting is more culpable than thoroughgoing unawareness of such a risk of which the offender should be aware, though both are highly culpable because both involve indifference to another's suffering. This is true even of the unconscious form of self-deception if we accept the idea of a unitary person—conscious and unconscious minds jointly embodying a single personality²⁸⁷—and especially given research revealing that unconscious traits can be changed in the long run by conscious choices to alter our behavior.²⁸⁸

B. Hypocrisy

Second, self-deception involves inner and outward hypocrisy, pretending to yourself and to others that you are morally better than you are.²⁸⁹ Hypocrisy enables us to engage in acts against our own better moral judgment.²⁹⁰ Hypocrisy also insults others by falsely elevating ourselves as if we were above their moral station, while inflicting upon them the very moral wrongs that we claim to despise.²⁹¹ Hypocrisy is rooted in human anxiety about status—our sense of the value that others assign to us as individuals—which is closely linked to our sense of equality. A Middle Ages peasant

²⁸⁵ Cf. *id.* at 62–63, 67–70 (stating that attitudes of indifference can be conceived of as akin to habits, and, while habits are hard to change, we can do so in many ways, such as changing our environment, consciousness-raising, punishment, and psychotherapy).

²⁸⁶ See Taslitz, *Two Concepts*, *supra* note 24, at 52–64 (offering a fuller explanation of why this is so).

²⁸⁷ Our minds are not unitary in that, as noted earlier, our unconscious in fact consists of a variety of task-specific "modules," and some argue that even our conscious selves may not be quite unitary, though others see consciousness as unitary for most practical purposes. See *supra* text accompanying notes 49–56. But we are "persons" in a very different sense. For our lives to have meaning and our identity to persist over time, each of us must construct a unified temporal narrative explaining who we are, where we have been, and where we are going. Cf. Andrew E. Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15, 70–74 (2003) (exploring in more detail the elements of personhood). In this sense we are unitary beings, and our healthiest narratives incorporate the various aspects of our unconscious minds.

²⁸⁸ See *infra* text accompanying notes 312–327.

²⁸⁹ See MARTIN, *supra* note 67, at 44–45.

²⁹⁰ See *id.* at 45–52.

²⁹¹ See *id.* at 45.

would likely not be insulted by the haughtiness of a noble.²⁹² But the more we see others as our equals, the more anxiety we have about their purported elevation of status.²⁹³ If someone is revealed to us as a hypocrite, we see him for what he is—our equal or our inferior—and not for the superior that he pretends to be. When he nevertheless acts *as if* he is our superior, he treats us as having lower status when we know that not to be true, and we therefore feel insulted.²⁹⁴

We also may be offended by the hypocrite because we recognize that his false pose of virtue marks him as a repeat-offender of vice. Law professor William Ian Miller explains:

The glutton and the lecher may self-servingly think their abstinence is virtuous; they may sincerely believe themselves to be turning over new leaves, but by the time they are turning over the hundredth new leaf surely they must know that their attempts at virtue are only so much foreplay to their vice, an enhancing of its deliciousness.²⁹⁵

Observers who spot another's hypocrisy may further be offended because it involves either the actual or attempted collection of a social benefit (status) that is undeserved, that is, for which no necessary price has been paid.²⁹⁶ "Hypocrisy is a parasite, operating by mimicking the attractiveness of virtue, appropriating its rewards."²⁹⁷

Many religious cultures repudiate hypocrisy.²⁹⁸ Jesus especially condemned this sort of hypocrisy in which one blames others when he is blameworthy himself.²⁹⁹ Thus, Jesus said:

How can you say to your brother, "Let me take the speck out of your eye," when all the time there is a plank in your own eye? You

²⁹² See ALAN DE BOTTON, STATUS ANXIETY 25–44 (2004).

²⁹³ See *id.* at 23–44.

²⁹⁴ See WILLIAM IAN MILLER, FAKING IT 20 (2003) (noting that "[o]nce people suspect hypocrisy, many start to mistrust all appearances of virtue as so much glory seeking and shamming").

²⁹⁵ *Id.* at 20.

²⁹⁶ See *id.*

²⁹⁷ See *id.*

²⁹⁸ See D. JASON SLONE, THEOLOGICAL INCORRECTNESS: WHY RELIGIOUS PEOPLE BELIEVE WHAT THEY SHOULDN'T 4 (2004). Slone addresses the cognitive bases for hypocrisy, counter to the teachings of a wide variety of religions, answering questions like:

[W]hy do people believe things they shouldn't according to the tenets of their own beliefs? Why do religious people kill? Why do religious people philander? Why do Bible believers eat cheeseburgers when the rules in Leviticus say to not mix beef and dairy? Why are religious people racist?

Id. at 4.

²⁹⁹ See Miller, *supra* note 294, at 13.

hypocrite, first take the plank out of your own eye and then you will see clearly to remove the speck from your brother's eye.³⁰⁰

Jesus condemns, according to Professor Miller, the *unconscious* cognitive bias (the plank) that obscures one's conscious vision of the truth.³⁰¹ The plank saves an individual from the anxiety of realizing that he is feigning his superiority over others.³⁰² Partiality to oneself thus interferes with one's assessment of others:³⁰³ "You fall victim to a false but sincere belief that you are seeing the world objectively and seeing it whole."³⁰⁴ But, says Miller:

It is not even clear that . . . conscious hypocrisy is morally worse than the mote/beam situation of merely being blind to one's own faults. Take the ever-present anxiety regarding racism and accusations of it. Is the person who fears that deep down she might be a racist [but prefers not to chastise herself in public where her self-blame may be read as self-serving fakery], and [who] aggressively blames others for their racism, worse than the person who does not know he is one and blames others for theirs?³⁰⁵

Miller's answer to his own question is "no." The conscious hypocrite hates racism in herself and in others and so is faking nothing. But the unconscious hypocrite is a fraud whose double lies—to herself and to others—make it even less likely that she will do the right thing and more likely that she will denigrate those around her.³⁰⁶ In the context of rape, this observation suggests that the unconsciously self-deluding rapist (an unconscious hypocrite) is *at least* as dangerous as the man who knowingly rapes but holds himself out as the wronged party, too virtuous to be so cruel, wrongly victimized by a lying Jezebel.

C. Inauthenticity

Third, self-deceivers are inauthentic persons. An authentic person lives a life of integrity—a life in which conscious and unconscious beliefs and values are similar and are consistent with her behavior.³⁰⁷ Research

³⁰⁰ *Matthew* 7:4–5.

³⁰¹ See MILLER, *supra* note 294, at 13–14.

³⁰² See *id.* at 14.

³⁰³ *Id.* at 15.

³⁰⁴ *Id.* at 14.

³⁰⁵ *Id.* at 15.

³⁰⁶ See *id.* at 15–16.

³⁰⁷ See MARTIN, *supra* note 67, at 78 (explaining that authentic persons are best understood as those "who shape their self-identities on the basis of . . . concern for truth" and who integrate these truths in the rest of their lives); WILSON, *supra* note 57, at 218 (stating that "people whose conscious conceptions of themselves are 'in synch'—that represent

suggests that those living authentic lives of integrity are happier, better adjusted, and more able to make positive contributions to others and to society as a whole.³⁰⁸ Authentic persons are less troubled by the moral ambiguity and confusion that can lead inauthentic persons to anger, violence, alcoholism, and drug addiction.³⁰⁹ According to experimental research, some men associate attraction with power, that is, they see sex as a way of asserting power over others, a domination that they find sexually stimulating.³¹⁰ But this association is an unconscious one. Thus, one commentator explains:

[M]en likely to engage in sexual aggression are unaware that they have a nonconscious association between sex and power, and unaware that this association is triggered automatically. This lack of awareness makes it more difficult to prevent sexual aggression. Men in a position of authority may believe that their behavior toward female associates is motivated by good intentions, because they are unaware that their feelings were triggered by their position of power.³¹¹

A man who engages in self-deception about his need and willingness to exercise power over female associates to achieve sexual stimulation may see himself as a feminist, or at least as fair, kind, and professional to all women employees. Such a man fails to lead a life of integrity, however, because his behavior contradicts his consciously held values. Since the self-deceiver cannot recognize the problem, his aggression persists, and his character degrades. These same observations should hold at least equally for the extreme sexual aggressor—the rapist. Given these grave harms, rape law should discourage and punish both semiconscious and unconscious self-deception. How to do so is the point to which I now turn.

V. KNOW THYSELF: RAPE LAW AND MINIMIZING SELF-DECEPTION BY CHANGING BEHAVIOR AND EDUCATING THE UNCONSCIOUS MIND

Self-deception can be overcome by sustained effort. Such efforts do not necessarily require direct access to the content of our unconscious.³¹² Rather, each of us has some power to shape even an unconscious mind of whose content we are consciously unaware. This position defies earlier conventional wisdom in legal academia, which held that criminal liability could not be based on unconscious thoughts and emotions because: (1) they are

their nonconscious motives well—are better off emotionally”).

³⁰⁸ See WILSON, *supra* note 57, at 218–19.

³⁰⁹ See *id.* at 211–16.

³¹⁰ See *id.* at 34–35.

³¹¹ *Id.* at 35.

³¹² See *id.*

too difficult to discern accurately, and (2) they are beyond an individual's control and thus are not a fair ground for holding her culpable.³¹³ Explains Professor Wilson:

A standard analogy is that consciousness is the president in the executive branch of the mind. . . . If he or she is ignorant of what is occurring out of sight (lacking in self-insight), then the agencies of the adaptive unconscious may start to make decisions that are contrary to the wishes of the president.³¹⁴

The modern conception of the conscious and unconscious minds and their interrelationship undercuts the conventional position. Wilson summarizes an important view of the differing functions and abilities of the conscious and unconscious minds in this chart:

Adaptive Unconscious	Consciousness
<ul style="list-style-type: none"> • Multiple systems • On-line pattern detector • Concerned with the here-and-now • Automatic (fast, unintentional, uncontrollable, effortless) • Rigid • Precocious • Sensitive to negative information 	<ul style="list-style-type: none"> • Single system • After-the-fact checker and balancer • Taking the long view • Controlled (slow, intentional, controllable, effortful) • Slower to develop • Sensitive to positive information³¹⁵

The unconscious detects patterns quickly, but at a cost in accuracy. The conscious mind reduces these costs by checking and reevaluating many of the unconsciously initiated judgments and actions. For example, we may jump at the sight of a "snake," but our conscious mind later realizes that the snake did not move and is in fact a stick.³¹⁶

The unconscious lives primarily in the here and now, focusing on problems that need immediate attention by detecting patterns, alerting us to danger, and spurring goal-directed behavior.³¹⁷ But "what it cannot do is anticipate what will happen tomorrow, next week, or next year, and plan accordingly. Nor can the adaptive unconscious muse about the past and integrate it into a coherent self-narrative. Among the major functions of con-

³¹³ See *supra* text accompanying notes 63–64.

³¹⁴ WILSON, *supra* note 57, at 46.

³¹⁵ *Id.* at 49.

³¹⁶ *Id.* at 50.

³¹⁷ See *id.* at 50–51.

sciousness are the abilities to anticipate, mentally stimulate, and plan.”³¹⁸ It is true that the unconscious is fast and uncontrollable *in the short run*, that its automatic thinking is partly aided by its tendency to categorize and stereotype other people, and that it is resistant to change.³¹⁹ Indeed, the unconscious is so rigid that it resists information contradicting its preconceptions, sees expected patterns where they do not exist, encourages behavior that makes expectations self-fulfilling, jumps to conclusions, and often ignores evidence contrary to preconceived positions.³²⁰ Perhaps even worse, many of our actions start in the unconscious, but once an action begins, we perceive it as being entirely under our conscious control and construct a narrative to explain *why* we engaged in this behavior.³²¹ This narrative, influenced by our own ignorance and aspirations and by social norms and expectations, may often have little to do with the true unconscious reasons for what we have done.³²² This obscures self-understanding and our ability to change.

Fortunately, however, the unconscious mind can be changed in the long run, and it can be changed in desired directions precisely because of the conscious mind’s ability to plan for the future. Forging an image of the kind of person you want to be and then insisting on behaving that way, even if it contradicts your initial inclinations, and continually providing both the conscious and the unconscious minds with higher quality information can, over time, “reprogram” your unconscious software in healthier ways. Even in the short-run and in the present, we can improve the accuracy of unconscious decisionmaking by improving the information flow to our deeper minds.³²³ Furthermore, although people differ in their ability to do so, we can become careful observers of how we behave and how others behave around us and perceive us. We can also more carefully contemplate alternative explanations for what we do. We can do these things with an eye toward improving our ability to interpret our unconscious thinking more accurately (since we often lack direct access to it).³²⁴ Better self-understanding allows us to craft strategies for altering our unconscious processing and our overt behavior. As our behavior changes, we will become even better observers of ourselves and others.³²⁵ This becomes a circle of change between our surface and deeper selves, promoting greater emotional well-being as the two selves move closer to one another.³²⁶ Our conscious and unconscious minds are also molded by situational factors, particularly

³¹⁸ *Id.* at 51.

³¹⁹ *See id.* at 53–54.

³²⁰ *See id.* at 53–56.

³²¹ *See id.* at 56.

³²² *See id.* at 88–91.

³²³ *See infra* text accompany notes 324–343.

³²⁴ *See WILSON, supra* note 57, at 84–86.

³²⁵ *See id.* at 86–88.

³²⁶ *See id.* at 90–91.

our cultural and social environment, so we can change ourselves by changing the environment within which we live and work as well.³²⁷

The crucial point is that by consciously controlling the situations in which we place ourselves and our information flow, our conscious minds can gain some measure of control over our unconscious—even in the short run. Moreover, in the long run, and with patience and commitment, we can alter our unconscious and improve our interpretive understanding of it via strategies crafted by our conscious minds. Therefore, the conventional wisdom is wrong: we *can* control our unconscious in morally relevant ways and are *responsible* for what it thinks and does. Furthermore, though it is often not directly accessible, we can indirectly access our unconscious by improving our interpretive skills. We can also influence it by the strategies just discussed even if we have little conscious awareness of its contents.

If a well-informed unconscious is likely to make better decisions than an ill-informed one,³²⁸ how can we achieve this goal in the case of rape? A man can choose to progress slowly, spending more time with a woman, getting to know her better. He can directly ask her questions about her thoughts, feelings, and desires, especially when he intends to engage in any sort of physical intimacy. This need not squelch spontaneity, but it will involve a negotiation, a give and take. If a woman says “no,” a man can ask again later—but gently and carefully, lest she perceive him as unwilling to take no for an answer³²⁹—or he can wait until she takes the initiative rather than plunging forward as if “no” meant nothing. An unconscious more informed about a woman’s desires will be less likely to delude itself and more able to convey the truth to the conscious mind, for example, by generating “gut feelings” of discomfort.³³⁰ I am not taking the position that the state should dictate that persons can have sex only if they are in a stable, committed relationship. What I am saying is that where two people are not in such a relationship, do not know each other well, and do not have an established record of clear communication, the sexual aggressor must proceed with caution; be alert for yield signs; slow down in the face of any such signs to stop, look, and listen; and be ready to stop immediately or change direction where warranted.³³¹

³²⁷ See *id.* at 89–90.

³²⁸ See *id.* at 171–72.

³²⁹ See SCHULHOFER, *supra* note 11, at 263–64 (explaining how a man’s repeated inquiries and repeated pressure in the face of protests can lead a woman to believe that the man will never really do what she asks and that it is better to relent to get the unhappy experience over with as quickly as possible).

³³⁰ Cf. WILSON, *supra* note 57, at 171–72 (noting that rather than marrying the first person you meet, you should “spend a lot of time with someone and get to know him or her very well, and [if you] still have a very positive gut feeling, that is a good sign”).

³³¹ See Taslitz, *Two Concepts*, *supra* note 24, at 54–55; *supra* notes 189–190 and accompanying text (describing physical versus verbal indications of consent and nonconsent).

The unconscious mind also monitors and learns from our own behavior. If someone behaves courageously, his unconscious eventually infers that he is indeed courageous.³³² New behavior provides new data for the unconscious, and any behavior repeated often enough to become habitual will also become part of the unconscious.³³³ Correspondingly, one who behaves like a man who is sincerely interested in the sexual well-being of his partner, rather than only his narrow self-interest—even if his true current feelings are in fact that his partner's wishes are irrelevant to him—will in the future become a more sexually attentive man. Given the risk of harm—namely rape—from a mistake, society has an interest in encouraging such sensitivity.³³⁴

There are also strategies for gaining insight into the unconscious that do not depend upon using tricks to change its otherwise unknown content. As noted earlier, close attention to how others treat you and to what they think of you can teach you much about yourself.³³⁵ People who know us well observe those many unguarded moments of unconsciously motivated behavior of which we are so often unaware. This frequently means that they know those parts of ourselves better than we do, though we might have better knowledge of our controlled, deliberate, self-aware behavior.³³⁶ Even strangers are aware of cultural and situational factors, which allows them access to understanding our feelings and motivations, even though we ourselves might not be consciously aware of them. Although we have information about our “internal world” that they lack, unconscious filtering of information, the need for self-esteem, and our willingness to confabulate data to conform to our expectations may skew self-understanding so that strangers often have as good, and sometimes even a better, understanding of ourselves than we do.³³⁷ Yet our access to apparently more internal but distorted information, and the need for a sense of control over ourselves and our world, create the illusion that we know ourselves better than others do.³³⁸ This does not mean that careful observation of ourselves in a search for patterns of behavior and emotions, and sometimes cautious and skeptical efforts at introspection, cannot improve our self-understanding if we proceed cautiously, with an open mind, and with awareness of cognitive biases and roadblocks.³³⁹

If you think you are kind but notice people spitting at you and cursing your name, you can choose to pause and wonder whether there is a le-

³³² See WILSON, *supra* note 57, at 203–16, 221 (noting rewards and cognitive pitfalls of self-observation and positing that acting like the kind of person you want to be is a solution to many of the pitfalls).

³³³ See *id.* at 212.

³³⁴ See generally Taslitz, *Two Concepts*, *supra* note 24, at 53–55.

³³⁵ See *supra* text accompanying notes 324–327.

³³⁶ See WILSON, *supra* note 57, at 84–86.

³³⁷ See *id.* at 84–86, 107–13.

³³⁸ See *id.* at 113.

³³⁹ See *id.* at 159–75, 204–09.

gitimate reason for their behavior. You can engage them in conversation, watch them, and critically examine your own behavior, asking yourself whether it is what most people would expect from someone whom they consider kind. So too in sexual relations, a man can note behavior inconsistent with his partner's believing him to be concerned about her desires. This is yet another reason for men to progress slowly in sexual encounters, to ask their partner questions, and to question repeatedly the accuracy of their own understanding of the situation.³⁴⁰

As noted in Part IV.A.3 of this Article, I have argued elsewhere for a regime in which juries in rape cases are instructed to determine whether a defendant made reasonable communicative efforts to determine whether his partner had given consent.³⁴¹ I offered detailed suggested instructions on how to operationalize this determination in a practical, commonsense fashion easily within jurors' competence.³⁴² I do not want to repeat those details here. What matters for present purposes is that I have justified this communicative notion of reasonableness by arguing that a negligence standard can reveal certain especially reprehensible character traits in an offender who is so indifferent to his victim's fate that he is unaware of, and makes no effort to discover, that she did not consent.³⁴³ My focus was entirely on lack of conscious awareness demonstrating a depraved character. But I want now to suggest that men's semiconscious and unconscious processes provide an important additional reason to impose this duty of reasonable communicative inquiry on an alleged date rapist.

By requiring each man to engage in reasonable communicative efforts about sexual consent, we discourage self-deception.³⁴⁴ And by impos-

³⁴⁰ See *id.* at 48–64.

³⁴¹ See Taslitz, *Two Concepts*, *supra* note 24, at 70–71.

³⁴² See *id.* at 70–72.

³⁴³ See *id.* at 45–55.

³⁴⁴ Professor Schulhofer rejects the use of an undefined “reasonableness” or negligent belief in consent standard for rape because juries, gripped by dominant gendered narratives, would simply define “reasonableness” in a way that failed to respect female sexual autonomy. See SCHULHOFER, *supra* note 11, at 260 (stating that “[b]ecause ‘no’ [usually does but] doesn’t always mean ‘no,’ even for women, the reasonableness requirement solves very few of the problems of ambiguous sexual communication. It doesn’t stop juries from acquitting men who ignore a woman’s ‘no’—even when ‘no’ is exactly what she meant.”). Schulhofer also bemoaned the failure of a vague reasonableness standard because *it permitted male self-deception*. See *id.* at 260 (stating that “[t]he reasonableness requirement doesn’t stop prosecutors from deciding not to prosecute such cases, and it doesn’t stop self-deluded men from continuing to act on their own view of what is reasonable”). Accordingly, Schulhofer effectively endorses defining “reasonableness” with more specificity as turning on evidence of affirmative consent by the woman, see *id.* at 264–72, and I have offered my own effort to craft a more workable definition of reasonableness; see Taslitz, *Two Concepts*, *supra* note 24, at 70–71. The key point is that Schulhofer apparently recognizes, as do I, a negligence standard of some sort as appropriate in rape cases partly because he sees it as a way to discourage self-deception, though he mentions the point only in passing, without developing an analysis of how widespread sexual self-delusion is and what defines it, or what makes it evil and worse than ordinary negligence, as I begin to do in this Article.

ing significant penalties for negligent rape, as here defined, we also punish the especially reprehensible mental state of being self-deluded. In other words, the communicative version of reasonableness makes negligence a proxy for a more culpable mental state: self-deception.³⁴⁵ The communicative negligence standard enables us to condemn self-deception without having to inquire whether it exists in an individual case.³⁴⁶ Law professor Mayo Moran has suggested at least the theoretical possibility of a partial, mitigating defense of excusable moral ignorance.³⁴⁷ Moran favors a reasonableness standard in sexual assault cases that focuses on the accused's defective character rather than the victim's protests.³⁴⁸ However, Moran suggests that, theoretically, the defendant should be given the opportunity to prove that the social context in which the person lived prevented him from developing a proper moral character, thus rendering his moral ignorance partly excusable.³⁴⁹ Nevertheless, Moran sees this inquiry as more likely a theoretical one that can reveal society's complicity in rape rather than a genuine legal standard because the burden is one that very few, if any, defendants are likely to meet.³⁵⁰ Moran elsewhere concludes:

An insistence on gender-inclusive normative standards can be understood as expressing in more concrete terms the general assumption in law and beyond, that except in the case of extreme moral incapacity such as youth and insanity, *we are entitled to demand of all the same degree of attentiveness to others.*³⁵¹

I would add that, even in theory, our ability to change our unconscious natures in the long run does render us fully responsible for our moral ignorance,³⁵² and that Moran ignored entirely the role of self-deception in adjudging degrees of moral responsibility.³⁵³ Therefore, a partial excuse for some men for their unreasonable beliefs makes little sense. On the other hand, Moran is right that recognizing a partial excuse of this nature would have the practical benefit of requiring juries to be educated about

³⁴⁵ For a fuller explanation of how one statutorily defined mental state can in fact best be justified as a proxy for another, harder-to-identify-in-an-individual-case mental state, see Kenneth W. Simmons, *When Is Strict Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075, 1085–93 (1997) (distinguishing between “formal” and “substantive” liability); Taslitz, *Two Concepts*, *supra* note 24, at 46–48 (explaining the significance of this distinction for the substantive law of rape).

³⁴⁶ The whole point of a negligence standard is to impose liability for what an offender should have known or believed rather than what he in fact thought or believed in a particular case.

³⁴⁷ See MORAN, *supra* note 237, at 270–71.

³⁴⁸ See *id.* at 270.

³⁴⁹ See *id.*

³⁵⁰ See *id.* at 270–71.

³⁵¹ *Id.* at 290 (emphasis added).

³⁵² See Taslitz, *Two Concepts*, *supra* note 24, at 51–52.

³⁵³ See MORAN, *supra* note 237, at 270–71.

the social forces that promote gender inequality and sexual assault. This would prompt jurors to think about collective responsibility for individual wrongdoing yet would not entirely absolve the offender of liability for his actions. But a duty of reasonable communication should also involve jurors in deliberation about male responsibility to act to avoid harm. The affirmative consent standard requires men to act in the way that self-informed men, rather than self-deceiving ones, would act. As explained above, those who act like knowing and caring persons will become them. And thus we explain the conundrum with which this Article began: we punish rape more severely than most crimes of negligence in part because it is really self-deception, rather than only ordinary carelessness, that we condemn. Lying can serve good or bad ends, but where rape may occur, lying to ourselves is a unique evil, and it must be punished accordingly.

VI. A BRIEF WORD ON LAW'S GENERALITY

A. *A Troubling Objection?*

Readers who have paid close attention to my argument may have noted an apparent inconsistency that I want to resolve. On the one hand, I have argued that men who semi- or unconsciously deceive themselves into falsely consciously believing that their victims consented to sexual intercourse are morally worse than men who *should have known* the truth but did not even unconsciously suspect it. On the other hand, I have argued that there is strong reason to believe that most men who engage in forcible nonconsensual sexual intercourse are self-deceivers or worse (such as consciously knowing rapists). Therefore, I have advocated for an objective test that would punish men who have behaved *like* self-deceivers rather than sexually sensitive inquirers, thereby avoiding the costs of inquiry into specific men's semiconscious and unconscious mental states in individual cases.

However, if only *most* date rapists are self-deceivers, then there will be some men under my scheme who will perhaps be less morally culpable than my proposed negligence standard presumes, yet they will face the same penalty as true self-deceivers. Arguably, therefore, my proposal works some unfairness and should be replaced by a purely subjective, case-specific mental state analysis, or at least should offer the date rapist an affirmative defense. This defense could consist of the partial excuse that, "yes, I behaved unreasonably, but I did not deceive myself, so give me a break at sentencing," an excuse analogous to the theoretical partially mitigating excuse proposed by Moran.³⁵⁴

Although this objection to my proposal is a troubling one, it does not call into question the existence of the problem that I identify, but rather quibbles with the solution. Moreover, I ultimately find it unpersuasive for

³⁵⁴ See *id.*

reasons having to do with the nature of legal rules as generalizations, as I explain below.

B. Rules as Generalizations

All legal rules involve generalizations to one degree or another.³⁵⁵ Imperfect humans with imperfect knowledge seek to craft authoritative rules as a way of settling past and present disputes and avoiding future disagreements.³⁵⁶ The rules are based on some moral or policy generalization that is thought to be most often and best served by the rules.³⁵⁷ For example, “no dogs allowed in this park” may be based on the generalization that dogs will defecate upon, trample upon, and eat or dig up the grass and other greenery.³⁵⁸ In general, that concern is legitimate. But there will undoubtedly be some very well-trained dogs with punctilious owners, dogs who will never once relieve themselves on the park grass (waiting for the grass in their owner’s back yard). By excluding all dogs from the park, however, the small number of good dogs and civic-minded owners are denied the pleasure of strolling through the park. In some instances, the cost of exclusion will be higher, perhaps when the human-dog pair are in danger of being late for an important social engagement, and the park offers the quickest shortcut to the intended destination. We could avoid these costs by making a case-by-case judgment about which dogs are likely to harm the grass, but that solution would be costly in time, money, and error (particularly because of the difficulty of predicting future canine-owner behavior and the limited information likely available to the decision-maker about the dog’s personality). Permitting a rule requiring more case-specific judgments makes sense only if the cost of errors from the more general rule exceeds the benefits.³⁵⁹ But that is unlikely to be the case for the general rule I propose for date rape cases of imposing a duty of reasonable inquiry as to consent on the sexual initiator, usually meaning the male, a conclusion that becomes evident upon examining in more detail the justifications for having rules that make or rely upon generalizations.

³⁵⁵ See FREDRICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND LIFE* 17 (1991) [hereinafter *SCHAUER, THE RULES*].

³⁵⁶ See LARRY ALEXANDER & EMILY SHERWIN, *THE RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW* 11–15, 28–34 (2001).

³⁵⁷ See *id.* at 26–28.

³⁵⁸ *Cf. id.* at 28–34 (discussing the reason for having general rules); SCHAUER, *THE RULES*, *supra* note 355, at 27–31. For a more complete discussion of the law’s emphasis on generality and how that promotes a healthy political community, see FREDERICK SCHAUER, *PROFILES, PROBABILITIES, AND STEREOTYPES* 251–300 (2003) [hereinafter *SCHAUER, PROFILES*].

³⁵⁹ See SCHAUER, *THE RULES*, *supra* note 355, at 31–34 (describing the over-and-under-inclusiveness of rules); ALEXANDER & SHERWIN, *supra* note 356, at 34–36 (discussing the built-in imperfection of rules).

C. *Date Rape and the Three Primary Purposes of Rule-Generalization*

Rule-generalization has three primary purposes. First, it avoids coordination problems.³⁶⁰ If the only rule were “drive at whatever speed is safe,” individual drivers are likely to make wildly divergent judgments about what precise speed is required in individual cases.³⁶¹ The result might be some drivers going ninety-five miles per hour, others going thirty-five miles per hour, and still others going a range of speeds in between, a situation likely to increase the risk of an accident for everyone. Having a single authoritative rule can avoid the confusion and danger from this lack of coordination.

In the case of sexual intercourse, especially between persons lacking a long sexual history, coordination problems may be severe because variations in culture, gender, self-awareness, religious beliefs, age, and individual upbringing, among other factors, may lead to a diverse set of rules about what conduct can fairly be interpreted as indicating consent or its absence.³⁶² A single, relatively clear rule can reduce these problems. Law professors Larry Alexander and Emily Sherwin elaborate:

[S]uppose that everyone agrees that sex should be consensual, yet there is disagreement about what counts, or ought to count, as an expression of consent. Some think that if a woman says no, she does not consent; others think it is fair to assume consent unless she says no three times in a shrill voice; still others think that if the circumstances are inauspicious, even “yes” is not enough to show genuine consent. This situation presents a coordination problem: as long as people diverge in their understanding of what suffices to express consent, there will be instances of sex without subjective consent, instances of lost opportunity, endless debate, and a great deal of rancor.³⁶³

I have argued that there is in fact sufficient cultural agreement for most men to be at least unconsciously aware of when their own rules for what indicates a woman’s consent are in error in an individual case. But the rule that I propose here helps to reduce remaining coordination problems, both because it is a single rule applicable to all sexual encounters, and because the rule itself requires a man to make reasonable efforts to discover coordination problems and resolve them, that is, to make serious, sustained efforts to determine whether his conscious understandings and those of his intended sexual partner coincide. Where they do not, he should

³⁶⁰ See ALEXANDER & SHERWIN, *supra* note 356, at 14–15.

³⁶¹ Cf. *id.* at 15 (describing an analogous example).

³⁶² See Taslitz, *Patriarchal Stories*, *supra* note 17, at 410–21. See generally Baker, *Once a Rapist*, *supra* note 277 (exploring the various motivations of date rapists).

³⁶³ ALEXANDER & SHERWIN, *supra* note 356, at 60.

halt his efforts. Of course, there may be some disagreement about what efforts to communicate are reasonable, but jury instructions and expert testimony about the qualities of a sexually sensitive inquirer, supplemented by examples, as I have outlined elsewhere,³⁶⁴ can give the phrase “reasonable communicative efforts” more determinate meaning. Furthermore, the standard makes clear that it is the man’s burden to inquire about consent, not merely to assume it nor simply rely on his own preconceptions of when it exists.³⁶⁵ Most importantly perhaps, by educating the populace about a single rule and its justification, the standard should go a long way toward improving sexual coordination. An even more specific rule, such as requiring affirmative verbal consent for every stage of increasing sexual intimacy, might do an even better job on this score,³⁶⁶ but I and others have opted against it because of its higher costs in potentially squelching sexual spontaneity and emotional intimacy, its failure to accommodate the variety and breadth of sexual circumstances, and its complete rejection of the jury’s role in articulating community standards (as opposed to the objective test’s effort to guide the community’s representatives in a particular direction without thoroughly ignoring them).³⁶⁷

A second reason for general rules is that they may embody an expertise that individual laypersons may lack.³⁶⁸ Precisely the forces promoting self-deception that are outlined here mean that most men do not have an adequate understanding of less-than-fully conscious mental processes, how they may access and alter them, and their normative significance in protecting female autonomy in sexual matters. The statement of a duty of reasonable communication and its rationale, the explanation for such a rationale in jury instructions, and the attendant publicity would help to educate men about these matters, improving their own expertise and thereby reducing the frequency of male sexual self-deception.

Bringing this scientific and moral expertise to bear on the crafting of the law of rape would also promote what Professor Frederick Schauer has called “compensatory generalization.”³⁶⁹ Currently, widespread social generalizations about sex include these: that “good girls” do not place themselves into compromising situations and thus do not get raped, while “bad girls” know the risk of doing so and thus are really “asking for it”; that women who do not repeatedly, clearly, verbally say “no” necessarily mean “yes”; and that certain sorts of limited male physical aggression are to be expected.³⁷⁰ These generalizations have promoted female subordina-

³⁶⁴ See Taslitz, *Two Concepts*, *supra* note 24, at 70–73.

³⁶⁵ *See id.*

³⁶⁶ See Admin. Council of Antioch Coll., *supra* note 115 (describing a similar policy at Antioch College).

³⁶⁷ See Taslitz, *Two Concepts*, *supra* note 24, at 70–71; SCHULHOFER, *supra* note 11, at 271–72; Admin. Council of Antioch Coll., *supra* note 115; Guskin, *supra* note 115.

³⁶⁸ See ALEXANDER & SHERWIN, *supra* note 356, at 14–15.

³⁶⁹ See SCHAUER, *PROFILES*, *supra* note 358, at 150–53.

³⁷⁰ See Taslitz, *Two Concepts*, *supra* note 24, at 26–27; Taslitz, *Patriarchal Stories*, *su-*

tion and have cost many women the pain of being subjected to forcible, unwanted sexual intercourse.³⁷¹ Schauer's idea of compensatory generalization is that sometimes the best way to fight a bad generalization is with a counter-generalization.³⁷² Assuming that men are at least unconsciously aware of indicators of nonconsent and that they therefore have an especially rigorous duty to inquire about a woman's desires is a generalization that promotes female sexual autonomy and equal respect for the worth of men and women. This also combats longstanding cultural images that have unfairly led to women's subordination as a group and pain and suffering on the part of the individual women who are raped.

A third reason to favor general rules is efficiency.³⁷³ Particularized assessments are costly and prone to error.³⁷⁴ Asking jurors to make individual judgments about matters such as a particular individual's semiconscious or unconscious mental state at a particular point in time may take particularly high investments in battling experts' fees and in jury deliberation time, while raising grave dangers of error.³⁷⁵ Preexisting sexist social biases and the beyond a reasonable doubt standard might also mean that error is likely to favor acquitting true self-deceivers more than convicting non-self-deceivers; acquittals also sending the message that society is not serious about enforcing a duty of inquiry.³⁷⁶ On balance, the social costs of the generalization involved in my proposed rule will be far less than the benefits gained by avoiding the costs of particularized assessment. It is true that under my proposed standard some small number of non-self-deceiving men will be convicted, but they will be convicted only if they failed to engage in reasonable inquiry, itself a grievous moral wrong. Moreover, the mere existence of the duty of reasonable inquiry and its eventual incorporation in social mores should radically decrease over time the numbers of men who are in fact thoroughly unaware at any cognitive level of the risk of nonconsent created by their breach of duty. The costs imposed on a small and ever-vanishing group of men who are still significantly morally culpable are acceptable to achieve much wider future benefits.

pra note 17, at 422–28, 449–50.

³⁷¹ See TASLITZ, RAPE AND CULTURE, *supra* note 81, at 39–43; Taslitz, *Two Concepts*, *supra* note 24, at 25–27; Taslitz, *Patriarchal Stories*, *supra* note 17, at 449–52.

³⁷² See SCHAUER, PROFILES, *supra* note 358, at 150–53.

³⁷³ See ALEXANDER & SHERWIN, *supra* note 356, at 14–15; SCHAUER, PROFILES, *supra* note 358, at 23–24.

³⁷⁴ See sources cited *supra* note 373.

³⁷⁵ I have mentioned earlier that there are analogous dangers of error even in judging conscious mental states. See *supra* note 65 (describing interpretive problems in jurors' determinations of conscious mental states). Nevertheless, though too often overstated, the dangers are even greater in judging semiconscious and unconscious mental states for many of the reasons reviewed in this Article's explanation of why the unconscious so often seems inscrutable. See *supra* text accompanying notes 57–65 (describing the unconscious).

³⁷⁶ See TASLITZ, RAPE AND CULTURE, *supra* note 81, at 59–60; Taslitz, *Patriarchal Stories*, *supra* note 17, at 450.

VII. CONCLUSION

The severe potential penalties facing men accused of date rape at first blush seem odd given the majority of jurisdictions imposing liability for “merely” negligent, rather than reckless or knowing, rape. Furthermore, the current regime of judging men based on their “reasonable” beliefs leaves the word “unreasonable” largely undefined, permitting jurors to draw on sexist social preconceptions of proper gendered male behavior. This Article has argued that male self-deception is sufficiently widespread and morally blameworthy to render it central in the crafting of the law of date rape. A “reasonableness” standard that is defined for jurors as a duty of reasonable inquiry to determine an intended sexual partner’s desires is an effective way to combat male self-deception. The deceiver who does not seek to remove his blinders will pay a substantial price. If reasonableness is so understood, it becomes a proxy for ferreting out self-deception. Because self-deception in this area is morally worse than the simple ignorance involved in ordinary criminal negligence, self-deceptive negligence as a proxy for actual self-deception merits more severe punishment than is generally accorded to crimes of negligence. Understanding the cognitive phenomena of self-deception thus helps to explain the otherwise puzzling high penalties for negligent rape and give the negligence standard a clearer meaning. In so doing, modifying rape law to account for the possibility of male self-deception has the potential to foster sexual relationships between men and women that are more just, treating members of both sexes as equally valuable, autonomous sexual beings.