CONSISTENTLY REVEALING THE INCONSISTENCIES: THE CONSTRUCTION OF FEAR IN THE CRIMINAL LAW

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I. INTRODUCTION

Borne out of wonder, awe and optimism, I am fascinated with the law. One must remain optimistic if one is to believe in the power of the law to shape society for the better. Loss of faith in the law as a powerful tool for the equitable management of society eliminates avenues for peaceful social change and has a potentially destabilizing effect on society. As Felix Frankfurter famously stated, "[F]ragile as reason is and limited as law is as the . . . institutionalized medium of reason, that's all we have standing between us and the tyranny of mere will and the cruelty of unbridled, undisciplined feeling."[1]

Adherence to the law is thus a possible mechanism of peace. However, unfair laws also operate as the antithesis of peace and justice. That laws do not exist in a vacuum, but rather as historically situated constructs is a revealing point of departure. In my view, the criminal law allows an excellent opportunity to gauge the success of the law in furthering justice. Specifically, study of the criminal law allows for recognition and examination of inconsistencies within the law together with the corresponding inquiry as to *why* the law has operated and continues operating disparately for some. Additionally, exploration of the criminal law demands consideration of whether the goals of the law are equally attainable. In this regard, I am respectful of Reverend Dr. Martin Luther King Jr.'s steadfast reliance on the potential and value of legal doctrine, despite its racialized strategic deployment to marginalize African-Americans. He once said:

> [W]e are not wrong in what we are doing. If we are wrong, the Supreme Court of this nation is wrong. If we are wrong, the Constitution of the United States is wrong. If we are wrong, God Almighty is wrong. If we are wrong, Jesus of Nazareth was merely a utopian dreamer that never came down to earth. If we are wrong, justice is a lie. Love has no meaning. And we are determined here

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1. Felix Frankfurter, *Between Us and Tyranny*, TIME, Sept. 7, 1962, at 15.

> in Montgomery to work and fight until justice runs down like water and righteousness like a mighty stream.[2]

This insistence that law be used in the most appropriate manner in which to ensure justice is, perhaps, a naive insistence that those constructing the law be honest in their motivations, biases, conflicts and investments. That the law does not have an organic existence separate and apart from those that generate it belies the constructedness of legal doctrine. Law's imperfections reflect our own. Accordingly, despite classical formulations of the scientific method,[3] at its core, law is a *social* science. It is a construct defined, nuanced and manipulated within greater fora, which are also societal creations. In this way, the legal profession maintains its monopoly over doctrine and its generation.

While my main goal in teaching Criminal Law is to ensure that my students develop an understanding of the operation of criminal law doctrine, I also seek, as part of my pedagogical approach, to reveal the constructedness of doctrine, despite the fact that such revelation is often unsettling. Post-colonial and post-modern scholars have acknowledged the tensions and potential unraveling of the subject, or doctrine, once its human creation is acknowledged and problematized.[4] As scholars Patrick Williams and Laura Chrisman have stated:

> If texts exist in what . . . one could call a dialectical relationship with their social and historical context—produced by, but also productive of, particular forms of knowledge, ideologies, power relations, institutions and practices—then an analysis of the texts of imperialism has a particular urgency, given their implication in far-reaching, and continuing, systems of domination and economic exploitation. This involves an understanding of present circumstances as well as the ways in which these are informed by, perpetuate and differ from situations which preceded them . . . .[5]

Accordingly, the terrain on which discourse like law operates necessitates an appreciation of present circumstances as well as the ways in which contemporary legal issues are informed by, perpetuate and differ from the past.

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2. Martin Luther King, Jr., Speech at MIA (Montgomery Improvement Association) Mass Meeting at Holt Street Baptist Church (Dec. 5, 1955), *in* 3 THE PAPERS OF MARTIN LUTHER KING, JR.: BIRTH OF A NEW AGE, DECEMBER 1955–DECEMBER 1956, at 73 (Clayborne Carson et al. eds., 1997).

3. *See* BERTRAND RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 92-93 (14th ed. 1964). *See generally* E. BRIGHT WILSON, JR., AN INTRODUCTION TO SCIENTIFIC RESEARCH (1952); WILHGELM WINELBAND, A HISTORY OF PHILOSOPHY (1958).

4. *See generally* BILL ASHCROFT ET AL., THE EMPIRE WRITES BACK: THEORY AND PRACTICE IN POST-COLONIAL LITERATURES (1989); PAST THE LAST POST: THEORIZING POST-COLONIALISM AND POST-MODERNISM (Ian Adam & Helen Tiffin eds., 1990); EDWARD W. SAID, ORIENTALISM (1978); GAYATRI CHAKRAVORTY SPIVAK, THE POST-COLONIAL CRITIC: INTERVIEWS, STRATEGIES, DIALOGUES (Sarah Harasym ed., 1990).

5. COLONIAL DISCOURSE AND POST-COLONIAL THEORY: A READER 4 (Patrick Williams & Laura Chrisman eds., 1994) [hereinafter COLONIAL DISCOURSE].

Law, like life, is experienced and interpreted through the prism of our subjective realities. Our realities are informed by our identities and the situatedness along multiple axes of existence. As scholars Vijay Mishra and Bob Hodge have elaborated, because the subject is historical, this is the point at which it is possible to connect post-colonial doctrine to the post-modern subject. They write, "[i]f for postmodernism the object of analysis is the subject as defined by humanism, with its essentialism and mistaken historical verities, its unities and transcendental presence, then for post-colonialism the object is the imperialist subject, the colonized as formed by the processes of imperialism."[6]

As a progressive Black female law professor in America,[7] who cares deeply about issues relating to the constructedness and ascription of identity,[8] I encounter and engage the law from a particular subject position.[9] Accordingly, to my mind, the law can never be neutral for the law never exists separate and apart from society and the individuals of which it is composed. To situate law within the post-colonial and post-modern is intuitive to me—to name it as such is not.

Instead, for pedagogical purposes, I prefer to have the students reach their own conclusions about the illusive neutrality of the law and our frail attempts to remove ourselves and claim a disinterested position in the analysis of legal opinions. I do not purport to deliver the TRUTH to my students. Instead, I prefer that students contemplate how the ripples of the law, which we study together, are consequences of undercurrents just beneath the surface of the law. It is my hope that students engage with the undercurrents and reach their conclusions about their salience. Of course, there is much beneath the surface

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6. Vijay Mishra & Bob Hodge, *What is Post(-)colonialism?*, *in* COLONIAL DISCOURSE, *supra* note 5, at 281.

7. In keeping with post-modern scholars' insistence on the limitations of the universal, I foreground my identity to highlight the conflict between our self-identification and simultaneous constructedness—no position is neutral. Specifically, as a Jamaican-Canadian within the United States of America, I am racialized as African-American. In Canada, I am othered as West Indian. In Jamaica, I am interpreted alternatively as Kingstonian or "foreign." Similarly, in the United States, I am interpreted as progressive or liberal, while in Canada I am usually interpreted as moderate to slightly left thereof. Context is everything.

8. I have described such externally defined identity elsewhere as "ascribed otherness." Ascribed otherness "delineate[s] the fact that there are consequences that flow from how we are perceived and interpreted by the observer." Camille A. Nelson, *Breaking the Camel's Back: A Consideration of Mitigatory Criminal Defenses and Racism-Related Mental Illness*, 9 MICH. J. RACE & L. 77, 92 n.74 (2003). It describes the "process of interpretation . . . based not only on one's self-conceptualization and performance of identity, but on how others perceive one's identity and performance—this is the 'what one is thought to be' reference point." *Id.*

9. For elaboration on subject-matter positionality as it impacts upon writing in the legal academy, see CYNTHIA LEE, MURDER AND THE REASONABLE MAN: PASSION AND FEAR IN THE CRIMINAL COURTROOM 4 (2003).

of the law—politics, economics, history, and identity constructs are but a few of the currents which, together with the depth of the record, the skill of the advocacy and the quality of the briefs or pleadings impact upon the courts' ability to craft just law.

For purposes of this essay, I will focus upon my attempts to have Criminal Law students problematize the criminal law reasonable person. For illustrative purposes, I will focus upon two areas in the criminal law, rape and self-defense, in which the inconsistency, if not the irrationality, of the use of the reasonable person reveals the undercurrents of negative associations of both gender and racial identity constructs. Part II will briefly discuss the reasonable person standard as it is used in the criminal law. Part III uses the *People v. Goetz*[10] case, the quintessential articulation of the reasonable person standard in self-defense claims, as a counterpoint for analysis of the articulation of reasonable fear. Part IV will focus the lens on the construction of fear in rape cases as exemplified by *State v. Alston*,[11] a leading case typically studied by first-year law students.[12] In conclusion, I explore the possibility that rules flowing from these doctrines are incoherent, inconsistent and exactly the opposite of what they should be. Indeed, the rules demonstrate the challenges to alienated subjects constructed as "other" within the confines of a society that is not so post-colonial after all.

By consistently exposing these types of inconsistencies in class, I encourage the students to attempt a rationalization of the definition of fear in rape cases with the definition of fear in self-defense. I ask that they query whether there is more at work in the judicial decision-making processes of these doctrines than was generated by zealous counsel. They often query the role of perspective—we do not pretend that these decisions were made in a vacuum and that the victim's, defendant's, judge's or juror's race, gender, class, culture, religion or sexual orientation is irrelevant to the legal dispute. Whatever the outcome of the students' consideration, I hope to reveal that behind the dichotomous treatment and incoherence lurks creativity, perspective and power in the guise of precedential neutrality. Specifically, my pedagogical

10. 497 N.E.2d 41 (N.Y. 1986).

11. 312 S.E.2d 470 (N.C. 1984).

12. I recognize that many schools or law professors choose not to teach rape in the first-year law school curriculum for various reasons. I have decided to attempt a compromise of sorts—I abandon my typical Socratic approach to the Criminal Law course and instead lecture through the case law, statutes and Model Penal Code. Additionally, I do not include hypotheticals involving sexual violence on the examinations. I will occasionally, however, ask an elemental multiple choice question relating to a rape provision or to information conveyed on the subject matter by guest speakers. *See generally* Kate E. Bloch, *A Rape Law Pedagogy*, 7 YALE J.L. & FEMINISM 307 (1995); Susan Estrich, *Teaching Rape Law*, 102 YALE L.J. 509, 510-11 (1992); Kevin C. McMunigal, *Reducing the Risks and Realizing the Rewards: An Approach to Teaching Rape Law*, 34 SAN DIEGO L. REV. 519 (1997); James J. Tomkovicz, *On Teaching Rape: Reasons, Risks, and Rewards*, 102 YALE L.J. 481 (1992).

orientation encourages doctrinal competence in addition to self-revelation of the normative constructs driving legal decision-making and *stare decisis*.

II. THE REASONABLE PERSON IN BRIEF

> *Law reflects but in no sense determines the moral worth of a society. The values of a reasonably just society will reflect themselves in a reasonably just law. . . . The values of an unjust society will reflect themselves in an unjust law.*[13]

Many legal rules engage the hypothetical "reasonable person" as a benchmark for judgment about the criminal culpability of an accused.[14] Typically, if the reasonable person would have behaved as the accused did, then the accused is worthy of mitigation or exoneration. The standard is applied differently in the context of rape law, as the reasonable person standard is geared to the behavior of the victim, not the accused.

It is important to consider the concept of the "reasonable person," or what used to be called the "ordinary man" and its antecedent the "reasonably prudent man." "Jurists have struggled for centuries to identify the 'reasonable person.'"[15] The reasonable person has been articulated as that which represents the best of us, as "an ideal, . . . the embodiment of all those qualities which we demand of the good citizen."[16] Definitionally, the reasonable person test prevents slippage of the objective standard into the realm of idiosyncrasy. Rather, this objective test is designed in order to encourage some normative baseline behavior. Some jurists have even articulated an aspirational tone for such standards. Indeed, Chief Justice Lord Coleridge remarked in *The Queen v. Dudley and Stephens* [17] that:

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13. GRANT GILMORE, THE AGES OF AMERICAN LAW 110-11 (1977) (paraphrasing Justice Holmes).

14. Indeed, this standard is not simply relevant to criminal law, but is to be found throughout legal discourse. In the realm of the criminal law, however, the reasonable person is the foundational concept for criminal negligence assessments and features wherever there is an objective test, i.e. provocation, self-defense, necessity, duress and rape doctrine, to name but a few instances of its relevance.

15. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 10.04[D][2][d], at 131 (3d ed. 2001).

16. *Id.* § 10.04[D][2][d], at 131-32 (citing A.P. HERBERT, MISLEADING CASES IN THE COMMON LAW 12 (1930)). Compare Nadine Klansky, Comment, *Bernard Goetz, A 'Reasonable Man': A Look at New York's Justification Defense*, 53 BROOK. L. REV. 1149, 1168 (1988). "The truly reasonable man is that sort of perfect being whom one will be hardpressed ever to encounter—let alone relate to. Clearly, no such animal exists who is capable of such flawless restraint that the most seemingly provocative acts would be easily ignored and left unretaliated against." *Id.*

17. 14 Q.B.D. 273 (1884).

> [w]e are often compelled to set up standards we cannot reach ourselves, and to lay down rules which we could not ourselves satisfy. But a man has no right to declare temptation to be an excuse, though he might himself have yielded to it, nor allow compassion for the criminal to change or weaken in any manner the legal definition of the crime.[18]

As social sensitivity to gender-equity progressed, this objective test was renamed the "reasonable person." However, when the legal term of art called the "reasonable person" was initially introduced, it was still written about men, by men.[19] Thus, criticism of the objective standard centers on the charge that the content and character of the "reasonable person" test has not changed and is still, essentially, the reasonable White man in disguise. The application of the reasonable person test has meant that those outside the original contemplation of the objective test—the poor, women, racial and ethnic minorities, lesbians, gays, bisexuals and transgendered individuals—have been evaluated against a standard that was not designed with them in mind and that neither reflects their experiences, nor realities.[20] Accordingly, the test has been criticized as unable to respond to individual social realities and for superimposing a notion of abstract equality where systemic inequality is the norm.[21]

The necessity of subjectivizing the objective test has been recognized as in the interest of justice.[22] Accordingly, the defendant's conduct is increasingly to be compared to a subjectivized reflection of the accused that incorporates mental and physical characteristics of the defendant, as well as relevant personal life experiences.[23] Inconsistent subjectivization, however, plagues the use of this standard. As will be demonstrated below, often the construction of the reasonable person is in conformity with prevailing social norms, even biased norms. Therefore, the reasonable person takes on the hallmarks of injustice by reflecting the very imperfections and idiosyncrasies against which

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18. *Id.* at 288.

19. *See, e.g.*, LEE, *supra* note 9, at 203-25; Toni Lester, *The Reasonable Woman Test in Sexual Harrassment Law—Will It Really Make a Difference?*, 26 IND. L. REV. 227, 233 (1993); Camille A. Nelson, *(En)raged or (En)gaged: The Implications of Racial Context to the Canadian Provocation Defence*, 35 U. RICH. L. REV. 1007, 1025 (2002); Meri O. Triades, Student Article, *Finding a Hostile Work Environment: The Search for a Reasonable Reasonableness Standard*, 8 WASH. & LEE RACE & ETHNIC ANCESTRY L.J. 35 (2002).

20. Nelson, *supra* note 19, at 1025-26 (citing Joanne St. Lewis & Shelia Galloway, *Reforming the Defence of Provocation*, in ONTARIO WOMEN'S DIRECTORATE 11-12 (1994)).

21. *See* Sue Bandalli, *Provocation—A Cautionary Note*, 22 J.L. & SOC'Y 398, 402-05 (1995); Dolores A. Donovan & Stephanie M. Wildman, *Is the Reasonable Man Obsolete? A Critical Perspective on Self-Defense and Provocation*, 14 LOY. L.A. L. REV. 435 (1981); Nelson, *supra* note 19, at 1026 (citing ISABEL GRANT ET AL., THE LAW OF HOMICIDE § 6.2(b), at 6-12 to 6-14 (1994)).

22. DRESSLER, *supra* note 15, § 10.04[D][2][d], at 132.

23. *Id.*

this objective standard was designed to mitigate. The examples used in this essay, derived from the *Goetz* and *Alston* cases, demonstrate the inconsistent analysis of reasonable fear in the doctrine of self-defense and rape. Such dichotomous application of an objective test reveals the challenges posed by societal constructions of race and gender as they are played out on the legal terrain.

III. *GOETZ* AND BEYOND

> *Journalists, politicians, and other opinion leaders foster fears about particular groups of people both by what they play up and what they play down. Consider Americans' fears of [B]lack men. These are perpetuated by the excessive attention paid to dangers that a small percentage of African-American men create for other people, and by a relative lack of attention to dangers that a majority of [B]lack men face themselves.*[24]

Every state in the United States recognizes self-defense against the use of force, including deadly force for self-preservation.[25] The elements of self-defense entitle a non-aggressor to use "force upon another if he *reasonably* believes that such force is necessary to protect himself from imminent use of unlawful force" by the aggressor.[26] "[H]owever, *deadly* force is only justified in self-protection if the actor reasonably believes that its use is necessary to prevent imminent and unlawful use of *deadly* force by the aggressor."[27] Additionally, there are often requirements that a person not use deadly force against an aggressor if he knows that he has a safe avenue of retreat available.

It is important to note that there are three overarching overlays at work in the doctrine. The first theme is that of necessity, which specifies that force should not be used against an aggressor unless, and only to the extent, that such force is necessary.[28] The overlay of proportionality dictates that a person is not justified in using force that is excessive in relation to the force threatened. For instance, this theme would prevent the use of deadly force in response to a non-deadly attack.[29] The final overlay is particularly important with regard to the *Goetz* case as it specifies that the need for self-defense must originate from reasonable appearances, not subjective yet unreasonable interpretations of reality.[30] Accordingly, self-defense is unavailable to defendants who respond with violence while laboring under an honest but

24. BARRY GLASSNER, THE CULTURE OF FEAR: WHY AMERICANS ARE AFRAID OF THE WRONG THINGS 109 (1999).

25. DRESSLER, *supra* note 15, § 18.01[A], at 221.

26. *Id.* § 18.01[B], at 221 (emphasis added).

27. *Id.*

28. *Id.* § 18.01[C], at 222.

29. *Id.* § 18.01[D], at 222.

30. DRESSLER, *supra* note 15, § 18.01[E], at 222-23.

unreasonable belief in the necessity for self-preservation. Equally important for our analysis of *Goetz* is the first rule that an aggressor is disentitled from claiming self-defense.[31] Consideration of these criteria for the operation of a valid claim of self-defense assists Criminal Law students in their assessment of the following facts from the Court of Appeals of New York decision in *People v. Goetz*.[32]

In the afternoon of December 22, 1984, Troy Canty, Darryl Cabey, James Ramseur, and Barry Allen boarded an express subway train in the Bronx and headed south towards Manhattan. The four youths rode together near the back of the seventh subway car. Two of the four youths, Ramseur and Cabey, had screwdrivers inside their coats, which they said were to be used to break into video machine coin boxes.[33]

Bernhard Goetz boarded this subway train in Manhattan and took a seat towards the rear of the same car occupied by the youths. Goetz was carrying an unlicensed .38 caliber pistol with five rounds of ammunition in a waistband holster. Canty approached Goetz, possibly with Allen beside him, and stated, "give me five dollars." Neither Canty nor any of the other youths displayed a weapon. Goetz responded by standing up, pulling out his handgun and firing four shots in rapid succession. The first shot hit Canty in the chest; the second struck Allen in the back; the third went through Ramseur's arm and into his left side; the fourth was fired at Cabey, who was then standing in the corner of the car, but missed, deflecting instead off of a wall of the conductor's cab. After surveying the scene around him, Goetz approached Cabey who was sitting on the end bench of the car and said, "You seem to be [doing] all right; here's another," and fired the last of five shots.[34] The bullet entered the rear of Cabey's side and severed his spinal cord.[35]

All but two of the other passengers fled the car when the shots were fired or immediately thereafter. The conductor, who had been in the next car, heard the shots and instructed the motorman to radio for emergency assistance. The

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31. As one author states:

> The struggle between passion and reason in the law of self-defense is played out against a background of shared, albeit vague, assumptions about the contours of the defense. First, in order to be properly resisted, an attack must be *imminent*. Further, the defender's response must be both *necessary* and *proportional* to the feared attack. And finally, the defender must act with the *intention* not of hurting the victim per se, but of thwarting the attack. There is no statute or authoritative legal source that expresses this consensus, but lawyers all over the world would readily concur that these are the basic, structural elements of a valid claim of self-defense.

GEORGE P. FLETCHER, A CRIME OF SELF-DEFENSE: BERNHARD GOETZ AND THE LAW ON TRIAL 19 (1988).

32. 497 N.E.2d 41 (N.Y. 1986).

33. *Id.* at 43.

34. *See* FLETCHER, *supra* note 31, at 1, 5.

35. *Goetz*, 497 N.E.2d at 43.

conductor then went into the car where the shooting had taken place. He found Goetz sitting on a bench, three injured youths lying bleeding on the floor, one youth slumped against a seat, and two women passengers who had taken cover also lying on the floor. Goetz told the conductor that the four youths had "tried to rip him off." While the conductor was aiding the youths, Goetz jumped onto the tracks and fled. Ramseur and Canty, initially listed in critical condition, fully recovered. Cabey was paralyzed and suffered some degree of brain damage.[36]

The normative currency of racialized self-defense claims is revealed by this case. Bernhard Goetz successfully claimed that his shooting of the four Black youths on the New York subway was justified as an act of self-defense. Deploying racialized imagery and playing on societal fears of Black men and youth, defense attorney Barry Slotnick consistently constructed the Black youths as racialized "others" who were deserving of the vigilante justice meted out to them. His relentless use of stereotypical terminology such as "savages," "predators of society" and "vultures" was a successful tactic in ensuring Goetz's acquittal.[37] Professor Armour, writing about Slotnick's defense tactics, writes:

> In the end, Slotnick's . . . covert appeal to racial fear may have had more impact on the jury precisely because it remained hidden behind innuendo and suggestion. It spoke to that side of jurors' personality that they could not confront directly. Paradoxically, Slotnick may have gained more from not [explicitly playing on the racial factor] than from bringing the racial issue out into the open. Openly talking about racial fear in the courtroom might have helped the jury to deal more rationally with their own racial biases.[38]

Race norms tend to support claims of self-defense made by individuals who have killed or injured men of color.[39] In the realm of racialized self-defense claims, as articulated largely by Whites against people of color, the common tendency is to draw on prevailing social norms situating Black men, in particular, as overly violent, dangerous and possessing super-human strength. By stooping to the lowest common denominator—the stereotypical construction of Black men and youth as problematic—the reasonable person standard in the *Goetz* case is loaded with society's historical baggage and biases.[40]

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36. *Id.* at 43-44.

37. FLETCHER, *supra* note 31, at 206-08 (describing the deployment of racial imagery and the use of racial tactics by the defense to emphasize the racial identity of the four Black youths shot by Bernhard Goetz).

38. JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM: THE HIDDEN COSTS OF BEING BLACK IN AMERICA 146 (1997) (citing FLETCHER, *supra* note 31, at 208).

39. CYNTHIA LEE, *supra* note 9, at 137-74.

40. *Id.*

In articulating the theory of "double-consciousness," famous African-American scholar-activist W.E.B. DuBois analyzed this very issue. At a time when blaming the victim was explicit, racism in America was frequently described as the "Negro problem."[41] This transference prompted DuBois to ruminate, "How does it feel to be a problem?" He replied, "I answer seldom a word. And yet, being a problem is a strange experience."[42] DuBois further stated:

> [T]he Negro is a sort of seventh son, born with a veil, and gifted with second-sight in this American world,—a world which yields him no true self-consciousness, but only lets him see himself through the revelation of the other world. It is a peculiar sensation, this double consciousness, this sense of always looking at one's self through the eyes of others, of measuring one's soul by the tape of a world that looks on in amused contempt and pity. One ever feels his two-ness,—an American, a Negro; two souls, two thoughts, two unreconciled strivings; two warring ideals in one dark body, whose dogged strength alone keeps it from being torn asunder.[43]

Instead of the individual being the problem, being *cast* as the "other" in a hostile or indifferent world is the problem, especially when this perception becomes the norm and is deemed reasonable. Indeed, in overcoming the doctrinal impediment to an aggressor successfully using self-defense and in overcoming questions about proportionality and necessity (especially as they relate to his shooting of Cabey who had himself retreated to the back of the train), Bernhard Goetz was able to draw upon racialized norms which conflate Black masculinity with violence.[44] Such norms, which are both well-learned and automatic, include the stereotype of the Black man as criminal, which allows for the White accused to claim self-defense against alleged Black aggressors more easily by articulating a normatively reasonable, though racialized, basis for their fears.

In this way, the undercurrents of what Professor Jody Armour has termed "reasonable racism" legitimates the objective standard of reasonableness.[45] The Reasonable Racist believes that, even if his belief that Blacks are "prone

41. *See* W. E. BURGHARDT DUBOIS, THE SOULS OF BLACK FOLK 15-17 (1953). *See also* GUNNAR MYRDAL, AN AMERICAN DILEMMA, at lxix (1944) (arguing that the Negro problem had become the American problem because of the deteriorating effects of racism upon the nation).

42. DUBOIS, *supra* note 41, at 15.

43. *Id.* at 16-17.

44. According to Goetz, the look in the eyes of the Black youth before him suggested evil intentions. He stated:

> I knew I had to pull the gun, but it was the look and now, you cannot understand this. It was his eyes were shiny. He had a smile on his face. He'll claim it was all a joke. If you believe that, I will accept that. When I saw the, the smile on his face and the shine, and the shine in his eyes, that he was enjoying this, I knew what they were going to do.

Klansky, *supra* note 16, at 1168 (citing the record).

45. ARMOUR, *supra* note 38, at 19-60.

to violence" is based on prejudice, this is excusable as most Americans share such racist views.[46] Accordingly, the reasonable racist asserts that an individual racist in a racist society cannot be condemned for expression of a "human frailty as ubiquitous as racism."[47] Professor Cynthia Lee notes:

> In this society, Black and Latino men are stereotyped as violent criminals, gang members, and drug dealers. Because of these stereotypes, a man who kills a Black or Latino male may be perceived as having acted reasonably in self-defense even if he would be considered unreasonable had he killed a White man under similar circumstances. Less common, but equally problematic, are claims of self-defense asserted by individuals who use deadly force against unarmed Asian males in the mistaken belief that the victim knew martial arts.[48]

Unlike the battered woman[49] or the defendant asserting a cultural defense,[50] the claimant of racialized self-defense need not introduce expert testimony to overcome societal (mis)perceptions or stereotypes. Instead, these claimants rely upon and engage racialized societal norms to bolster their claims. Presumably, this is because the racism of the racialized self-defense claimant is "typical" and resonates with majoritarian notions of fear, response and power. Even Professor Fletcher, in his seminal book on the *Goetz* case, understands the power of the construction of fear—indeed, he himself conducts his analysis within this constructed otherness when he states:

> A mythical figure is born—an unlikely avenger for the fear that both unites and levels all urban dwellers in the United States.... A common man had emerged from the shadows of fear. He shot back when others only fantasize their responses to shakedowns on the New York subways.
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> Like the Lone Ranger, the mysterious gunman subdues the criminals and disappears into the night.[51]

The construction of fear situates Goetz as the victim. Note, however, that the normative (mis)perceptions of fear do not similarly accrue to rape victims.

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46. Jody D. Armour, *Race Ipsa Loquitor: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 787 (1994).

47. *Id.*

48. LEE, *supra* note 9, at 5-6.

49. *See* DR. LENORE WAKER, THE BATTERED WOMAN (1979); DR. LENORE WAKER, THE BATTERED WOMAN SYNDROME (2d ed. 1984); State v. Norman, 378 S.E.2d 8 (N.C. 1989); State v. Norman, 366 S.E.2d 586 (N.C. Ct. App. 1988); State v. Kelly, 478 A.2d 364 (N.J. 1984).

50. The cultural defense involves the invocation by criminal defendants or civil litigants of elements of their cultural background that they feel a court ought to take into account to reach a fair outcome. *See* ALISON DUNDES RENTELN, THE CULTURAL DEFENSE 5-7 (2004). Although courts usually exclude such evidence, Renteln argues that the cultural defense must have a place in the courtroom because "culture shapes the identity of individuals, influencing their reasoning, perceptions, and behavior." *Id.* at 10.

51. FLETCHER, *supra* note 31, at 2.

Specifically, women who are victimized by sexual violence must counter normative constructs of "willing victims," "improper women" and generally the notion that women "say no while meaning yes." Additionally, according to *Alston*, the fear experienced by women in situations of sexual violence is neither pervasive nor normative—it is not general, abstract, contextual, neither sociological nor experiential—it must be precise and generated instantaneously with a discrete connection to the offense at issue.[52] Unlike Mr. Goetz, a victim of sexual violence cannot invoke the rhetoric of generalized or mythical fear lacking a contemporaneous genesis. The test found in the following passage from the *Goetz* opinion does not assist the rape victim, as she is *not* permitted to consider the relevant knowledge she has about her assailant in articulating the fear that prevented her resistance, nor is she permitted to ground her fear in past experiences of sexual victimization:

> [W]e have frequently noted that a determination of reasonableness must be based on the "circumstances" facing a defendant or his "situation." Such terms encompass more than the physical movements of the potential assailant. . . . *[T]hese terms include any relevant knowledge the defendant had about that person.* They also necessarily bring in the physical attributes of all persons involved, including the defendant. Furthermore, *the defendant's circumstances encompass any prior experiences he had which could provide a reasonable basis for a belief that another person's intentions were to injure or rob him or that the use of deadly force was necessary under the circumstances.*[53]

This inconsistency merits contemplation in the forum of the Criminal Law curriculum. The fear factor in cases of racialized self-defense has been construed with great breadth. Specifically, *Goetz* was able to articulate wide-sweeping contextual, historical, even abstracted fears. Unlike the fear required of a victim of rape, the reasonable fear of Bernhard Goetz was not discrete; rather, he was able to draw upon his past experience of being mugged, presumably by other young Black men.[54] To be legitimated as reasonable, Goetz's fear did not even have to find its genesis in the specific behaviors of the youths involved. Rather, as legal theorist Professor Jody Armour has stated, Goetz was able to draw upon stereotypical racial imagery which automatically (re)activates biased views of the Black youths. He writes:

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52. State v. Alston, 312 S.E.2d 470 (N.C. 1984). *See infra* notes 57-97 and accompanying text.

53. People v. Goetz, 497 N.E.2d 41, 52 (N.Y. 1986) (emphasis added).

54. *See* WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 10.4 n.28 (2d ed. 2003): "'he was certain that none of the youths had a gun, he had a fear based on prior experience, of being "maimed,"' he would be allowed to introduce into evidence 'any prior experiences he had which could provide a reasonable basis for [such] belief,' e.g., that a few years earlier he had been injured in a mugging."

> This activation renders negative thoughts and *feelings* associated with that stereotype acutely accessible for social judgments about the Black victims. The decision makers may not experience these judgments as stemming from their knowledge of the Black stereotype, but instead as rational evenhanded evaluations of objective reality.[55]

Equally telling for the inconsistencies forming the focus of this essay, unlike the rape victim, claimants of racialized self-defense may successfully articulate a comprehensive framework for their fear so as to justify their claims for self-defense. Such racialized fear, accordingly, can stem from familiarity with a "certain type" or the alleged fact that a previous encounter with a "similar type of person" generated reasonable fears.[56]

IV. THE CONSTRUCTION OF FEAR IN RAPE DOCTRINE

One commentator has described rape as an "act of terrorism" that keeps women dependent on men.[57] I would add that rape is an act of violence that keeps women in their place and in fear of men. There has been much concern for the continuing role of the history of rape law as it impacts modern day articulation of the doctrine.

> Crenshaw criticizes the explanation of the origin of rape laws as protecting chastity as being "an oversimplified . . . and . . . inadequate account" because such an explanation speaks only to white women. This point is well taken because it cautions us to look closely at how the various forms of sexual domination are played out in different types of interracial and status relationships. Chastity may be the prevailing rationale in [a] relationship [] where there is the transmission of property rights whereas in those relationships where the female herself is seen as an object of property having value, protection of one's property rights may be the dominant rationale. But when the female is neither the vessel for transmitting property rights nor the object of those rights, sexual assault lays bare the basic issue of male domination and usurpation of control over one's sexuality. This is the case whether or not one is a female of color or not.[58]

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55. ARMOUR, *supra* note 38, at 145-46.

56. LEE, *supra* note 9, at 137-54.

57. *See* Deirdre Davis, *The Harm That Has No Name: Street Harassment, Embodiment, and African American Women*, 4 UCLA WOMEN'S L.J. 133, 140 (1994).

58. Susan McCoin, *Law and Sex Status: Implementing the Concept of Sexual Property*, 19 WOMEN'S RTS. L. REP. 237, 242 n.74 (1998) (quoting Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 157 (1989)). *See also* Renée L. Jarusinsky, *Gender Difference in Perceiving Violence and Its Implication for the VAWA's Civil Rights Remedy*, 27 FORDHAM URB. L.J. 965, 982 (2000) (focusing on the origins of rape law as originating from the concept of women as property of men: "Because wives became property of their husbands upon marriage, British common law allowed husbands to discipline their wives, but 'only blows with a switch no wider than a man's thumb were allowed.' This rule came to be

Blackstone defined rape as "carnal knowledge of a woman forcibly and against her will."[59] Typically, rape is defined as sexual intercourse achieved "forcibly," "against the will" of the female, or "without her consent."[60] Some penal provisions contain all three phrases.[61] Thus, in general, sexual intercourse by a male with a female, who is not his wife, constitutes rape if it is committed: (1) forcibly; (2) by means of certain forms of deception; (3) while the victim is unconscious or asleep; or (4) under circumstances in which the victim is incompetent, for example by reason of age or mental incapacity, to give consent.[62]

Focusing on forcible rape, a successful prosecution requires proof that the female did not consent to the intercourse and that the sexual act was "by force" or "against her will." Thus, it has been held that where there is a lack of consent, but no showing of force, a forcible rape conviction is inappropriate.[63] The definition of "forcible" will be the focus of this section as nonconsensual intercourse is "forcible" if the male uses or *threatens to use* force likely to cause bodily harm to the female[64] or, in some cases, a third person.[65] Generally, intercourse secured by non-physical threats does not constitute forcible rape.

An inconsistency arises when considering the objective standard at the point at which non-consent and force merge. The defendant's use of force, or his threats of force, relates both to the victim's non-consent and to the overcoming of her will. Accordingly, a conviction of forcible rape can only be secured where the victim either resisted the defendant's sexual aggression and such resistance was overcome by force, or where the victim was prevented from resisting by threats to her safety.[66]

The victim, therefore, "must follow the natural instinct of every proud female[67] to resist" the attacker to the "utmost,"[68] unless she is prevented from

known as the 'rule of thumb.' The 'rule of thumb' and a husband's right to discipline his wife were also recognized in the United States.").

59. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *210 (1769). Carnal knowledge is sexual intercourse. Sexual penetration by the penis of the vulva is necessary to constitute rape. 1 MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 628 (1847).

60. BLACK'S LAW DICTIONARY 1267 (7th ed. 1999).

61. *See* MD. ANN. CODE art. 27, § 462 (1988).

62. *See* MODEL PENAL CODE § 213.1 (1985); CAL. PENAL CODE § 261 (West 1999).

63. State v. Alston, 312 S.E.2d 470 (N.C. 1984) (forcible rape conviction overturned, notwithstanding that the victim did not consent to the intercourse); Commonwealth v. Berkowitz, 641 A.2d 1161, 1164 (Pa. 1994).

64. *See* MODEL PENAL CODE § 213.1 note on status of section (Proposed Official Draft 1962).

65. Fitzpatrick v. State, 558 P.2d 630, 631 (Nev. 1977).

66. Hazel v. State, 157 A.2d 922, 925 (Md. 1960).

67. State v. Rusk, 424 A.2d 720, 733 (Md. 1981) (Cole, J., dissenting).

68. People v. Dohring, 59 N.Y. 374, 383 (1874).

doing so by serious threats to her safety. Fear, in a rape case, is not a general fear of the perpetrator; rather, it is fear of death or serious bodily harm generated by the actions of the rapist at the time of the violence.[69]

Despite the fact that the nonconsensual rape was itself an act of violence, courts routinely demanded further physical manifestations of violence in order for a victim to overcome skepticism about whether she actually consented.[70] In the absence of additional physical violence, courts also accepted that threats of such conduct would be sufficient to overcome the will to resist.[71] Accordingly, a rape victim could articulate a genuine fear of further battery, an assault, as evidencing her lack of consent. This threshold question of fear of force or further violence, however, has been narrowly confined by some courts as requiring an a-contextual, a-historical nexus only to the violent incident at issue in the trial.[72]

Typically, for a forcible rape conviction to be upheld on the basis of "threat of force," as distinguished from actual force, the prosecution cannot rely on the victim's subjective fear of serious bodily harm. The subjective emotion of fear must be externally legitimized by an assessment of the threat, either physical or verbal, on an objective basis. Thus, the fear versus threat distinction in rape cases requires a two-tiered inquiry—first, what was the victim's subjective assessment and apprehension; and second, it is required that the accused undertook some conduct which placed the victim in a state where she had *reasonable* apprehension for her safety—hence, the rape victim must pass a threshold assessment of the legitimacy of her fear in the circumstances of impending sexual violence.[73]

Note the focus on the victim. Like the doctrine for self-defense, the lens of the law is focused upon the victim, not the perpetrator. This curiosity might play a significant role in the inconsistent development of the law. The rape law resistance requirement imposes conflicting imperatives upon the victim. In order to ensure a subsequent successful prosecution, the victim, not the perpetrator, must conform to certain objective standards. Either she must act in a manner that demonstrates her lack of consent by performing resistance in such a way that it is cognizable to the court, or she must be prevented from physical resistance by objectively determined fear. Accordingly, "nonconsent

69. King v. State, 357 S.W.2d 42, 45 (Tenn. 1962).

70. *Id.* at 46; *Rusk*, 424 A.2d 720.

71. State v. Burns, 214 S.E.2d 56 (N.C. 1975), *cert. denied*, 428 U.S. 933 (1975); State v. Alston, 312 S.E.2d 470, 476 (N.C. 1984).

72. *Alston*, 312 S.E.2d at 476. *See also* Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1111-12 (1986).

73. People v. Iniguez, 872 P.2d 1183, 1188 (Cal. 1994); Commonwealth v. Berkowitz, 641 A.2d 1161, 1164 (Pa. 1994). However, a forcible rape prosecution is appropriate, even if the victim's fears are unreasonable, if the accused knowingly takes advantage of her fear in order to accomplish sexual intercourse. *See Iniguez*, 872 P.2d at 1188.

and force are not synonymous."[74] With such law, saying "no" is insufficient, as it does not rise to the level of physicality required for resistance. Moreover, the male perpetrator must use or threaten force on the present occasion to an extent that would cause a reasonable person to fear grievous injury if she were to resist sexual intercourse.[75]

Given this doctrine, who is the reasonable person experiencing the fear? If subjectivization of the objective standard were at work to the same extent as in the *Goetz*[76] case, the reasonable person would be a similarly situated woman. Had the reasonable woman standard been operative in *Alston*,[77] the outcome would likely have been different.

Furthermore, if the race of the victim in *Alston* were different, we might well have different law from this leading case. Specifically, there are several factors that lead to a reasonably informed hypothesis that both the perpetrator and the victim in *Alston* were Black. First, if the colloquialisms[78] referenced by the court are any indicator, this was a case of Black-on-Black violence, which is often treated with less seriousness than Black-on-White violence.[79] Indeed, in cases of alleged rape, the race of both the victim and the perpetrator have historically been important to the outcome. As such, the second racial factor indicating the under-consideration of sexual violence in *Alston* is the fact that historically the harshest penalties in rape law have been reserved for Black men accused of raping White women.[80] Additionally, African-American

74. DRESSLER, *supra* note 15, § 33.04[B][1][c], at 580.

75. *Id.*

76. 497 N.E.2d 41 (N.Y. 1986). *See supra* notes 24-56 and accompanying text.

77. 312 S.E.2d 470 (N.C. 1984). *See infra and supra* notes 57-97 and accompanying text.

78. Alston complained to Cottie Brown, the victim, that she had been "dogging" him and making him seem a fool. Alston also threatened Cottie Brown that he was going to "fix" her face so that her mother "could see he was not playing." State v. Alston, 312 S.E. 2d 470, 472 (N.C. 1984).

79. "African Americans are significantly more likely to be the victims of major crimes than whites. . . . [T]raditionally African American communities have not been plagued by too much police presence but too little: for long stretches of American history, white-dominated law enforcement organizations were altogether uninterested in investigating black-on-black crime." Angela P. Harris, *Criminal Justice as Environmental Justice*, 1 J. GENDER RACE & JUST. 1, 19-20 (1997).

80. As Joshua Dressler points out in his casebook, "[i]t is difficult to understate the role of racism in the history of rape prosecutions. If sexism has resulted in the creation of 'boys' rules,' racism has resulted in 'whites' rules' in the enforcement and punishment of rape laws." JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 379 n.1 (3d ed. 2001). Furthermore, Susan Estrich states:

> The death penalty for rape in this country, now unconstitutional under Coker v. Georgia, was traditionally reserved for black men who raped white women. Between 1930 and 1967, 89% of the men executed for rape in this country were black. That figure includes 36% of the black men who were convicted of raping a white woman; only 2% of the defendants convicted of rape involving any other racial combination were executed.

women are disproportionately represented among victims of rape.[81] Furthermore, perpetrators typically rape women of the same race.[82] Lastly, stereotypes of Black female sexuality operate against Black women who are stereotypically constructed a hyper-sexualized other.[83]

Alston[84] is a case in point. Evidence was presented to show that Alston and the victim, Cottie Brown, had been involved in an abusive relationship prior to the rape. They had lived together and, on occasion, Brown would acquiesce to sexual relations "just to accommodate" Alston's violent demands.[85] On those occasions, the victim testified "[she] would stand still and remain entirely passive while [the accused] undressed her and had intercourse with her."[86]

At the time of the rape, however, they no longer lived together and the victim wanted to end the relationship but was afraid to tell Alston. On the day of the rape, Alston grabbed the victim in a parking lot and threatened to "fix her face so that her mother could see he was not playing."[87] When the victim agreed to walk with him if he let go, Alston did so. The two of them walked along the street as Alston spoke of their relationship. They arrived at a house belonging to Lawrence Taylor,[88] a friend of Alston's, where they had had sex in the past. Inside, after additional conversation, Alston asked the victim if she was "ready." The victim told him that she did not want to have sex with him,

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> Professor Wolfgang, after a systemic analysis of 1,238 rape convictions between 1945 and 1965, concluded that race was the only factor that accounted for the disparities in the imposition of the death penalty. Although the death penalty for rape is now prohibited, at least one study has found that black men convicted of raping white women continue to receive the harshest penalties.

Estrich, *supra* note 72, at 1184 n.2 (citations omitted).

81. *See* ANDREW E. TASLITZ, RAPE AND THE CULTURE OF THE COURTROOM 78 (1999).

82. *See* CALLIE RENNISON, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, VIOLENT VICTIMIZATION AND RACE, 1993-98, at 10 (2001), http://www.ojp.usdoj.gov/bjs/pub/pdf/vvr98.pdf.

83. *See* JUAN F. PEREA ET AL., RACE AND RACES: CASES AND RESOURCES FOR A DIVERSE AMERICA (2000), for information on stereotypical depictions of Black woman as hyper-sexed. *See also* BELL HOOKS, BLACK LOOKS: RACE AND REPRESENTATION (1992); PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT (2d ed. 2000).

84. State v. Alston, 312 S.E.2d 470 (N.C. 1984).

85. *See* DRESSLER, *supra* note 15, § 33.04[B][1][c], at 579.

86. *Alston*, 312 S.E.2d at 471.

87. *Id.* at 472.

88. Because of Taylor's race and reputation on campus, it is further likely that Alston is African-American. Given the segregated society in which we live, it is probable that Alston and Taylor are both Black. Further, if Lawrence Taylor is the (in)famous "LT," he was a soon to be professional football player and any friend of his, who had just come to his house to have sex with an ex-girlfriend, was also likely "a big man on campus"-type such that Cottie Brown likely knew he would have his way given her relative powerlessness in the realm of sport, sex, gender, hierarchy and power.

but when Alston told her to lie down on a bed, she complied, after which Alston pushed her legs apart and had intercourse.[89]

At trial, Alston was convicted of forcible rape, but the appellate court overturned the conviction. It held that while there was sufficient evidence that the victim had not consented to the intercourse, there was no evidence that Alston "*used force or threats to overcome the will of the victim to resist the sexual intercourse.*"[90] Accordingly, neither the victim's historically informed contemporary *general fear* of Alston, nor his specific threats of force *not linked directly to the demand for sexual intercourse* on the present occasion, could support a forcible rape conviction. As Professor Joshua Dressler comments:

> [I]n a remarkable "example of narrow time-framing and psychological naivete," the court discounted [the victim]'s reasonable fear of [the defendant] that was based on his prior use of force, and even ignored his specific threat to "fix" her face because it was not linked directly to a demand for sexual intercourse on the present occasion.[91]

Thus, in order to support a rape conviction, the victim will be assessed upon her *reasonable* apprehension of grievous harm. In order for this apprehension to be reasonable, the victim's fear cannot find its genesis in prior acts of violence or abuse *unrelated* to the demand for sex. There must be an a-historical nexus between the fear factor and the threatened harm such that generalized, contextual, or societal bases for fears of sexual violence are discounted, despite the unfortunate statistics indicating the prevalence of such violence, especially against women.[92] Hence, in the *Alston* case, the accused's prior abusive behavior, his prior extractions of forced sex and his prior threats, on the same day, to "fix" the victim's face "so that her mother [would know] he was not playing," were too remote, too disconnected from the subsequent demand for sex so as to disprove the victim's claims that her will was overcome. To cause a reasonable fear, meaning fear that overcomes the will of the victim by creating an apprehension of grievous harm if the victim were to resist, the rapist will be assessed upon his use or threats of force at the instant of the sexual violation. *Altson* states:

> The evidence in the present case tended to show that, shortly after the defendant met Brown at the school, they walked out of the parking lot with the

89. *Alston*, 312 S.E.2d at 472-73.

90. *Id.* at 476 (emphasis added).

91. DRESSLER, *supra* note 15, § 33.04[B][1][c], at 579.

92. *See* DRESSLER, *supra* note 80, at 374-78. According to the Violence Against Women Survey conducted by the Department of Justice, one in six U.S. women has been a victim of a completed or attempted rape. PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 13 (2000), http://www.ncjrs.org/pdffiles1/nij/183781.pdf.

> defendant in front. He stopped and told Brown he was going to "fix" her face so that her mother could see he was not "playing." *This threat by the defendant and his act of grabbing Brown by the arm at the school, although they may have induced fear, appeared to have been unrelated to the act of sexual intercourse between Brown and the defendant. More important, the record is devoid of evidence that Brown was in any way intimidated into having sexual intercourse with the defendant by that threat or any other act of the defendant on June 15....*
>
> ... Although Brown's general fear of the defendant may have been justified by his conduct on prior occasions, absent evidence that the defendant used force or threats to overcome the will of the victim *to resist the sexual intercourse alleged to have been rape, such general fear was not sufficient* to show that the defendant used the force required to support a conviction of rape.[93]

Given the understanding of Goetz's reasonable, contextualized and historically motivated fears, I ask the students why the court would not similarly subjectivize the fears of Cottie Brown. We consider the likelihood of a court adopting a reasonable sexual assault victim standard, a reasonable abused woman standard, or simply a reasonable woman standard in the circumstances. Such a re-formulation might take into account the reality of violence against women, or at least inform the objective reasonable person standard about the history of the rape victim in question. Many students express their doubts about the adoption of such standards as non-idiosyncratic and therefore as workable within the confines of the objective test.

Accordingly, rape law doctrine is driven by dominant societal norms in a way that does not accrue to the benefit of the victim of sexual violence. While racialized self-defense claimants use dominant social mores, however stereotypical, to bolster the likelihood of exoneration, women violated by rape[94] must counter stereotypical assumptions around both the issue of consent and fear.

An examination of the limited conceptualization of fear in traditional rape cases reveals a narrow conceptualization of the violent circumstances, and the

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93. *Alston*, 312 S.E.2d at 476 (some emphasis added).

94. I recognize that men are also victims of sexual violence, both from women and men. In another forthcoming article, *The Construction of Fear: Race, Rape and Jack in the Box*, I delve further into the intersection of gender, sexual-orientation, and sexuality to analyze societal under-consideration of male-male rape, and the societal norms compelling under-reporting of female-male sexual violence. Additionally, the prison context is an area particularly under-explored given the prevalence of sexual violence both against male and female inmates. *See* Zachary R. Dowdy, *Prison Sued in "Sex Slave" Case: Inmate Says Gangs Used Him as "Chattel,"* NEWSDAY, Apr. 30, 2002, at A37. (Black man alleges that guards and prison officials in the Texas prison where he was imprisoned for bouncing a check ignored his allegations that he was being repeatedly raped by inmates who traded him as part of slave ring in operation by prison gangs.)

gendered context confronting, the victim in question and women in general. At the other extreme, the breadth and scope of the concept of fear accepted by grand juries and courts in their considerations of cases where claims of racialized self-defense are made is so profound as to allow for abstractions well beyond the situation confronting the accused involved in a controversial killing. Susan Estrich acknowledged this dichotomy in her excellent article, *Rape*, in which she writes:

> The courts' unwillingness to credit the victim's past experience of violence at the hands of the defendant stands in sharp contrast to the black letter law that a defendant's knowledge of his attacker's reputation for violence or ownership of a gun is relevant to the reasonableness of his use of deadly force in self-defense.
>
> That these decisions depart so straightforwardly from established criminal law doctrine is noteworthy but not unusual in the law of rape.[95]

Accordingly, *Alston* is consistent with doctrine that has for centuries regulated the sexual autonomy of women for the benefit of men. It is also consistent with jurisprudence that prefers some victims to others and that minimizes violence by Blacks against Blacks. The decision in *Alston* further underscores the reality facing many women—sexual violence and predation is often a fact of life. Accordingly, many quite reasonable women live in fear of such violence. Unlike the fear factor in *Goetz*, such fear is not founded upon stereotypical assessments, biases or prejudice against men. Rather, the fear of a reasonable woman is based in the reality of sexual abuse of women that is often inflicted from an early age. In the case of Cottie Brown, this was certainly not an abstraction, but her history with the perpetrator himself was the basis for her fear.

Alston reveals that prior instances of domestic and sexual violence or fear derived from the societal treatment of women might not inform the judge or jury of the fear the woman felt in the particular case before the court. Additionally, a prior history of violence with another man might not be relevant to the woman's fear at the moment of the rape. Per *Alston*, even a prior history of violence with the accused may be seen as uninformative to the fear factor in considering whether the victim's will was overcome. I agree with the following articulations of Professor Estrich in condemning the analysis of fear that the *Alston* court was so willing to conduct in a vacuum:

> [I]t is not at all difficult to understand that a woman who had been repeatedly beaten, who had been a passive victim of both violence and sex during the "consensual" relationship, who had sought to escape from the man, who is confronted and threatened by him, who summons the courage to tell him their relationship is over only to be answered by his assertion of a "right" to sex—a

95. Estrich, *supra* note 72, at 1111.

> woman in such a position would not fight. She wouldn't fight; she might cry.... Hers is the reaction of people who have already been beaten, or who never had the power to fight in the first instance. Hers is, from my reading, the most common reaction of women to rape.[96]

While the students might not know it, and indeed some would recoil if they did, they mature in their appreciation of feminist legal theory and postmodern critical race theory as mechanisms for social change. In particular, the critique of objectivity of many "crit" scholars, feminists and critical race theorists in particular, is often empowering to students who sit in class stupefied by the seeming injustice of some judicial outcomes.[97] Many, both men and women, of all races, sense that some of the outcomes of these criminal cases are intuitively unfair or difficult to reconcile. However, until we delve into the language of the objective reasonable person, they lack the legalese to ground their sense of equity or concern for consistency.

By struggling with these inconsistencies, many students gain considerable insights into the forces that reproduce bias in the legal system. In attempting to reconcile the inconsistent formulations and outcomes of legal tests across various doctrines, fear in the criminal law being just one example, students, often for the first time, see how the law is simultaneously one of the most powerful catalysts for societal change and how the law has contributed to the construction of societal inequity. At the very least, those resistant to such critiques recognize the basis upon which such criticisms could be made.

V. CONCLUSION

Both feminist legal theory and post-modern race theory reveal that constructions of gender, race, and the nexus of both, have permeated legal thought on multiple levels. Not only is doctrine affected, so too are legal discourse and basic structures of legal institutions. Noted feminist legal theorist Martha Chamallas has stated that, "[i]n a variety of contexts, legal feminists have demonstrated that gender is often inseparable from hierarchy—that 'male' functions as a code word for superior, while 'female' still carries associations of inferiority."[98] This insight also has a race dynamic—as is demonstrated by the dichotomies of the criminal law—the hierarchy reflects White male superiority and the consequent devaluation of racialized women.[99] Indeed, if my speculations about the *Alston* case are correct, then Black

96. *Id.*

97. *See* MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 317 (2d ed. 2003) (describing the impact of gender on the law).

98. *Id.*

99. *See generally* State v. Alston, 312 S.E.2d 470 (N.C. 1984); People v. Goetz, 497 N.E.2d 41 (N.Y. 1986); DRESSLER, *supra* note 80, at 51-53, 374-78.

feminist Angela Harris' assertions about the intersectional experience of Black women who are victims of rape is profoundly accurate.

Professor Harris asserts that the selective focus of rape laws poses a distinctive hardship for Black women who mistrust the law's racism and never benefit from the racialized prototype of White womanhood when they are victimized by Black men.[100] Black women have been stereotyped as naturally promiscuous[101] and have been denied even the nominal legal protections afforded to White women. Disentangling the gender dynamic reveals a further racialized construct, as Black men accused of raping White women have historically received greater sentences than have White men accused of the same crime. Further, Black men falsely accused of raping White women have been victimized, for instance by lynching, as "[W]hite men maintained their control over the bodies of all [B]lack people."[102]

The casebook that I use for Criminal Law, Joshua Dressler's *Cases and Materials on Criminal Law*, has much of this critical information buttressing the case law and statutory provisions. As students of the law, together we examine the cases and commentary and try to make sense of it all—trouble is, in the absence of the critique, explication, commentary and investigation, the law may actually make little sense. The one thing that is consistent with much of the criminal law is its inconsistency. I highlight this fact by supplementing the materials with contemporary legal issues with which the students might be familiar from the media. Long after the course is over, some students continue to forward and critique controversial criminal law matters they come across. To me, this is success, for it seems the longer we continue to engage with the subject and continue our study of the criminal law, the more we are conscious of its construction as a site which reflects our own inconsistencies and perhaps even our idiosyncrasies.

Such critical self-reflection is a task too often avoided in the interests of supposed neutrality. Situating myself within the American legal academy has allowed me the ability to explore and analyze legal doctrine without the baggage of self-serving claims of objectivity. Starting from the position that law is created allows an exciting foray into the law that is as informative and demystifying as it is empowering. Such a starting point allows for the relevance of perspective to be openly discussed in the classroom, not as non-legal, emotional, soft considerations, but rather as important policy considerations which inform our appreciation of the law and allow for an

100. *See* Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 601 (1990).

101. *See* Sharon Angella Allard, *Rethinking Battered Woman Syndrome: A Black Feminist Perspective*, 1 UCLA WOMEN'S L.J. 191, 196-97 (1991); Darren Lenard Hutchinson, *Ignoring the Sexualizations of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 84-85 (1999).

102. Harris, *supra* note 100, at 600.

enriched experience. Indeed, to think like a lawyer in this new millennium may demand such a critically informed framework for analysis.