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# RAPE, FEMINISM, AND THE WAR ON CRIME

Aya Gruber\*

*Abstract:* Over the past several years, feminism has been increasingly associated with crime control and the incarceration of men. In apparent lock step with the movement of the American penal system, feminists have advocated a host of reforms to strengthen state power to punish gender-based crimes. In the rape context, this effort has produced mixed results. Sexual assault laws that adopt prevailing views of criminality and victimhood, such as predator laws, enjoy great popularity. However, reforms that target the difficulties of date rape prosecutions and seek to counter gender norms, such as rape shield and affirmative consent laws, are controversial, sporadically-implemented, and empirically unsuccessful. After decades of using criminal law as the primary vehicle to address sexualized violence, the time is ripe for feminists to reassess continued involvement in rape reform. This Article cautions feminists to weigh carefully any purported benefits of reform against the considerable philosophical and practical costs of criminalization strategies before making further investments of time, resources, and intellect in rape reform. In advancing this caution, the Article systematically catalogues the existing intra-feminist critiques of rape reform and discusses reasons why these critiques have proven relatively ineffective at reversing the punitive course of reform. The Article then crafts a separate philosophical critique of prosecution approaches by exposing the tension between the basic tenets of feminism and those animating the modern American penal state. Finally, it discusses why purported cultural and utilitarian benefits from rape reform cannot outweigh the destructive effect criminalization efforts have on feminist discourse and the feminist message. The Article concludes that feminists should begin the complicated process of disentangling feminism's important stance against sexual coercion from a criminal justice system currently reflective of hierarchy and unable to produce social justice.

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## INTRODUCTION

Over the past several years, feminism has become increasingly identified with crime control and the prosecution of men who commit offenses against women. Some feminist scholars have begun to express grave concern that “a punitive, retribution-driven agenda” now constitutes “the most publicly accessible face of the women’s movement.”<sup>1</sup> Twenty-six years ago, feminist scholar Catharine MacKinnon exposed the theoretical incongruity between feminism and the “liberal”<sup>2</sup> protection of women’s rights through police power.<sup>3</sup> She

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1. Dianne L. Martin, *Retribution Revisited: A Reconsideration of Feminist Criminal Law Reform Strategies*, 36 OSGOODE HALL L.J. 151, 158 (1998).

2. I use the term “liberal” not in its colloquial form to signify a person with left-leaning views, but to describe the philosophy that there are “autonomous spheres of family, civil society (economy), and state” each with “natural” conditions. Wendy Brown, *Finding the Man in the State*, 18 FEMINIST STUD. 7, 17 (1992) [hereinafter *Man in the State*]. Liberalism constructs the state “both to protect citizens from external danger and to guarantee the rights necessary for commodious commerce with one another.” *Id.*

3. Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist*

observed, "The liberal state coercively and authoritatively constitutes the social order in the interest of men as a gender, through its legitimizing norms, relation to society, and substantive policies."<sup>4</sup> Despite MacKinnon's insistence that only radically social, as opposed to liberal, strategies adequately address rape, most feminists took her basic message<sup>5</sup> as a call to legal arms against rapists.<sup>6</sup>

The United States is one of the most punitive nations on earth.<sup>7</sup> Fear of crime constitutes a meaningful part of Americans' everyday lives and exerts significant influence on how Americans live.<sup>8</sup> As the United States became more and more punitive, feminists hopped on the bandwagon by vigorously advocating reforms to strengthen the operation of criminal law to combat gendered crimes. Today, many associate feminism more with efforts to expand the penal laws of rape and domestic violence than with calls for equal pay and abortion rights.<sup>9</sup> The zealous, well-groomed female prosecutor who throws the book at "sicko" sex offenders has replaced the 1970s bra-burner as the icon of women's empowerment.<sup>10</sup> Indeed, many regard criminal law reform as one of feminism's greatest successes.<sup>11</sup>

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*Jurisprudence*, 8 SIGNS 635, 644 (1983) [hereinafter *Toward a Feminist Jurisprudence*].

4. *Id.*

5. See Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515, 534 (1982) ("Without a change in the very norms of sexuality, the liberation of women is a meaningless goal." (quoting Susan Sontag, "The Third World of Women," *Partisan Review* 40 no. 2 (1973): 180–206, esp. 188)).

6. See STEPHEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* 25 (1998) [hereinafter *UNWANTED SEX*]; Corey Rayburn, *To Catch a Sex Thief: The Burden of Performance in Rape and Sexual Assault Trials*, 15 COLUM. J. GENDER & L. 437, 443 (2006) (noting MacKinnon's influence on criminal rape reforms). Of course, I am not suggesting that MacKinnon's was the only voice motivating early rape reform efforts. See *infra* notes 56–59 and accompanying text.

7. See Ric Simmons, *Private Criminal Justice*, 42 WAKE FOREST L. REV. 911, 913 (2007) (observing that "the United States leads the world by imprisoning 750 people out of every 100,000 citizens, while almost every European country ranges between 100 and 200").

8. See Jonathan Simon, *Crime, Community, and Criminal Justice*, 90 CAL. L. REV. 1415, 1416–17 (2002) [hereinafter *Crime, Community, and Criminal Justice*] ("[B]y far the larger portion of people actively governed by crime are not criminal-law violators but persons affirmatively seeking to protect themselves and their families from crime.").

9. Cf. Symposium, *Battered Women & Feminist Lawmaking: Author Meets Readers*, Elizabeth M. Schneider, Christine Harrington, Sally Engle Merry, Renée Römken, & Marianne Wesson, 10 J.L. & POL'Y 313, 344 (2002) (querying whether "the feminist social movement [is] to be remembered for its influence on criminal law").

10. For example, *Law & Order: Special Victim's Unit* (NBC television) airs almost continuously in syndication and features an attractive, slim female prosecutor, who is particularly driven to

Feminists' feelings of victory are certainly understandable, given the widespread implementation of rape and domestic violence reforms and the massive shift in mindset on gendered crimes during the late twentieth century. Society moved from viewing domestic violence as legitimate or private to regarding batterers as among the lowest forms of criminals.<sup>12</sup> Rapists, especially those who violently rape children or strangers (as opposed to dates, wives, or acquaintances), are widely considered predatory monsters deserving of the most brutal forms of punishment.<sup>13</sup>

Nonetheless, for all the vitriol lodged against certain perpetrators of gendered crimes, feminist policies that challenge popular gender constructions and accepted views of criminality are not so well-liked. Even as they vehemently condemn sadistic abusers, many continue to deem other forms of coercive domestic control noncriminal and even acceptable.<sup>14</sup> Rape shield and affirmative consent laws, which I will refer to as "realist reforms," attempt to shelter date rape trials from gender stereotypes. However, these have proven unpopular and empirically ineffective.<sup>15</sup> Although reformers secured widespread

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combat sex crimes, and is always more involved with "women's" issues than any other legal actor in the show. See Diane Klein, *Ally McBeal and Her Sisters: A Quantitative and Qualitative Analysis of Representations of Women Lawyers on Prime-Time Television*, 18 LOY. L.A. ENT. L. REV. 259, 278, 284 (1998) (observing that female prosecutors are overrepresented on television when compared to female civil attorneys, and discussing the appeal of show *Law & Order*'s Claire Kincaid character who "display[s] aggression against criminals, competitiveness against defense attorneys, dedication to her job, and at least some degree of emotional detachment" as well as "sensitiv[ity] to witnesses and co-workers, and self-sacrific[e]"); Abbe Smith, *Can You Be a Good Person and a Good Prosecutor?*, 14 GEO. J. LEGAL ETHICS 355, 355 n.4 (2001) (asserting that society views characters like the female prosecutors on *Law & Order* and *NYPD Blue* as heroic and even "saintly").

11. E.g., Paula Finley Mangum, Note, *Reconceptualizing Battered Woman Syndrome Evidence: Prosecution Use of Expert Testimony on Battering*, 19 B.C. THIRD WORLD L.J. 593, 593 (1999) (asserting that defining domestic violence as a criminal act rather than private conduct "is one of the great achievements of feminism"); see Rose Corrigan, *Making Meaning of Megan's Law*, 31 LAW & SOC. INQUIRY 267, 302 (2006) (observing "perceived success of feminist rape law").

12. See *infra* notes 315–20 and accompanying text.

13. See *infra* notes 321–26 and accompanying text.

14. Compare *infra* note 319 (cataloging men's responses expressing disdain for domestic batterers) with PlanetPsych.com, Men and Women Define Domestic Violence Differently, [http://www.planetpsych.com/zPsychology\\_101/domestic\\_violence.htm](http://www.planetpsych.com/zPsychology_101/domestic_violence.htm) (last visited Sept. 13, 2009) (reporting that the majority of male respondents did not find nonviolent domestic control to be abuse).

15. See David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1199 (1997) ("[R]eforms have generally had little or no effect on the outcomes of rape cases . . ."); see *infra* notes 242–43 and accompanying text.

legislative adoption of rape shield laws, such laws are riddled with exceptions, enforced sporadically, and remain controversial. Affirmative consent is nearly universally rejected by judges and legislatures, and the concept of requiring a “yes” before sex continues to engender public disdain.<sup>16</sup> For decades, the women’s movement has made enormous investments in criminal law, and it is now time to examine critically the world feminist crime reform created.<sup>17</sup>

Feminists hoped enlisting state prosecutorial power would improve the lives of individual women and change norms about female sexual agency, male dominance, and courtship behavior. Unfortunately, that is not what happened. Although general criminal prosecutions have increased significantly, date rapes continue to be underreported and underprosecuted.<sup>18</sup> Some scholars even note the phenomenon of young women embracing retrograde notions of feminine mystique.<sup>19</sup> By adopting a prosecutorial attitude, which largely conceives of rape (and crime in general) as a product of individual criminality rather than social inequality, the feminist rape reform movement strayed far from its anti-subordination origins and undermined its own efforts to change attitudes about date rape. The feminist effort to send society messages about gender equality through criminal law was drowned out by the din of American criminal justice’s ever-louder declaration of the war on crime.

This Article asserts that given the philosophical tension between criminal punishment and feminism, the problematic politics of the current American criminal justice system, the limited potential of rape laws to shape gender norms, and the effects of criminal rape law on women victims, feminists should be extremely wary of further entanglement with the penal system.<sup>20</sup> It exhorts feminists to commence

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16. See *infra* notes 297–300 and accompanying text.

17. See Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 830 (2007) [hereinafter *Feminist War*] (arguing now is the “critical point, when feminists should redirect their efforts toward challenging structures that subordinate not only women but other disadvantaged minorities”).

18. See *infra* note 243 and accompanying text.

19. See *infra* notes 287–94 and accompanying text.

20. See *Feminist War*, *supra* note 17 (asserting that feminists should no longer support mandatory prosecution programs and the concept of forced separation); cf. Karen Engle, *Feminism and its (Dis)contents: Criminalizing Wartime Rape in Bosnia and Herzegovina*, 99 AM. J. INT’L L. 778, 804 (2005) (discussing negative effects on women’s agency of international criminal rape prosecutions in Balkans as preface to “reconsider whether increasing the number of convictions for sex crimes should be a central goal of international feminist advocacy”).

a discursive shift and consciously distance scholarly dialogue about and political strategies to counter sexual violence from arguments and strategies that strengthen the American penal state.<sup>21</sup> Part I provides a brief history of rape reform, concentrating on doctrinal changes that culminated in rape shield and affirmative consent laws. This Part also sketches early feminist theorizing on rape. Part II surveys feminist literature on sexual violence and distills four primary critiques of rape reform from within feminist theory. Part III provides a new theoretical critique of the alliance between feminism and the criminal justice system as it currently exists. Part IV examines the limitations on realist rape reform's ability to change cultural norms given the structure of the reforms, current state of gender relations, and prevailing discourse on criminality. It also challenges the argument, often central to feminists' continued reform efforts, that reforms "work" by helping individual female victims. Part V opines that after balancing the theoretical conflicts, the potential of realist reforms to change norms, and the effects of the laws on individuals, feminists should self-consciously turn away from strategies and theories that broaden the reach of criminal law.

## I. BRIEF HISTORY OF CRIMINAL RAPE LAW REFORM

Tracing the history of rape reform in the United States has been done with great care and eloquence elsewhere,<sup>22</sup> and accordingly this discussion will not encompass all of the legal issues regarding rape. Rather, it will trace some of the most visible contributions of feminists to rape law reform as a starting point for further analysis.

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21. See Panel Discussion, *Men, Women and Rape*, 63 FORDHAM L. REV. 125, 152 (1994) [hereinafter *Rape Panel*] (noting that focus on criminal law obscures that feminism's goal "is an end to sexual violence and not maximum incarceration" (remarks of Prof. Robin West)); see also *Crime, Community, and Criminal Justice*, *supra* note 8, at 1416 (discussing "governing through crime").

22. See generally Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51 (2002) [hereinafter *Chastity Requirement*] (discussing history of chastity requirement in rape law); Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373 (2000) (chronicling marital rape laws); Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT L. REV. 359 (1993) [hereinafter *Rape, Violence, and Women's Autonomy*] (discussing historical connections between rape law and racial discrimination).



### A. *Early Reforms Eliminated Formal Prosecution Barriers*

Criminal rape laws, of course, existed for decades prior to feminist intervention in the latter half of the twentieth century. According to some experts, the criminalization of rape was never about female empowerment. Rather, in late-nineteenth- to early-twentieth-century America, rape law was part of the larger state effort to police sexuality in general,<sup>23</sup> entrench male domination over women through chastity and ownership paradigms,<sup>24</sup> and enforce white racial supremacy.<sup>25</sup> During this era, the law of rape incorporated the paradigm of a pathological stranger, prototypically a black man, lurking in the shadows, ready to violently assault the presumed-chaste (white) woman.<sup>26</sup> White men, by contrast, had a virtual license to rape, as the law required “true” victims to be ultimately innocent ladies who would rather fight to the death than give up their virginity.<sup>27</sup> Owing to these paradigms, black men became primary targets of rape prosecutions (officially),<sup>28</sup> and lynchings (less officially).<sup>29</sup> For this reason, some of the earliest progressive objections

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23. See generally Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1 (1998) (contending that rape law existed as a quasi-defense for women who had engaged in unwanted prohibited sex and was always part of the state’s larger effort to constrain sexual autonomy).

24. See Alice Ristoph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139, 179 (2006) (“[R]ape law was used to police the sexual—to police virginity, chastity, and monogamy—and to police through the sexual—to enforce gender and racial hierarchies as well as codes of public morality.”).

25. Angela Harris quotes nineteenth-century suffrage activist Ida B. Wells, who observed how “white men used their ownership of the body of the white female as a terrain on which to lynch the black male.” Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 600 (1990) [hereinafter *Race and Essentialism*] (quoting IDA B. WELLS, SOUTHERN HORRORS: LYNCH LAW IN ALL ITS PHASES (1892)). Thus, Harris observes that for many black women, rape has come to “signif[y] the terrorism of black men by white men, aided and abetted, passively (by silence) or actively (by ‘crying rape’), by white women.” *Id.* at 599. Therefore, rape law not only reflected the racist assumption of black male sexual savagery but also the “patriarchal idealization of white womanhood.” *Id.* at 600. Of course, “as a legal matter, the experience of rape did not even exist for black women.” *Id.* at 599.

26. See *id.* at 600; see also *Rape, Violence, and Women’s Autonomy*, *supra* note 22, at 365 (noting “[t]he image of Black men as a constant threat to the virtue of white womanhood”).

27. See Aviva Orenstein, *Special Issues Raised by Rape Trials*, 76 FORDHAM L. REV. 1585, 1587 (2007) [hereinafter *Special Issues*] (“Traditionally, successful rape allegations involved a virtuous, ideally virginal woman, who is attacked by a creepy stranger.”).

28. See, e.g., *State v. Jefferson*, 28 N.C. (6 Ired.) 305, 305–06, 309 (1846) (upholding defendant’s conviction for rape despite consensual sex and the victim’s admission that she had allowed defendant “to put his hands on her in a free and familiar manner”).

29. See Susan A. Bandes, *Child Rape, Moral Outrage, and the Death Penalty*, 103 NW. U. L.

to rape law were that they were overenforced, not underenforced.<sup>30</sup> Concern over the deployment of strong rape laws to oppress minority men led the Model Penal Code's drafters to craft defense-friendly provisions<sup>31</sup> that many feminists and progressives believe underpunish rape.<sup>32</sup>

Sexist gender norms were woven into the very fabric of rape law in the form of iniquitous obstacles to prosecution such as resistance<sup>33</sup> and corroboration<sup>34</sup> requirements. Outside of race-based prosecutions, in which the chastity and veracity of white victims were virtually presumed, these rules tended to privilege rape defendants.<sup>35</sup> The

REV. COLLOQUIY 17, 28 (examining historical lynching and death sentences for black accused rapists); see also *Rape, Violence, and Women's Autonomy*, *supra* note 22, at 366 ("Black men's supposed propensity to rape white women became the pretext for thousands of brutal lynchings in the South."). The case of Emmet Till, a black teenager who was lynched for whistling at a white woman, has become symbolic of the connection between the social construction of rape and racial subordination. See, e.g., William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 2012 (2008) (discussing Till's case and noting that his murderers were acquitted).

30. See, e.g., IDA B. WELLS, *SOUTHERN HORRORS: LYNCH LAW IN ALL ITS PHASES* (1892).

31. See MODEL PENAL CODE § 213.1 (1985) (preserving marital exemption, privileging acquaintance rapists, and requiring rape to involve compulsion by "force or by threat of imminent death, serious bodily injury, extreme pain, or kidnapping," administration of intoxicants, or unconsciousness); *id.* § 213.1 cmt. 3 (1980) (discussing racial history of rape law).

32. See Vera Bergelson, *Conditional Rights and Comparative Wrongs: More on the Theory and Application of Comparative Criminal Liability*, 8 BUFF. CRIM. L. REV. 567, 580 n.44 (2004) (calling rape provisions of Model Penal Code (MPC) "outdated" and "embarrassing"). See generally Deborah W. Denno, *Why the Model Penal Code's Sexual Offense Provisions Should Be Pulled and Replaced*, 1 OHIO ST. J. CRIM. L. 207 (2003) (offering comprehensive criticism of MPC rape provisions).

33. The law required the prosecution to prove beyond a reasonable doubt that the rape complainant resisted the rape to the "utmost" as part of its case-in-chief. E.g., *Kinselle v. People*, 227 P. 823, 825 (Colo. 1924); *People v. Geddes*, 3 N.W.2d 266, 267 (Mich. 1942); *State v. Hunt*, 135 N.W.2d 475, 479 (Neb. 1965); *Holmes v. State*, 505 P.2d 189, 191 (Okla. Crim. App. 1972); *Purpero v. State*, 208 N.W. 475 (Wis. 1926); *State v. McClain*, 149 N.W. 771, 771 (Wis. 1914) ("[T]here must be the utmost resistance by the woman by all means within her power." (citing *Brown v. State*, 106 N.W. 536 (Wis. 1906))).

34. This requirement prevented prosecutions for rape in the absence of specific corroborating physical evidence, typically injury. Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 956–60 (2004) [hereinafter *Prompt Complaint*] (discussing history and citing cases on corroboration).

35. See Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981, 983–90 (2008) (noting these laws "made it quite difficult to convict even the guilty"). For example, under the resistance requirement, if a rape victim did not resist to the utmost, even a stranger who used force or weapons would be acquitted. See, e.g., *People v. Scott*, 95 N.E.2d 315, 317 (Ill. 1950) (overturning conviction of violent stranger

requirement that a woman resist to the “utmost”<sup>36</sup> was the doctrinal reflection of the gender norm creating a chaste woman/sex object dichotomy. Pursuant to this norm, a proper lady exercises no sexual agency, inside or outside of marriage; displays no sensuality in dress or demeanor; and goes to great lengths to protect her delicate womanhood.<sup>37</sup> As many have observed, a real woman is unlikely to satisfy such stringent criteria, and thus finds herself recast as a purely sexual individual.<sup>38</sup> The woman who fails to resist forcefully the taking of her all-important, heavily guarded sexuality, or, even better, virginity, immediately transforms from Madonna into whore.<sup>39</sup>

This dual objectification is necessary for the maintenance of male sexual privilege. If every woman is ultimately chaste, there will be no women fit for casual, pre-marital sex. There must accordingly be a category of women who constantly and freely give sex with little or no right to refuse. Today, these are *Girls Gone Wild*<sup>40</sup>—perpetually sexual beings with neither inclination nor right to deny sex.<sup>41</sup> Minority and

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rapist for lack of resistance); *State v. Willie*, 422 So. 2d 1128 (La. 1982) (applying resistance standard to paradigmatic rape but finding standard met). There is the well-known case of a victim who awoke in the middle of the night to a knife-wielding stranger demanding sex. See Ross E. Milloy, *Furor Over a Decision Not to Indict in a Rape Case*, N.Y. TIMES, Oct. 25, 1992, at A30. Fearing AIDS, she convinced her attacker to wear a condom. *Id.* Later, a grand jury refused to indict, and jurors explained they believed she consented. *Id.*

36. See *supra* note 33.

37. See *Chastity Requirement*, *supra* note 22, at 53 (observing rape law’s “informal, though powerful, normative command that women maintain an ideal of sexual abstinence”).

38. See Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 405 (1984) (“The double standard divides females into two classes—virgins and whores, ‘good girls’ whose chastity should be protected and ‘bad girls’ who may be exploited with impunity.”).

39. See *Chastity Requirement*, *supra* note 22, at 54 (noting requirement that women refrain from extramarital sexual behavior in order to be protected against rape “by someone other than her husband”).

40. *Girls Gone Wild* is a video series featuring drunken young women—think college girls on spring break—flashing various body parts. The cheerful commercials, which feature cruise-reminiscent Calypso music and a “happy guy” narrator, pervade late night television. The franchise, insiders say, makes its parent company, Mantra, about \$40 million a year. Claire Hoffman, *Joe Francis: ‘Baby, give me a kiss,’* L.A. TIMES, Aug. 6, 2006, (Magazine), at 16, available at <http://www.latimes.com/features/magazine/west/la-tm-gonewild32aug06,0,2664370.story>. *Girls Gone Wild* is an amazing phenomenon because of its mainstream nature. In 2007, *USA Today* mentioned the series as among the twenty-five trends that shaped America over the past quarter century, along with ethnic diversity and the aging population. *25 Trends That Changed America*, USA TODAY, Mar. 26, 2007, <http://www.usatoday.com/news/top25-trends.htm>.

41. One reporter describes *Girls Gone Wild*’s “Spring Break 2005: Anything Goes!” video: “Women in bikinis giggle as they stare into the camera and explain just how wild their vacations are

lower class women have historically occupied (and often continue to occupy) this position.<sup>42</sup> Black women, for example, had no right to claim rape because of racist beliefs about their very nature as “sexual savages.”<sup>43</sup> At the same time, men desire official relationships with women who are not sexual savages—chaste (or today relatively chaste) ladies.<sup>44</sup>

Reporting<sup>45</sup> and corroboration<sup>46</sup> requirements, which erected formal barriers to prosecution by placing specific credibility burdens on complainants,<sup>47</sup> also legally cemented the chastity paradigm. The law presumed the rape complainant to be untruthful unless the prosecution presented evidence independent of her testimony,<sup>48</sup> typically evidence of serious injury.<sup>49</sup> Such laws also reflected the related caricature of the

getting: group showers, oral sex in bars with strangers, topless dancing. One girl, surrounded by her friends, explains, ‘I’m ready and willing, and I’m a dirty slut.’” Hoffman, *supra* note 40, at 18.

42. See Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 85 (1999) (“[T]he construction of black women as promiscuous causes jurors in sexual assault prosecutions to doubt black women’s credibility . . .”); cf. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1274 (1991) (observing that black women who bring rape claims against black men are often vilified in the black community because of the belief that rape laws are oppressive to black men).

43. BELL HOOKS, *AIN’T I A WOMAN: BLACK WOMEN AND FEMINISM* 52 (1981); see also *Chastity Requirement*, *supra* note 22, at 68–69 (“Women of other races, slaves, indentured servants, and Native Americans, as well as ‘outsiders’ such as ‘rebellious women,’ were . . . by definition unchaste . . .”); *Race and Essentialism*, *supra* note 25, at 599 (“[R]ape laws were seldom used to protect black women against either white or black men, since black women were considered promiscuous by nature.”).

44. Today, men may not require virginity, but they still balk at the idea of marrying a “slut.” See *Chastity Requirement*, *supra* note 22, at 56 (noting persistence of “[r]etrograde notions of sexual propriety”).

45. See *Prompt Complaint*, *supra* note 34, at 954–77 (discussing history and law of requirement).

46. See, e.g., *Allison v. United States*, 409 F.2d 445, 448 (D.C. Cir. 1969) (stating that “no person may be convicted of a ‘sex offense’ on the uncorroborated testimony of the alleged victim”); *Franklin v. United States*, 330 F.2d 205, 208 (D.C. Cir. 1963) (requiring corroboration because of the “danger of a fabricated rape”); *State v. Garza*, 191 N.W.2d 454, 457 (Neb. 1971) (requiring corroboration); *People v. Masse*, 156 N.E.2d 452, 453 (N.Y. 1959) (same).

47. See, e.g., *Davis v. State*, 48 S.E. 180, 181 (Ga. 1904) (“The accused should not be convicted upon the woman’s testimony alone, however positive it may be . . .”).

48. See, e.g., *Allison*, 490 F.2d at 449 n.10 (“[T]he danger of a fabricated rape is of greater magnitude than the danger of erroneous identification.”); *Strickland v. State*, 61 S.E.2d 118, 121 (Ga. 1950) (stating that corroboration “furnish[es] the jury a criterion for ascertaining” credibility).

49. See Klein, *supra* note 35, at 986. This requirement had a major impact on rape reporting and prosecution. See Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 YALE L.J. 1365, 1370 n.38 (1972) (discussing 1969 study of New York City, which had strict corroboration

lying vindictive shrew.<sup>50</sup> The vindictive shrew image assumes that women are jealous, desire to make men suffer for leaving or mistreating them, and fabricate the specific crime of rape<sup>51</sup> as revenge.<sup>52</sup> Taken together, these laws confined rape to a violent attack on a chaste woman, ideally a virgin, by a stranger whom she resists, resulting in her severe injury.<sup>53</sup> While other forms of sexual coercion may have been considered less than ideal, they were certainly not criminal.

The intensely chauvinistic parameters of rape law were not lost on feminists, and in the 1970s and 1980s, “second-wave”<sup>54</sup> feminist activists engaged in concerted efforts to reform rape law and educate the

requirement, where there were 18 convictions out of 1085 rape arrests (citing Lesley Oelsner, *Law of Rape: 'Because Ladies Lie,'* N.Y. TIMES, May 14, 1972, at E5)).

50. See SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 369 (1975) (observing “the cherished male assumption that female persons tend to lie”); Mary I. Coombs, *Telling the Victim's Story*, 2 TEX. J. WOMEN & L. 277, 282 (1993) (noting pervasive myth of lying complainant).

51. See, e.g., ANDREW E. TASLITZ, *RAPE AND THE CULTURE OF THE COURTROOM* 6 (1999) [hereinafter *CULTURE OF THE COURTROOM*] (stating that robbery “victim’s identification of the defendant alone results in conviction” while rape “victim’s truthfulness is almost always challenged”); John Dwight Ingram, *Date Rape: It's Time for "No" to Really Mean "No,"* 21 AM. J. CRIM. L. 3, 7 (1993) (observing that robbery victims’ credibility is not tested like rape victims’).

52. See Ingram, *supra* note 51, at 7 (observing “a widespread belief that the female gender is rife with spiteful shrews who often falsely accuse men of sexual attacks”) (internal quotations omitted). The existence of the “shrew myth” helps enable society to discount rapes as rare occurrences. Duncan Kennedy observes that “[r]arity is important” because “unless cases are rare it is hard to sustain the notion that they are ‘abnormal’ and pathological” and “it is hard to sustain the view that they play no significant structural role in the relations between ‘normal’ men and women.” Duncan Kennedy, *Sexual Abuse, Sexy Dressing and the Eroticization of Domination*, 26 NEW ENG. L. REV. 1309, 1322–23 (1992) [hereinafter *Sexy Dressing*].

53. Another “old” rape law that reflected and entrenched sexist norms was the marital exemption—the formal legal bar to the prosecution of spousal rape. See, e.g., *Wales v. Miner*, 89 Ind. 118, 125 (Ind. 1883) (“As against the rights of the husband, the wife is incapable of consenting to her seduction.”). Feminists have not been so successful at eradicating this antiquated law. See Hasday, *supra* note 22, at 1375 (reporting that most state legislatures have preserved the exemption “in some substantial manifestation” and “courts have not invalidated state laws protecting marital rape”).

54. Second-wave feminism describes a set of feminist ideas resulting in law reform (i.e. rape law, sexual harassment law, domestic violence law, abortion law) at a particular point in time, specifically the early 1960s through late 1980s. See Jane E. Larson, *Introduction: Third Wave—Can Feminists Use The Law To Effect Social Change In The 1990s?*, 87 NW. U. L. REV. 1252, 1252 n.1 (1993) (“The term ‘Second Wave’ is used to refer to the second broad-based feminist movement in the history of the United States, beginning in the late 1960s.”). Thus, both the “liberal feminism” and “dominance feminism” views, see *infra* note 129 and accompanying text, can be considered second-wave feminist views.

public about sexual assault stereotypes.<sup>55</sup> Not all feminist scholars intervening in the rape issue started from the same theoretical or practical base. Notable commentators, such as Susan Brownmiller, Catharine MacKinnon, and Susan Estrich, espoused different perspectives on the sexual violence issue. Brownmiller emphasized the violent nature of rape in the hopes of convincing society that coerced sex was a “real” crime to be taken seriously.<sup>56</sup> This led to the much-publicized feminist maxim that “rape is a crime of violence.”<sup>57</sup> In this view, rape is not a product of men’s natural sexual desires but a manifestation of a criminal’s deviant desire for power and control over the victim. This argument analyzes the rape issue from a liberal standpoint,<sup>58</sup> perceiving the problem as the state’s non-recognition of women’s right to be free from coerced sex.<sup>59</sup> Catharine MacKinnon’s “dominance feminism” conceived sexual assault as a product of the ubiquitous operation of patriarchy and male domination in gender relationships, particularly sexual ones.<sup>60</sup> Under MacKinnon’s theory,

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55. See CASSIA SPOHN & JULIE HORNEY, *RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT* 20 (1992) (explaining that beginning in the early 1970s, rape reform “quickly became a key item on the feminist agenda” and describing women’s groups’ lobbying efforts); see also *infra* note 65.

56. BROWNMILLER, *supra* note 50, at 377 (asserting that rape should be “placed where it truly belongs, within the context of modern criminal violence and not within the purview of ancient masculine codes”).

57. Although Brownmiller, like MacKinnon, was particularly concerned with how male power structures sexuality, for example, BROWNMILLER, *supra* note 50, at 15 (maintaining that rape has played the “critical function” of a “conscious process of intimidation by which *all men* keep *all women* in a state of fear”), her basic message has been understood as establishing that rape is a crime of violence. See Ristroph, *supra* note 24, at 139 n.3 (“Several commentators trace the claim that rape is violence and not sex to Susan Brownmiller.”); see also Samuel H. Pillsbury, *Crimes Against the Heart: Recognizing the Wrongs of Forced Sex*, 35 LOY. L.A. L. REV. 845, 909 (2002) (“Over the last generation, many reformers have argued that rapists are motivated by anger and a need to assert power, rather than sex.”).

58. See *supra* note 2 (defining “liberalism”).

59. See Morrison Torrey, *Feminist Legal Scholarship on Rape: A Maturing Look at One Form of Violence Against Women*, 2 WM. & MARY J. WOMEN & L. 35, 38 (1995) (observing that “liberal feminism” shaped rape reform in the “classic liberal ideology of privacy, autonomy, and individual choice”). One of the criticisms of the “rape is violence” approach is that it led to the law’s singular focus on particularly violent offenders rather than social gender norms that predicate sexual coercion. See *Rape, Violence, and Women’s Autonomy*, *supra* note 22, at 362 (“If rape is violence as the law defines it (weapons, bruises, blood), then what most men do when they disregard women’s sexual autonomy is not rape.”); Christina E. Wells & Erin Elliott Motley, *Reinforcing the Myth of the Crazy Rapist: A Feminist Critique of Recent Rape Legislation*, 81 B.U. L. REV. 127, 154 (2001).

60. See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 49

curbing rape was not just a matter of using state power to enforce women's right to be free from sexual violence but required a radical overhaul of the very structure of the state and society.<sup>61</sup> Susan Estrich adopted a theory that lies philosophically between liberal and dominance feminism. She did not espouse a global view of patriarchy as did MacKinnon, but neither did she simply call for formal equality of rape and other crimes.<sup>62</sup> Estrich's project consisted of exposing various "myths" like that of the chaste lady, sex object, and vindictive shrew that underlay the operation of rape law.<sup>63</sup> In Estrich's view, eliminating the bias produced by rape myths required more than just formal equality between rape and other crimes—it required specific protective measures.<sup>64</sup>

Although not all feminists viewed rape the same way and proposed solutions ranging from modest to radical, they converged on the necessity to eliminate the legal barriers that formally differentiated rape from other crimes. Spurred on by feminists, liberals, and prominent female politicians, courts and legislatures began to systematically eliminate resistance and corroboration requirements.<sup>65</sup> Some courts noted explicitly how the resistance requirement reflected an inaccurate view of the actual psychology of rape victims and created risks of

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(1987) [hereinafter FEMINISM UNMODIFIED] ("[T]he organized expropriation of the sexuality of some for the use of others defines the sex, woman."). See generally *Toward a Feminist Jurisprudence*, *supra* note 3. In this view, rape is not just an effect of patriarchy but the principle expression of male domination of women. *Id.*

61. See *Rape, Violence, and Women's Autonomy*, *supra* note 22, at 370 ("MacKinnon demonstrates that the pervasive effect of male dominance makes it impossible to say definitively that some of women's sexual relations with men (called sex) are 'free' and others (called rape) are 'coerced.'").

62. See generally Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986) [hereinafter *Rape*].

63. See *id.* at 1090; Susan Estrich, *Palm Beach Stories*, 11 LAW & PHIL. 5, 11 (1992); see also Morrison Torrey, *When Will We be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1025 (1991) (cataloging "classic rape myths").

64. See *Rape*, *supra* note 62, at 1181–84.

65. See Leigh Bienen, *Rape Reform Legislation in the United States: A Look at Some Practical Effects*, 8 VICTIMOLOGY 139, 139 (1983) ("Changes in the legal definition of the crime of rape, with their accompanying statutes directed at limiting the admissibility of evidence regarding the prior sexual history of [the] victim at trial, were enacted in response to vigorous, nationally co-ordinated lobbying by feminists."). See generally Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953, 962–68 (1998) [hereinafter *Reviving Resistance*] (discussing evolution and eventual abolition of resistance requirement, including reformers' roles); *Prompt Complaint*, *supra* note 34, at 964–75 (discussing movement to abolish corroboration).

serious injury.<sup>66</sup> Other states abandoned the doctrines by statute or court ruling.<sup>67</sup> Eradication of the formal obstacles helped produce significant legal and social changes regarding rape.<sup>68</sup>

As a legal matter, eliminating the prosecution obstacles put stranger rapes involving force on the same footing as other violent crimes.<sup>69</sup> The current law rarely permits, and modern juries rarely support, acquittal of a violent stranger rapist because there is no physical resistance or corroboration.<sup>70</sup> Consent is seldom used to excuse a stranger rape, the preferred defense being mistaken identity.<sup>71</sup> As a social and political matter, feminist efforts to recast stranger rape as a crime rather than a manifestation of legitimate (white) male privilege likely played a part in the profound shift of public opinion on sexual assault issues.<sup>72</sup> Today, stranger rapes are considered paradigmatic crimes perpetrated by monstrous criminals.<sup>73</sup> Politicians and the media championed a string of legal innovations to incapacitate, separate, and express society's moral outrage at sex offenders.<sup>74</sup> Early feminist and legal efforts thus

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66. See, e.g., *People v. Barnes*, 721 P.2d 110, 118–19 (Cal. 1986).

67. See, e.g., *Arnold v. United States*, 358 A.2d 335, 344 (D.C. Cir. 1976) (eliminating corroboration requirement); *People v. Frye*, 255 P.2d 105, 107 (Cal. Dist. Ct. App. 1953) (same).

68. See *Rape*, *supra* note 62, at 1092, 1179 (observing that after abolition of formal requirements, victims of stranger rapes were treated as “real” victims).

69. See Beverly J. Ross, *Does Diversity in Legal Scholarship Make a Difference?: A Look at the Law of Rape*, 100 DICK. L. REV. 795, 854 (1996) (noting that rape reforms primarily benefited “victims of stranger rapes”).

70. See *supra* note 68 and *infra* note 71.

71. See Bryden & Lengnick, *supra* note 15, at 1272 n.487 (asserting that the usual defense to stranger rape is misidentification).

72. See *infra* note 334 (discussing link between feminism and victims' rights movement).

73. See Aviva Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials*, 49 HASTINGS L.J. 663, 679 (1998) [hereinafter *No Bad Men*] (“[S]tranger rapes are perceived to be prototypical . . .”); Pillsbury, *supra* note 57, at 865 (“The traditional paradigm of rape remains that of the stranger attack, of a man lurking in the dark . . . who grabs an unsuspecting female, takes her to a remote location, and violently attacks her.”).

74. One undeniable face of rape reform is the series of laws subjecting sex offenders to registration requirements, residency restrictions, and civil commitment. All U.S. states have enacted sex offender registration statutes. See *People v. Ross*, 646 N.Y.S.2d 249, 250 n.1 (1996) (listing registration statutes). Many have instituted residency and work restrictions. See ALA. CODE § 15-20-26 (2000) (prohibiting sex offenders from living or working within 2000 feet of school or childcare facility); GA. CODE ANN. § 42-1-15 (2009) (prohibiting sex offenders from residing within 1000 feet of childcare facility, school, or area where minors congregate); OKLA. STAT. tit. 57, § 590 (2003) (prohibiting sex offenders from residing within 2000 feet of educational institutions). One commentator notes, “In the Miami area, such laws ban [sex offenders] from living within 2,500 feet of schools, playgrounds and other places where children might gather. The tiny bridge encampment



“succeeded” at bringing the strong arm of the government down on “true” rapists.

### B. *Realist Rape Reforms Address De Facto Sexism in Rape Trials*

While eliminating formal legal barriers to prosecution and publicizing the violent nature of rape did much to shape society’s condemnation of paradigmatic rape, it did less to advance the cause of “nonparadigmatic” victims—victims of rapes without physical injuries, victims acquainted with defendants, and victims in sexual professions.<sup>75</sup> This is because such complainants face largely de facto obstacles to prosecution created by lingering sexist norms.<sup>76</sup> Although in modern times even an unchaste woman or vindictive shrew will be believed if raped by a stranger or terribly injured, rape myths still profoundly influence nonparadigmatic rape trials.<sup>77</sup> People continue to believe that women who dress and behave in sexual ways deserve to be raped.<sup>78</sup> Today, respected media commentators show no hesitation in slinging bafflingly sexist attacks at high profile rape complainants: Kobe Bryant’s accuser was no more than

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[under a causeway], home to between 15 and 30 men on any given night, is one of the few places in the booming metropolis the paroled offenders can legally live.” Jim Loney, *Nowhere to Go, Miami Sex Offenders Live Under Bridge*, REUTERS, Feb. 5, 2008, <http://www.reuters.com/article/domesticNews/idUSN0515234320080205>. The Supreme Court upheld indefinite civil commitment of sexually violent offenders in *Kansas v. Hendricks*, 521 U.S. 346, 350 (1997).

75. Even reform laws do not completely address these issues. See, e.g., *United States v. Harris*, 41 M.J. 890, 894 (A. Ct. Crim. App. 1995) (holding evidence of prior prostitution relevant); *Casey v. State*, 215 S.W.3d 870, 880 (Tex. Crim. App. 2007) (noting that trial court allowed defense to “focus[] upon [complainant’s] purportedly low moral character as a stripper”); see *infra* notes 364–68 and accompanying text.

76. See FEMINISM UNMODIFIED, *supra* note 60, at 5 (noting that rape is “as allowed de facto as [it is] prohibited de jure”); VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 204 (1986) (maintaining that jurors incorporate public’s rape myths).

77. Andrew E. Taslitz, *Forgetting Freud: The Courts’ Fear of the Subconscious in Date Rape (and Other) Cases*, 16 B.U. PUB. INT. L.J. 145, 155 (2007) [hereinafter *Forgetting Freud*] (“[E]ven the most well-meaning, ‘feminist’ jurors may find that they have reasonable doubt about the . . . rape case . . . if the tale told fits cultural stories about ‘sluttish women.’”).

78. See KATHLEEN A. BOGLE, *HOOKING UP: SEX, DATING, AND RELATIONSHIPS ON CAMPUS* 109 (2008) (performing a qualitative study of sexual behavior on college campuses and finding that men labeled seductively-dressed women “easy” or “stupid”); Lynn Hecht Schafran, *Writing and Reading About Rape: A Primer*, 66 ST. JOHN’S L. REV. 979, 995 n.58 (1993) (citing survey in which thirty-eight percent of men and thirty-seven percent of women indicated a seductively dressed woman is partly responsible for rape); Mark A. Whately, *Victim Characteristics Influencing Attributions of Responsibility to Rape Victims: A Meta-Analysis*, 1 AGGRESSION & VIOLENT BEHAV. 81, 91 (1996) (discussing studies in which respondents assigned more blame to provocatively dressed victims).

a “mountain trash slut,”<sup>79</sup> and the Duke complainant just a lying “crypto-hooker.”<sup>80</sup> Chastity ideals persist even in our highly sexualized *Girls*

79. Conservative radio commentator Michael Savage informed his approximately six million listeners that Kobe Bryant’s accuser was a “19-year-old mountain trash slut,” and forbade his callers to refer to her as anything other than “the Rocky Mountain Trash.” Andrew Billen, *The Savage Voice of an Angry America*, TIMES (London), Sept. 2, 2003, at 14, available at [http://www.timesonline.co.uk/tol/life\\_and\\_style/article1154449.ece](http://www.timesonline.co.uk/tol/life_and_style/article1154449.ece). Kobe Bryant, a famous basketball player for the Los Angeles Lakers, was accused of rape by the front desk clerk at his Colorado hotel. Bryant at first denied the sexual encounter, but admitted to consensual sex when police requested blood and semen samples. Kirk Johnson, *As Accuser Balks, Prosecutors Drop Bryant Rape Case*, N. Y. TIMES, Sept. 2, 2004, at A18. During the pretrial phase of proceedings, there were a number of leaks of confidential material, including Bryant’s police interview and information about the complainant, including her identity. The latter precipitated death threats and scathing internet indictments of her character. See Lauren Johnston, *Kobe Accuser Reveals Identity*, CBSNEWS, Oct. 15, 2004, <http://www.cbsnews.com/stories/2004/10/05/national/main647384.shtml>. Perhaps most damaging to the complainant, the trial judge provided to the press the transcript of a closed hearing in which defense experts speculated that the complainant had multiple sex partners during the week of the encounter and had sex with another partner after the alleged rape but before going to the police. Associated Press, *Kobe Judge Releases Sealed Transcripts*, FOXNEWS.COM, Aug. 2, 2004, <http://origin.foxnews.com/story/0,2933,127851,00.html>. At that hearing, the judge ruled that he would admit into evidence the complainant’s prior sexual history. *Id.* The defense also sought to introduce evidence of the complainant’s mental health history, including two prior suicide attempts. *Id.* The complainant eventually asked prosecutors to terminate the prosecution as she pursued a civil case. The prosecutor remarked, “The victim has informed us, after much of her own labored deliberation that she does not want to proceed with this trial. For this reason, and this reason only, the case is being dismissed.” Johnson, *supra*. After the dismissal, Bryant remarked, “I now understand how [the complainant] feels that she did not consent to this encounter.” *Id.* The parties reached a confidential settlement less than a year later. Associated Press, *Suit Settlement Ends Bryant Saga*, MSNBC, Mar. 3, 2005, <http://nbcsports.msnbc.com/id/7019659/>.

80. *The Situation with Tucker Carlson* (MSNBC television broadcast Apr. 11, 2006), <http://www.msnbc.msn.com/id/12285620/> (statement of Tucker Carlson). The “Duke Lacrosse Case” was a widely publicized case in which one of two black women, who had been hired to strip at a party for the largely white, elite university’s lacrosse team, accused three undergraduate lacrosse players of rape. See, Susan Hanley Kosse, *Race, Riches & Reporters—Do Race and Class Impact Media Rape Narratives? An Analysis of the Duke Lacrosse Case*, 31 S. ILL. U. L.J. 243, 268–72 (2007). To call the case “ugly” would be an understatement, as media vilified both the players as white privileged jock-thugs and the complainant as a low-class “ho.” *Id.* The case illuminated the long-simmering racial and political tensions of the area, as some area citizens expressed horror at reports of the team’s use of racial slurs and one team member’s email stating of the African American women, “i [sic] plan on killing the bitches as soon as the [sic] walk in and proceeding to cut their skin off while cumming in my duke issue spandex,” while others considered District Attorney Mike Nifong’s pursuit of the case as pandering to his African American voter base. Peter J. Boyer, *Big Men on Campus*, THE NEW YORKER, Sept. 4, 2006, [http://www.newyorker.com/archive/2006/09/04/060904fa\\_fact?currentPage=all](http://www.newyorker.com/archive/2006/09/04/060904fa_fact?currentPage=all). During the course of the investigation, Nifong recused himself from the case amidst charges of ethics violations. The prosecutor’s office eventually dropped the charges, citing the complainant’s lack of consistency in recounting the event, botched identification procedures, and the fact that the semen found on complainant did not match any of the lacrosse players. Lara Setrakian, *Charges Dropped in Duke Lacrosse Case*, ABC NEWS, Apr. 11, 2007, <http://abcnews.go.com/US/LegalCenter/>

*Gone Wild* society.<sup>81</sup> Co-eds still widely justify their open sexual communication or activity by overconsumption of alcohol that induced them to act in a manner inconsistent with gender paradigms.<sup>82</sup>

In addition, the vindictive shrew myth continues to pervade nonparadigmatic rape trials, leading jurors to require evidence of

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story?id=3028515&page=1. Supporters of the team saw the dismissal as not only proof that the three accused were innocent, but also as a total exoneration of team behavior and practices and confirmation that the accuser was no more than a lying loose woman. See Liza Porteus, *North Carolina Attorney General: Duke Lacrosse Players Victims of 'Tragic Rush to Accuse,'* FOXNEWS.COM, April 12, 2007, <http://www.foxnews.com/story/0,2933,265481,00.html> (quoting former coach as stating that he was proud of team and that they deserved an apology). In an unusual development, Nifong was found guilty of ethics violations and disbarred. Staff, *Nifong Faces Contempt Charge*, THE NEWS & OBSERVER.COM, Jul 26, 2007, [http://www.newsobserver.com/news/crime\\_safety/story/68441.html](http://www.newsobserver.com/news/crime_safety/story/68441.html). The accused men, who have since graduated from Duke University, have filed numerous state and federal claims against the University, city, police, and now-bankrupt Nifong. Associated Press, *Nifong Reports to Jail; Exonerated Duke Lacrosse Players Seek \$30 Million Settlement*, FOXNEWS.COM, Sept. 7, 2007, <http://www.foxnews.com/story/0,2933,296017,00.html>.

81. See *supra* text accompanying note 40. The *Girls Gone Wild* phenomenon is not one of sexual agency, but rather one of women reinforcing the sex object caricature in exchange for the fleeting benefits of momentary fame, attention, and popularity. One seventeen-year-old who wanted to spend her first moments as an adult disrobing for *Girls Gone Wild* explained, "You want people to say, 'Hey, I saw you.' Everybody wants to be famous in some way. Getting famous will get me anything I want. If I walk into somebody's house and said, 'Give me this,' I could have it." Hoffman, *supra* note 40, at 40. A twenty-one-year-old "girl gone wild" observed, "Anybody enjoys the attention. T-shirts, hats—we got all the accessories. If you do it, you do it. You can't complain later. It's almost like your 15 minutes of fame." *Id.*

82. The popular claim, "I was so drunk—I acted totally unlike myself," is scrutinized on many college student web forums. "The Student Room" proclaims itself "the UK's largest and fastest growing student community." TheStudentRoom.co.uk, About Us, [http://www.thestudentroom.co.uk/wiki/About\\_TSR](http://www.thestudentroom.co.uk/wiki/About_TSR) (last visited Sept. 18, 2009). One Student Room poster poses the question, "Is 'I was so drunk' an acceptable excuse for slutty behavior?" Posting of "Toomanymanz" to <http://www.thestudentroom.co.uk/showthread.php?t=946635> (June 17, 2009, 21:56) (last visited Sept. 18, 2009). Of course, the very framing of the question suggests the position that sexual behavior is condemnable. In any case, the answers range between indicating "yes" and stating that drunkenness should not be an excuse for "bad" behavior. One poster states, "If you're slutty when drunk it means that deep down you're a slut, no matter how nice you are sober." Posting of "Jelephant" to <http://www.thestudentroom.co.uk/showthread.php?t=946635> (June 17, 2009, 22:09). However, quite a few posters also maintain that women should not have to excuse sexual behavior. *Id.* (other postings on the same page of the website). Another website, "College Candy," hosts a similar discussion entitled "Being Drunk Makes Everything OK." College Candy, *Being Drunk Makes Everything Okay*, <http://collegecandy.com/2009/06/13/being-drunk-makes-everything-ok/> (last visited Sept. 18, 2009). One poster, "Courtney," opines, "People who use alcohol as an excuse are just plain stupid. Grow up. The alcohol doesn't make you do anything, it is your terrible morals and slutty ways which make you a vile piece of filth." Posting of "Courtney" to <http://collegecandy.com/2009/06/13/being-drunk-makes-everything-ok/> (June 13, 2009).

corroboration despite elimination of the formal requirement.<sup>83</sup> Some contend that the belief that women lie about rape is no more than a “Bayesian” conclusion based on empirical evidence, and is not a product of sexism.<sup>84</sup> Nonetheless, the statistics on false rape accusation widely vary<sup>85</sup> and “[a]s a scientific matter, the frequency of false rape complaints to police or other legal authorities remains unknown.”<sup>86</sup> Continued adherence to the shrew myth is bolstered by the media publicizing cases of false reporting, in which accused date rapists play the role of folk heroes—innocent boys tragically charged by vindictive women.<sup>87</sup> Today, typing “false rape accusations” into Google will

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83. CULTURE OF THE COURTROOM, *supra* note 51, at 7 (maintaining that despite elimination of requirement, juries still demand corroboration); *see also* Klein, *supra* note 35, at 1049 (noting that jurors want more than victim’s word).

84. *See, e.g.*, Edward Greer, *The Truth Behind Legal Dominance Feminism’s “Two Percent False Rape Claim” Figure*, 33 LOY. L.A. L. REV. 947, 948–49 (2000) (arguing that rape reform agenda might be reasonable if false reporting were rare, but because it is frequent, feminist rape efforts “are truly destructive”). Bayesian theory posits that conditional probabilities can be calculated mathematically. *See* James Joyce, *Bayes’ Theorem*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Fall 2003), <http://plato.stanford.edu/entries/bayes-theorem/#3>. I use “Bayesian” as a description of the “logic” that, for example, fear of African Americans is a necessary and non-racist consequence of probabilistic reasoning about blacks and crime. Jody D. Armour, *Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes*, 46 STAN. L. REV. 781, 790–91 (1994).

85. Reports range from finding false rape claims to be surprisingly rare to astoundingly frequent. *Compare* BROWNMILLER, *supra* note 50, at 387 (noting that only two percent of rape claims are false), *with* Eugene J. Kanin, *False Rape Allegations*, 23 ARCHIVES SEXUAL BEHAV. 81, 84 (1994) (reporting study of small town in which forty-one percent of “disposed” rape cases involved victim recantation). The FBI reported in 1997 that eight percent of rapes were “unfounded.” FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS FOR THE UNITED STATES 26 (1997), *available at* [http://www.fbi.gov/ucr/Cius\\_97/97crime/97crime.pdf](http://www.fbi.gov/ucr/Cius_97/97crime/97crime.pdf) [hereinafter FBI CRIME REPORT]. 1997 was apparently the last time the FBI reported statistics for “unfounded” rapes. *See* Fed. Bureau of Investigation, Uniform Crime Reports, <http://www.fbi.gov/ucr/ucr.htm> (last visited Sept. 18, 2009). “Unfounded” does not mean “false,” but only that police decided the case was not pursuable, a decision that itself could be influenced by gender stereotypes. *See Prompt Complaint*, *supra* note 34, at 985–86 (“[P]olice may think a rape claim is false or unfounded if the victim had a prior relationship with the attacker, used drugs or alcohol at the time of the attack, lacked visible signs of injury, delayed notifying police, did not have a rape exam, blames herself for the rape, or did not immediately conceive of the assault as a rape.”).

86. *Prompt Complaint*, *supra* note 34, at 986. Tellingly, there are few, if any, reports comparing rape recantation rates with recantation rates in similar non-rape cases. *See, e.g.*, FBI CRIME REPORT, *supra* note 85, at 26 (reporting only “unfounded” rate for rape cases).

87. During Kobe Bryant’s trial, the courthouse parking lot boasted “cars festooned with balloons of Lakers’ purple and gold. Fans wore Kobe jerseys and cheered his name as he stepped out of a sport utility vehicle to enter the courthouse.” Tim Dahlberg, *Kobe Leads in Court of Public Opinion*, NBCSPORTS, Aug. 7, 2003, <http://nbcsports.msnbc.com/id/3074434/print/1/displaymode/1098/>. Even scholars indulge in such characterizations. *See, e.g.*, Dan Subotnik, *Copulemus in Pace*:

produce far more articles with headlines screaming that false reporting is an “alarming national trend” than articles targeted toward dispelling the myth.<sup>88</sup>

Feminists recognized that nonparadigmatic rapes were underreported<sup>89</sup> and underpunished<sup>90</sup> because the date rape trial had become known as a locus of victim trauma and embarrassment,<sup>91</sup> more

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*A Meditation on Rape, Affirmative Consent to Sex, and Sexual Autonomy*, 41 AKRON L. REV. 847, 848 (2008) (“I never want to see a man’s life devastated through a bad rap from some vindictive woman.”). Consider one incident at the College of William & Mary in 2006, where a female student reported she was raped during a sorority party. Richael Faithful, *Assault Gets Even Uglier*, CAMPUS PROGRESS, Oct. 10, 2006, <http://www.campusprogress.org/features/1210/assault-gets-even-uglier/index.php>. The prosecutor declined to pursue the case for insufficient evidence, although the school found the male guilty of sexual misconduct in disciplinary proceedings. *Id.* After his expulsion, anonymous flyers went up all over campus addressed to the victim stating, “I know what you did last semester” and urging her to tell the “truth.” *Id.* In response to student feminists’ call to wear red in support of sexual abuse survivors, a student publication urged students to wear blue in support of “truth.” *Id.* The student publication sided with the man, posted personal details about the woman online, including her home address, and put up flyers announcing “Rape Case Blown Open.” *Id.*; see also Andrew Petkofsky, *At W&M, Some Say Too Much Detail*, RICHMOND TIMES-DISPATCH, Feb. 19, 2006, at B1; Letters to the Editor, THE FLAT HAT ONLINE (February 24, 2006), <http://flathat.wm.edu/2006-02-24/story.php?type=2&aid=15> (last visited Sept. 2, 2009) (on file with author).

88. The first several hits on a Google search for the keywords, “false rape accusation” performed in September 2009, included “FOXNews.com - False Rape Accusations May Be More Common Than Thought”; “GlennSacks.com [-] Research Shows False Accusations of Rape Common”; “Ananda Answers - An alarming national trend – False Rape Allegations”; and “Salon Newsreal [-] Who says women never lie about rape?” No websites on the first page involved establishing false rape reporting as a myth. One website went as far as saying, “False allegations [of rape] are the feminists’ ‘Silver Bullet,’ making feminism, an abomination before God, responsible directly for most of our excess prison population.” The Christian Party, *One Third of the World’s Prison Population*, <http://www.christianparty.net/prison.htm> (last visited Sept. 18, 2009).

89. See SUSAN ESTRICH, *REAL RAPE* 10–15 (1987) [hereinafter *REAL RAPE*]; SHANNON M. CATALANO, U.S. DEP’T OF JUSTICE, *CRIMINAL VICTIMIZATION*, 2004, 10 (2005), available at <http://www.ojp.usdoj.gov/bjs/abstract/cv04.htm> (stating only thirty-six percent of sexual assaults are reported to police); Lita Furby, Mark R. Weinrott & Lyn Blackshaw, *Sex Offender Recidivism: A Review*, 105 PSYCHOL. BULL. 3, 27 (1989) (stating fewer than ten percent are reported); Paul Marcus & Tara L. McMahon, *Limiting Disclosure of Rape Victims’ Identities*, 64 S. CAL L. REV. 1020, 1049–50 (1991) (“[R]ape remains the most underreported crime within the criminal justice system.”); Tracy Wilkinson, *Violence Against Women Pervasive, Panel Told*, L.A. TIMES, Oct. 17, 1990, at B4 (discussing Los Angeles study finding that only three percent report rape or attempted rape).

90. See, e.g., GARY LAFREE, *RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT* 61 (1989) (finding that 11.8% of rape reports resulted in conviction); Deborah Fineblum Raub, *Sure, People are Aware of Rape, Especially Now. But . . .*, ROCHESTER DEMOCRAT & CHRON., Apr. 15, 1999, at 1C (citing 1993 finding that two percent of reported rapes result in conviction).

91. See *Rape*, *supra* note 62, at 1094 (arguing that rape cases put victim on trial); see also

concerned with reinforcing myths than determining consent or force.<sup>92</sup> Moreover, prevalent stereotypes affected judges' management of cases and caused juries to unfairly acquit either because they mistakenly concluded there was consent or believed the victim deserved it.<sup>93</sup> As a consequence, feminists advocated changes in the rape law that would reflect the reality of stereotyping and subtle sexism, despite the apparent achievement of formal equality.<sup>94</sup>

Reformers pushed for transformation in two main areas of the law: evidentiary prohibitions (shield laws) and actus reus standards. These laws are well covered in the legal literature, so an extended discussion is not necessary here.<sup>95</sup> Generally, rape shield laws create specific rules prohibiting the defense from presenting evidence of complainants' past sexual conduct or "precipitation" evidence, like dress,<sup>96</sup> but most laws

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SEDELLE KATZ & MARY ANN MAZUR, UNDERSTANDING THE RAPE VICTIM: A SYNTHESIS OF RESEARCH FINDINGS 198–99 (1979) (discussing trauma of trial for rape victim). *See generally* VERNON R. WIEHE & ANN L. RICHARDS, INTIMATE BETRAYAL: UNDERSTANDING AND RESPONDING TO THE TRAUMA OF ACQUAINTANCE RAPE 32 (1995).

92. *See, e.g.*, 124 CONG. REC. 34,913 (1978) (statement of Rep. Holtzman) ("Since rape trials become inquisitions into the victim's morality, not trials of the defendant's innocence or guilt, it is not surprising that it is the least reported crime."); Megan Reidy, *The Impact of Media Coverage on Rape Shield Laws in High-Profile Cases: Is the Victim Receiving a "Fair Trial"?*, 54 CATH. U. L. REV. 297, 299 (2004) (asserting that "defense attorneys, in an effort to exonerate their clients, challenge rape victims' testimony and credibility through an attack on the victims' sexuality").

93. *See* Kim Lane Scheppele, *The Re-Vision of Rape Law*, 54 U. CHI. L. REV. 1095, 1104–13 (1987) (reviewing SUSAN ESTRICH, *REAL RAPE: HOW THE LEGAL SYSTEM VICTIMIZES WOMEN WHO SAY NO* (1987)) (discussing judges' construction of facts in light of rape myths); *see also* *Rape*, *supra* note 62, at 1177–79 (discussing juries' focus on acquaintance of victim to defendant, corroboration, and victim precipitation).

94. *See* Klein, *supra* note 35, at 985 (distinguishing between reforms eliminating "barriers to conviction" and those addressing "jury prejudice"); *Special Issues*, *supra* note 27, at 1599 ("[R]ape shield counteracts unfair prejudice arising from . . . sexist conclusions based on the woman's activities, dress, or sexual history.").

95. *See generally* Chastity Requirement, *supra* note 22; Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 794–98 (1986); John Lausch, *Stephens v. Miller: The Need to Shield Rape Victims, Defend Accused Offenders, and Define a Workable Constitutional Standard*, 90 NW. U. L. REV. 346, 348 (1995) (discussing rape shield laws); Frank Tuerkheimer, *A Reassessment and Redefinition of Rape Shield Laws*, 50 OHIO ST. L.J. 1245, 1246 (1989). *See also, e.g.*, UNWANTED SEX, *supra* note 6; David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 409 (2000) (affirmative consent laws); Joshua Dressler, *Where We Have Been, and Where We Might Be Going: Some Cautionary Reflections on Rape Law Reform*, 46 CLEV. ST. L. REV. 409, 427 (1998); Kenneth W. Simons, *The Conceptual Structure of Consent in Criminal Law*, 9 BUFF. CRIM. L. REV. 577, 589 (2006).

96. *See, e.g.*, FED. R. EVID. 412(a) (excluding evidence that victim "engaged in other sexual behavior" and evidence of "victim's sexual predisposition"); MASS. GEN. LAWS ch. 233, § 21B (1983) (prohibiting "[e]vidence of the reputation of a victim's sexual conduct" and "[e]vidence of

contain significant exceptions.<sup>97</sup> Reformers argued that shield laws would not only lessen victim discomfort,<sup>98</sup> but also prevent juror sexism from influencing verdicts.<sup>99</sup> They contended that without shield laws, jurors would acquit because of distaste for the victim's lifestyle, the belief that her behavior entitled the defendant to sex,<sup>100</sup> or a mistaken perception that past consent implies present consent.<sup>101</sup>

The second major reform involved reconstituting actus reus standards for the crime of rape.<sup>102</sup> Reformers courted significant controversy by

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specific instances of a victim's sexual conduct"). See also, e.g., CAL. EVID. CODE § 1103(c)(1) (West Supp. 2007); FLA. STAT. ANN. § 794.022 (West 2000); KY. R. EVID. 412 (West 2001); ME. R. EVID. 412 (West 2000); MD. CODE ANN., ART. 27, § 461A (LexisNexis 2000) (current version at MD. CODE ANN., CRIM. LAW § 3-319 (West 2002); MASS. GEN. LAWS ANN. ch. 233, § 21B (West 2000); MO. ANN. STAT. § 491.015 (West 1996); N.Y. CRIM. PROC. LAW § 60.42 (McKinney 2004); N.C. GEN. STAT. ANN. § 8C-4 (1999); OKLA. STAT. ANN. tit. 12, § 2412 (West Supp. 2000); VT. STAT. ANN. tit. 13, § 3255 (1998); VA. CODE ANN. § 18-2-67.7 (1996) (rape shield statutes). See generally *Chastity Requirement*, *supra* note 22, at 81-86 (describing and categorizing rape shield statutes).

97. For example, most shield laws permit the introduction of past sexual conduct evidence relevant to identity. See, e.g., IND. CODE § 35-37-4-4 (1981) (allowing admission of sexual conduct evidence showing "some person other than the defendant committed the act"). Many also incorporate catch-all provisions that allow the introduction of otherwise prohibited evidence whenever a judge deems it highly corroborative of consent. See, e.g., CONN. GEN. STAT. ANN. § 54-86F (West 1994); D.C. CODE § 22-3022 (2001); HAW. R. EVID. 412 (LexisNexis 2000); 725 ILL. COMP. STAT. ANN. 5/115-7 (West Supp. 2000); IOWA CT. R. 412 (West 2001); MISS. R. EVID. 412 (West 2000); N.Y. CRIM. PROC. LAW § 60.42 (McKinney 1992); N.D. R. EVID. 412 (West 2001); OR. REV. STAT. ANN. § 40.210 (Supp. 1996-1998); TENN. R. EVID. 412 (West 2000); TEX. R. EVID. 412 (West 2001); UTAH R. EVID. 412 (Lexis 2000).

98. See *Special Issues*, *supra* note 27, at 1599 (noting that rape shield sought to "spar[e] women humiliation and trauma").

99. See Adrian Vermeule, *Legislative History and the Limits of Judicial Competence: The Untold Story of Holy Trinity Church*, 50 STAN. L. REV. 1833, 1889 n.191 (1998) (maintaining that shield laws "promote accurate decisionmaking").

100. See Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 Harv. L. Rev. 563, 589 (1997) [hereinafter *Motivational Evidence*] ("[W]hen the law says rape, many juries don't care."); *Special Issues*, *supra* note 27, at 1599 (contending that rape shield counters "the rape myth that the victim 'asked' to be raped").

101. See Galvin, *supra* note 95, at 799 ("[T]he mere fact that the complainant has previously engaged in consensual sexual activity affords no basis for inferring consent on a later occasion."). But see Aya Gruber, *Pink Elephants in the Rape Trial: The Problem of Tort-Type Defenses in the Criminal Law of Rape*, 4 WM. & MARY J. WOMEN & L. 203, 234 (1997) [hereinafter *Pink Elephants*] (arguing that it should be up to juries to "hear the evidence and arguments and decide what weight to give the evidence and which inferences to draw").

102. See, e.g., VT. STAT. ANN. tit. 13, § 3252(a)(1) (1997) (prohibiting nonconsensual intercourse); *id.* 13, § 3251(3) (1998) (defining consent as "words or actions by a person indicating a voluntary agreement to engage in a sexual act"); *In re M.T.S.*, 609 A.2d 1266, 1277 (N.J. 1992) (redefining forcible rape as sexual intercourse without affirmative consent). See generally Stephen

seeking to reorient the trial from a focus on whether there was force or consent<sup>103</sup> to the question of the victim's language (whether she said "no" or "yes").<sup>104</sup> Without such reforms, jurors are free to choose what kinds and amounts of evidence support an inference of consent or nonconsent.<sup>105</sup> Reformers pushed for actus reus formulations that would reduce juror ability to focus on irrelevant and prejudicial evidence as part of the consent inquiry.<sup>106</sup> According to feminists, defining rape as

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J. Schulhofer, *The Feminist Challenge in Criminal Law*, 143 U. PA. L. REV. 2151, 2180–84 (1995) [hereinafter *Feminist Challenge*] (advocating affirmative consent).

103. Feminists criticized rape laws that only prohibited forcible sex as permitting rape whenever the rapist used psychological force, implied force, subtle coercive tactics, or relied on his size and demeanor as inducement. See, e.g., *Commonwealth v. Titus*, 556 A.2d 425 (Pa. Super. Ct. 1989) (reversing conviction of defendant who psychologically coerced thirteen-year-old daughter into sex because of lack of physical force). As a result of reform efforts, many jurisdictions moved from an external force to a nonconsent standard, either through revisions of criminal codes, see, e.g., ALASKA STAT. § 11.41.410(a) (1996) (defining sexual assault as "sexual penetration with another person without consent"), or changes in judicial interpretation of "force," see, e.g., *In re M.T.S.*, 609 A.2d at 1270 (arguing for interpretation of "force" as nonconsensual touching and noting "[c]urrent judicial practice" of defining "physical force" as "any degree of physical power or strength") (internal quotations omitted). See Robin Charlow, *Bad Acts in Search of a Mens Rea: Anatomy of a Rape*, 71 FORDHAM L. REV. 263, 272–76 (2002) (observing possibility of interpreting force statute as prohibiting nonconsensual sex).

104. See REAL RAPE, *supra* note 89, at 102 ("'Consent' should be defined so that no means no."); *Feminist Challenge*, *supra* note 102, at 2181 (1995) (arguing that consent should mean "affirmative permission clearly signaled"); see, e.g., *In re M.T.S.*, 609 A.2d at 1266. Of course, affirmative consent laws have garnered considerable criticism. See, e.g., Klein, *supra* note 35, at 1015 (contending that affirmative consent laws "go against the very core of our concept of criminal responsibility"). In response to a change in British law, George McAuley, chairman of the UK Men's Movement, stated, "It means men will have to get a consent form signed, dated and countersigned in triplicate before they make love. This legislation is deliberately designed to put more men behind bars." Kristy Walker, *Sex With a Woman Who is Drunk May Soon Be Rape*, DAILY MAIL ONLINE, June 17, 2007, <http://www.dailymail.co.uk/news/article-462614/Sex-woman-drunk-soon-rape.html>.

105. See, e.g., *Commonwealth v. Berkowitz*, 609 A.2d 1338 (Pa. Super. Ct. 1992) (holding verbal protestations not dispositive).

106. Milder reforms created a presumption of nonconsent whenever the victim expressed a "no." See, e.g., ILL. COMP. STAT. 5/12-17 (2003) (establishing "No Means No" law); *United States v. Carr*, 18 M.J. 297, 302 (C.M.A. 1984) (disallowing reasonable mistake of consent defense when victim said "no"); *Commonwealth v. Lefkowitz*, 481 N.E.2d 227, 232 n.1 (Mass. App. 1985) (Brown, J., concurring) ("'No' must be understood to mean precisely that."); see also Donald Dripps, *After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?*, 41 AKRON L. REV. 957, 976 (2008) [hereinafter *After Rape Law*] (noting possibility of "statute that punishes sex in the face of expressed refusal"). While such reforms did not succeed in shifting the burden of communication to the person desiring sex (versus the person opposed), they prevented jurors from engaging in "no means yes" analysis. See Lynne Henderson, *Rape and Responsibility*, 11 LAW & PHIL. 127, 141 (1992) (contending that "the 'no means yes' discounting of women's expressed interest has been with us for some time").



sex in the absence of affirmative consent<sup>107</sup> produces two benefits. First, it defines consent as communication, thereby eliminating jurors' ability to consider precipitating or past sexual conduct.<sup>108</sup> Second, it places the burden of communication properly on the person desiring the sex.<sup>109</sup>

In addition to encouraging reporting and producing more accurate verdicts, feminists hoped that realist reforms, like earlier reforms, would affect social attitudes about sex and rape. They would send the general message that nonparadigmatic rape is a "real" crime that the state should take seriously.<sup>110</sup> Reformers expected the criminal law to shape a new culture valuing female sexual agency and counseling restraint and respect in sexual relationships.<sup>111</sup> Part IV will analyze whether realist reforms have fostered social change and produced net utility for rape victims. First, however, it is important to contextualize any norming potential of rape reform by weighing it against collateral problems created by utilizing criminal law. The following two Parts thus critically assess feminist reformers' collective choice to engage criminal law as the primary mechanism for achieving social change in the area of sexual assault.

## II. EXISTING FEMINIST CRITIQUES OF CRIMINAL RAPE LAW

As the rape reform movement started to garner political power and effect legal change, self-reflecting feminists began to note the many tensions between criminalization strategies and feminism's general goals of ending women's subordination, dismantling hierarchy, and seeking distributive fairness.<sup>112</sup> As a result, feminist unity against sexualized

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107. See UNWANTED SEX, *supra* note 6, at 271 (asserting that only "clearly communicated" permission "should ever count as consent"); *Feminist Challenge*, *supra* note 102, at 2181.

108. See *In re M.T.S.*, 609 A.2d at 1274 (characterizing affirmative consent as response to old law that put victim on trial).

109. See UNWANTED SEX, *supra* note 6, at 271; *Feminist Challenge*, *supra* note 102, at 2181 (analogizing person who desires sex to surgeon who must get permission before bodily invasion).

110. See REAL RAPE, *supra* note 89, at 104 (proposing realist reforms "to announce to society that these actions are not to be done and to secure that fewer of them are done" (quoting H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 6 (1968))).

111. See *infra* note 344 and accompanying text.

112. Of course, there are a variety of feminist theories, which often prescribe different means for addressing gender inequality. Thus "liberal feminism," see *supra* notes 2, 57–58 and accompanying text, is philosophically distinct from "dominance feminism," see *supra* notes 58–60 and accompanying text, and the theories are sometimes described as conflicting. Compare *infra* note 129 and accompanying text (describing liberal feminism) with *infra* notes 131–32 and

violence has not led to homogeneous support of criminal rape laws. Rather, the variety of critical assessments of rape law from within feminist scholarship exemplifies the richness of feminist theory. In the past several years, more and more feminist theorists have begun to decry that “feminism has become identified with state-allied regulatory power over sexuality.”<sup>113</sup> Some, like me, denounce the “subsumption of the feminist movement into the state’s goal of managing undesirables.”<sup>114</sup> Post-feminist scholar Janet Halley adopts a critical approach to the

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accompanying text (discussing dominance feminism). There is also a third identifiable school termed “cultural feminism,” associated with the scholarship of Carol Gilligan and Robin West, which advocates legal responsiveness to women’s unique voices, characteristics, and values. *See, e.g.,* CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 13 (1988) [hereinafter *Jurisprudence and Gender*]; *see* Bridget J. Crawford, *Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 14 MICH. J. GENDER & L. 99 (2007) (describing schools of feminism); Cass R. Sunstein, *Feminism and Legal Theory*, 101 HARV. L. REV. 826, 827 (1988) (discussing the “basic” strands of feminism). There are also feminist theories that critique the limitations of these prominent second wave philosophies. For example, women of color scholars have developed critical race feminist perspectives that question mainstream feminism’s essentialism and marginalization of women of color. *See, e.g.,* *Race and Essentialism*, *supra* note 25. Post-feminists, sex-positive feminists, and queer theorists critique mainstream feminism’s bipolar construction of gender, assumptions about “female” views of sexuality, and diminution of lesbian issues. *See, e.g.,* JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990); JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006) [hereinafter *SPLIT DECISIONS*]; Ian Halley, *Queer Theory by Men*, 11 DUKE J. GENDER L. & POL’Y 7, 17 (2004) [hereinafter *Queer Theory by Men*].

Moreover, not all feminist theorists ascribe the same meaning to terms like “fairness” and “subordination.” As a consequence, I use the terms “feminism” and “feminist philosophy” in the loosest sense to describe the values and first principles upon which many feminists converge. These principles include securing women’s autonomy, eliminating unfair economic distributions between men and women, diminishing gender stereotypes, elevating women’s social status, and countering unjust private and public infringements on female liberty and bodily integrity. *See* Kellye Y. Testy, *Capitalism and Freedom—for Whom?: Feminist Legal Theory and Progressive Corporate Law*, 67 LAW & CONTEMP. PROBS. 87, 94 (2004) (asserting that “what unifies feminist legal thought is that it centers on an analysis of the use and distribution of power, seeking to articulate both a normative vision of equality and human flourishing for society as well as a critique of structures of subordination, particularly for women, that impede those values”); *cf.* JUDITH GRANT, *FUNDAMENTAL FEMINISM: CONTESTING THE CORE CONCEPTS OF FEMINIST THEORY* 51–53 (1993) (observing that Marxist feminists and radical (dominance) feminists may view the cause of patriarchal oppression differently, material resource limitation versus lived status inequality, but converge on the core concept of the oppressive patriarchy). *See also infra* note 234 and accompanying text (noting feminism’s commitment to fair distribution).

113. Judith Butler, *Against Proper Objects*, in *FEMINISM MEETS QUEER THEORY* 14 (Weed & Schor, eds. 1997).

114. *Feminist War*, *supra* note 17, at 825.

development of a phenomenon she calls “governance feminism.”<sup>115</sup> Governance feminism refers generally to the “quite noticeable installation of feminists and feminist ideas in actual legal-institutional power,” which often manifests as a substantive project that “emphasizes criminal enforcement” and “speaks the language of total prohibition.”<sup>116</sup>

For progressives like feminists, there is always a certain feeling of discomfort when a subordinated group turns to state police power to achieve equality.<sup>117</sup> American criminal law historically enforced and entrenched racial, gender, and socio-economic hierarchies,<sup>118</sup> such that criticizing and dismantling oppressive criminal laws has been a central facet of many antistatization agendas.<sup>119</sup> As a result, there is little controversy among progressives when minority groups fight against laws that criminalize miscegenation,<sup>120</sup> prohibit gay sexual relations,<sup>121</sup> or make immigrants perpetual criminals.<sup>122</sup>

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115. Janet Halley et. al., *From the International to the Local in Feminist Legal Responses to Rape, Prostitution/Sex Work, and Sex Trafficking: Four Studies in Contemporary Governance Feminism*, 29 HARV. J.L. & GENDER 335, 340–42 (2006) [hereinafter *International Responses to Rape*].

116. See *id.* at 340–41.

117. Historically, women’s groups have been vocal opponents of criminal prosecution, being the ill-fated subjects of morality-policing and legal restraints on bodily integrity. See Naomi Cahn, *Policing Women: Moral Arguments and the Dilemmas of Criminalization*, 49 DEPAUL L. REV. 817 (2000) (discussing how criminal laws limited women’s control over their bodies); see also Elizabeth Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women’s Movement*, 61 N.Y.U. L. REV. 589, 637 (1986) (describing feminist efforts in 1970s to counter abortion criminalization and articulate abortion rights as a fundamental principle of liberty).

118. See *supra* notes 23–32 and accompanying text (asserting that rape law entrenched racial and gender hierarchies).

119. Cf. Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223 (2007) (more generally advocating selective decriminalization and the streamlining of criminal codes as the solution to problems associated with criminalization).

120. See Rachel H. Moran, *Loving and the Legacy of Unintended Consequences*, 2007 WIS. L. REV. 239, 262 (noting that for “racial reformers,” the *Loving v. Virginia* decision, which struck down criminal law banning interracial marriage, “represents the dismantling of the final and most resistant feature of Jim Crow”).

121. Nan D. Hunter, *Living with Lawrence*, 88 MINN. L. REV. 1103, 1137 (2004) (contending that “for lesbians and gay men,” the *Lawrence v. Texas* decision, which struck down anti-sodomy criminal law, “is a breakthrough”).

122. See Raquel Aldana, *Of Katz and “Aliens”: Privacy Expectations and the Immigration Raids*, 41 U.C. DAVIS L. REV. 1081, 1087 (2008) (objecting to “the proliferation of local anti-immigrant ordinances that make it illegal for undocumented immigrants to loiter in public spaces, occupy housing, procure employment, or conduct business transactions”).

The issue becomes far more complicated, however, when minority groups call for reforms to remedy, not the overenforcement of criminal laws against minority defendants, but the underenforcement of criminal laws involving minority victims.<sup>123</sup> Certain scholars of color, notably Professor Randall Kennedy, highlight how systemic underenforcement of criminal law is a form of oppression. Kennedy asserts that “the principal injury suffered by African Americans in relation to criminal matters is not overenforcement but underenforcement . . . .”<sup>124</sup> However, while increased policing of crimes against minorities may achieve a state closer to formal equality for victims, there is a real question of whether it furthers the group’s empowerment overall.<sup>125</sup> Many regard the decision to seek group justice through increased criminal penalties as conflicting both philosophically and practically with the goal of antisubordination.<sup>126</sup>

Thus, feminists who instinctually see their role as fighting against the state and its maintenance of patriarchy lament that feminism is now publicly and politically associated with gender crime control.<sup>127</sup> Because feminist critiques of gender crime enforcement are still emerging,<sup>128</sup> the various positions are not as clearly delineated as other positions of intra-feminist debate—for example, the tension between liberal and

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123. Alexandra Natapoff, *Underenforcement*, 75 FORDHAM L. REV. 1715, 1717 (2006) (observing that “scholarly concerns with systemic unfairness . . . tend to revolve around the criminal system’s harshness and overextensions, not its laxity”).

124. RANDALL KENNEDY, *RACE, CRIME, AND THE LAW* 19 (1997). Some maintain that law reform is the answer—that the best solution to the dilemma of under-policing and over-policing of crime involving African Americans is “to infuse criminal enforcement with a dose of self-conscious egalitarianism.” William J. Stuntz, Essay, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1801 (1998). This assumes, however, that there is a real possibility of achieving such egalitarianism and that such efforts will not serve to legitimate the flawed system.

125. See Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271, 1280 (2004) (stating that Randall Kennedy’s position fails to account adequately for effects of increased criminalization on black communities). See generally Dorothy E. Roberts, *Criminal Justice and Black Families: The Collateral Damage of Over-Enforcement*, 34 U.C. DAVIS L. REV. 1005, 1007 (2001).

126. Sally Kohn, *Greasing the Wheel: How the Criminal Justice System Hurts Gay, Lesbian, Bisexual and Transgendered People and Why Hate Crime Laws Won’t Save Them*, 27 N.Y.U. REV. L. & SOC. CHANGE 257, 260 (2001) (contending that hate crime legislation “actually reinforces such discrimination by actively adopting legal structures premised on the concept of social hierarchy”).

127. See, e.g., Martin, *supra* note 1, at 158.

128. Recent feminist articles questioning the feminist-criminal law alliance include: Engle, *supra* note 20; *Feminist War*, *supra* note 17; *International Responses to Rape*, *supra* note 115; Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2 (2006).

dominance feminism on the role of rights discourse.<sup>129</sup> As a consequence, the feminist critiques of rape reform must be culled from bits and pieces of commentary in the feminist literature. This Part reconstructs and analyzes four main objections to rape criminalization and the responses thereto.

Despite such critiques, the trajectory of feminist rape reform continues toward increased punitiveness.<sup>130</sup> One possible reason is that these critiques exist at a high level of abstraction and are mired in classic feminist dilemmas,<sup>131</sup> such as the dilemma between treating women as free agents and understanding the constraints of subordination,<sup>132</sup> as well as the tension between encouraging sexuality and discouraging sexual abuse.<sup>133</sup> Exposing the limited efficacy of the existing critiques at focusing feminism away from increased prosecution sets the stage for Part III, which articulates a new critique of feminist criminalization stemming from the particular political and sociological characteristics of the current American criminal justice system. This critique enables feminists to weigh the potential of criminal rape law to further gender equality against problems posed by criminal law, not in the abstract, but as a matter of the current socio-political reality. First, let us turn to the most salient existing feminist critiques of criminal rape reform.

129. See Rosalind Dixon, *Feminist Disagreement (Comparatively) Recast*, 31 HARV. J.L. & GENDER 277, 279–85 (2008) (laying out common feminist debates and observing that dominance feminists reject liberal feminists' belief that equal rights can remedy gender subordination, given the existence of patriarchy).

130. See Adele M. Morrison, *Queering Domestic Violence to "Straighten Out" Criminal Law: What Might Happen when Queer Theory and Practice Meet Criminal Law's Conventional Responses to Domestic Violence*, 13 S. CAL. REV. L. & WOMEN'S STUD. 81, 93 (2003) (noting in domestic violence context that "[o]nce efforts to enlist the law in the fight against domestic violence became successful" criminal law "essentially took over anti-domestic violence efforts").

131. Other reasons for feminist reformers' continued embrace of the criminal law include: "(1) [T]he fact that many of such reformers are prosecutors as well as feminists and thus have already de-problemitized the question of state power, and (2) [S]uccess is addictive." *Feminist War*, *supra* note 17, at n.338.

132. See *infra* notes 149–52 and accompanying text. See generally Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805 (1999) (critiquing application of liberal notions of autonomy to women given existence of systematic subordination).

133. See *infra* notes 157–67 and accompanying text; see also Robin West, *Desperately Seeking a Moralist*, 29 HARV. J.L. & GENDER 1, 20–30 (2006) [hereinafter *Desperately Seeking*] (noting theoretical tensions between sex-positive theorists' critique of victimhood as stifling sexual autonomy, dominance feminists' skepticism of constructed "desire," and liberal feminists concept that sex must be consensual).

### A. *Criminal Rape Laws Negatively Affect Female Agency*

One common feminist concern over the feminist-police power alliance is that a nearly exclusive focus on the criminal system as the remedy for sexual assault detrimentally affects women's agency. Some theorists object that rape reform's myopic focus on women as victims runs counter to a thick view of female autonomy.<sup>134</sup> The agency critique manifests in conservative and progressive forms. The more conservative strain of the agency argument is often espoused by essayists<sup>135</sup> and men opposed to dominance feminism.<sup>136</sup> It criticizes rape law for rendering women unable to understand their own behavior and lifestyle choices as preconditioning sexual abuse and for failing to equip women to engage in self-contained sex crime prevention.<sup>137</sup> Conservative critics maintain that affirmative consent law stands at the pinnacle of paternalism because it assumes women are incapable of expressing their true desires.<sup>138</sup> This "pull yourself up by the bootstraps" argument essentially posits that minorities and society are harmed by minorities' self-perception as perpetual objects of oppression.<sup>139</sup> It seems somewhat inappropriate, however, to call this conservative agency argument

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134. See Melanie Randall, *Domestic Violence and the Constitutional Construction of "Ideal Victims": Assaulted Women's "Image Problems" in Law*, 23 ST. LOUIS U. PUB. L. REV. 107, 154 (2004) ("We need, among other things, theoretical frameworks of violence in women's lives which are more focused on women's strengths, resilience, and resistance as a way to correct the pathologizing and stigmatizing discourses which construct women as damaged, helpless, and irrational victims . . .").

135. See Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 305 (1995) [hereinafter *Sex Wars Redux*] (noting such a critique is primarily set forth by essayists Camille Paglia, Naomi Wolf, and Katie Roiphe and evidences "antipathy toward feminist activists").

136. See, e.g., Subotnik, *supra* note 87, at 848.

137. For example, Paglia's answer to gender based harassment is simply to "deal with it." CAMILLE PAGLIA, *SEX, ART AND AMERICAN CULTURE* 53 (1992). See *Sex Wars Redux*, *supra* note 135, at 330 ("Roiphe and Paglia, who cast a skeptical eye on claims of pervasive sexual domination, propose that women respond to instances of sexual coercion with vigorous individual resistance.").

138. See, e.g., KATIE ROIPHE, *THE MORNING AFTER: SEX, FEAR & FEMINISM ON CAMPUS* 62 (1993) (arguing that affirmative consent "proposes that women, like children, have trouble communicating what they want"); Subotnik, *supra* note 87, at 847 (critiquing affirmative consent as "fueled by the notion that contemporary women can't say 'no'").

139. See Richard Delgado, *Rodrigo's Roadmap: Is the Marketplace Theory for Eradicating Discrimination a Blind Alley?*, 93 NW. U. L. REV. 215, 245 (1998) (criticizing view of affirmative action that "leave[s] people of color with little protection, requiring them to pull themselves up by their bootstraps, something not even white immigrants managed to accomplish unaided").

“feminist”<sup>140</sup> because the argument seeks to downplay the pervasiveness of subordination and encourage women to work within the status quo.

There is another, more progressive, feminist agency argument that criticizes reforms that install the criminal law as “a coercive entity” in women’s lives.<sup>141</sup> Like the conservative agency argument, it criticizes discourse that characterizes female rape victims, not simply as individuals to whom something bad has happened, but as perpetually “ruined” women who must forever bear witness to their victimhood.<sup>142</sup> Moreover, critics point out that women’s general self-perception as constant potential victims of rape<sup>143</sup> effectively limits the range of their autonomous actions.<sup>144</sup> A socially constructed but deeply internalized fear of sexual crime victimhood has served to constrain women’s movement through the world—what we do, what we say, where we go, how we live—arguably to the benefit of men’s interests.<sup>145</sup> This is what some scholars term the “disciplinary” function of male abuse of women.<sup>146</sup>

It is unlikely, however, that individual instances of sexual abuse are enough to cause women to modify their behavior out of fear of rape. There must be a medium that translates individual cases of rape to women’s general understanding of abuse as part of their existence and affecting their behavioral choices. The focus on criminalization and victimhood provides this medium.<sup>147</sup> The characterization of sexual

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140. See *supra* note 112 (defining common feminist goals).

141. Christine O’Connor, *Domestic Violence No-Contact Orders and the Autonomy Rights of Victims*, 40 B.C. L. REV. 937, 961 (1999).

142. See Engle, *supra* note 20, at 813 (criticizing feminists who advocated treating wartime rape in Bosnia as genocide for portraying rape as “a fate worse than death”).

143. See M.P. Koss, *Scope, Impact, Interventions and Public Policy Response*, 48 AM. PSYCHOLOGIST 1062, 1062 (1993) (asserting that “uniting all women is the fear of rape”).

144. See Roxanne Lieb et al., *Sexual Predators and Social Policy*, 23 CRIME & JUST. 43, 49 (1998) (“Fear of sexual assault is an influential aspect of women’s psychology and often leads women to make adjustments in the kinds of activities they engage in and in their perceptions of situations.”).

145. Martha Chamallas explains, “Many women believe that they can avoid rape (or at least lessen the odds of being raped) provided they do not ‘assume the risk.’ In this way, patriarchal norms about the way women should behave (particularly that women should be passive, modest, and under male protection) are reproduced and reenacted, even by those who claim not to embrace the ideology.” Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 786 (2001).

146. See *Sexy Dressing*, *supra* note 52, at 1329–36.

147. See Simon, *Crime, Community, and Criminal Justice*, *supra* note 8 (asserting that the

abuse as a problem of crime victimhood rather than one of gender norms has created a world in which “behind gated fences, bolted doors, and barred windows,” women voraciously consume magazines that “lure us with images of women’s bodies as fungible, fragmented things to be taken and used at will.”<sup>148</sup>

There is, however, a real dilemma between vindicating female agency and recognizing conditions of subordination. On one hand, portraying women as incapable of communicating sexual choice or battered spouses as eternally damaged is not empowering to women. On the other hand, the discourse of victimhood publicizes that gendered crimes are wrongs the government has an obligation to address.<sup>149</sup> To solve this object-versus-agent dilemma, some modern feminists embrace a theory of constrained agency.<sup>150</sup> They note that women must constantly navigate the space between idealized autonomous liberality and the oppressive conditions of subordination.<sup>151</sup> Law must therefore simultaneously treat women as agents capable of making meaningful decisions but also seek to address the context of gender subordination in which women’s choices are made.<sup>152</sup>

Despite these autonomy concerns, feminists continue to pursue criminalization as the preferred remedy to sexual violence. One reason

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massive American criminal system has created a governance regime that orders citizens’ life choices).

148. Cheryl B. Preston, *Significant Bits and Pieces: Learning from Fashion Magazines about Violence against Women*, 9 UCLA WOMEN’S L.J. 1, 72, 73 (1998) [hereinafter *Fashion Magazines and Violence*].

149. See *Sex Wars Redux*, *supra* note 135, at 375 (“Women may assert their divergence from unremitting victimization, but only at the risk of being assimilated to the autonomous subject who does not require, or requires considerably less, legal intervention.”); Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 9–10 (1989) (proposing construction of language that reflects both individual and social aspects of women’s experiences).

150. See *Sex Wars Redux*, *supra* note 135, at 354 (recognizing that “women suffer systematic oppression in which sexualized domination by men plays a crucial role” but noting “the possibility of resistance”).

151. See Tracy Higgins, *Why Feminists Can’t (or Shouldn’t) be Liberals*, 72 FORDHAM L. REV. 1629, 1632 (2004) (recognizing that “under conditions of gender inequality, assumptions about choice and responsibility are not politically neutral”); see also Peter Margulies, *Identity on Trial: Subordination, Social Science Evidence, and Criminal Defense*, 51 RUTGERS L. REV. 45, 139 (1998) (observing that constrained agency accounts “recognize[] that subordinated groups show initiative and imagination, yet also recognize[] the challenges posed by subordination”).

152. See Randall, *supra* note 134, at 142–43 (suggesting that law shift inquiry away from battered women’s constrained responses to eliminating the barriers to their ability to prosecute).



may be that the conservative strain of the agency argument has been most visible, making left feminists wary of anti-victimhood arguments generally.<sup>153</sup> Alternatively, some feminists may believe that the benefits from rape and abuse criminalization outweigh any negative effects on agency.<sup>154</sup> Regarding constrained agency, some feminists remain hopeful that the criminal law might punish rape and abuse without relegating women survivors to the status of objectified child-like victims.<sup>155</sup> Thus, even feminists persuaded by autonomy arguments might still opt for criminal law solutions in the hope that the criminal law can be changed from within. Unfortunately, a critical analysis of the current American criminal system, undertaken in the next Part, will reveal that the benefits of rape reform do not necessarily outweigh the costs to agency, and the current criminal system necessarily condemns women to the status of either passive, damaged victim or autonomous agent responsible for rape.<sup>156</sup>

### B. *Criminal Rape Laws Negatively Affect Female Sexuality*

Another critique of the criminalization of rape is that the feminist focus on the crime of rape has actually served to entrench moralistic chastity norms and foster an unhealthy female view of sex. Katherine Franke cautions feminists to be wary of pursuing policies that “nourish[] a theory of sexuality as dependency and danger at the expense of a withering positive theory of sexual possibility.”<sup>157</sup> “Sex-positive” theorists assert that rape reformers’ emphatic insistence that women

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153. See *Sex Wars Redux*, *supra* note 135, at 332 (noting “popular” agency argument has “conservative political valence” that can be seen as “blaming victims of sexual aggression for their own injuries”).

154. Cf. Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1850 (1996) (arguing in domestic violence context that preventing further battering of women is more important than respecting victims’ choices).

155. See, e.g., Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973, 998–99 (1991) (suggesting, not that feminists abandon state power, but that feminists seek ways to develop a right to privacy that simultaneously protects women but recognizes appropriate limits on state intervention).

156. See *infra* notes 203–21 and accompanying text; cf. O’Connor, *supra* note 141, at 960 (stating in abuse context that “criminal intervention policies are most concerned with providing safety through punishment of perpetrators, and therefore are less attentive to differentiating the needs of individual domestic violence victims”).

157. Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 208 (2001).

view sex nearly exclusively as a hazard emphasizes sexual passivity, decreases sexual autonomy, and has thwarted the development of theories of female sexuality.<sup>158</sup> In addition, feminism's resolute focus on eradicating questionable (if not all) sex as if it were a virus denies women sources of pleasure.<sup>159</sup> Sexual pleasure is in many ways socially constructed, and women often idealize the image of a relentless sexual pursuer singularly attuned to her secret driving passion for sex, despite her ardent protestations.<sup>160</sup> Sex-positivists are rightly concerned that an overcriminalization of sexual "coercion" is difficult to distinguish from repressive chastity norms and morality policing.

Like agency arguments, sex-positive theories are steeped in feminist dilemma. Although it is true that women should not view sex as resolutely negative, there is a real danger that the sex-positive argument has potential to go further than critiquing rape laws' effect on women's sexuality and move into the realm of justifying sexual abuse. If feminism's principle normative project is to counter women's subordination, then it must at some level recognize that coercive, nonconsensual, or unpleasant sex (specifically, the type of sex that leads women to feel raped) is not a preferred state of affairs.<sup>161</sup> As a consequence, feminism is simply not so relativistic as to question whether or not coerced sex is "bad." Nonetheless, some argue that sexual coercion may be linked to pleasure in various ways.<sup>162</sup> However, in a feminist normative hierarchy, the sexual pleasure generated by the

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158. See *Sex Wars Redux*, *supra* note 135, at 311 (noting argument that "the subordination of pleasure to a virtually exclusive focus on identifying and preventing danger deprived women of a resource vital to self-understanding and resistance").

159. See Dixon, *supra* note 129, at 318–19 ("Sex-positive feminist theory points to the capacity of legal reforms aimed at protecting women from dangers such as rape, domestic violence, or inequality in the workplace to ultimately strengthen repronormative ideologies or increase the constraints experienced by women in their pursuit of sexual and political agency.").

160. See Camille Paglia, *Madonna—Finally, a Real Feminist*, N.Y. TIMES, Dec. 14, 1990, at A39 (asserting that "'No' has always been, and always will be, part of the dangerous, alluring courtship ritual of sex and seduction").

161. However, this first principle is not itself beyond question or post-modern objection. Indeed, consent can also reinforce and hide the operation of hierarchy. See generally William N. Eskridge, Jr., *The Many Faces of Sexual Consent*, 37 WM. & MARY L. REV. 47 (1995) (asserting that the consent standard's antisubordination potential is limited by its assumptions of liberal individualism). What I mean by encouraging "consensual" sexual relations is encouraging interactions that reflect women's equal rather than subordinate status.

162. See *Queer Theory by Men*, *supra* note 112, at 17 (asserting that "in the eroticization of domination we experience the unspeakable thrill of encountering our own metaphysical and experiential dissolution").

existence of coerced sex must yield to the female-empowering benefits of eradicating sexual violence.<sup>163</sup>

Some sex-positive theorists reject the normative first principle of women's empowerment and substitute a different first principle of de-gendered sexual freedom.<sup>164</sup> While this may be a valid theoretical project, it seems distinctly non-feminist in the sense that it places the satisfaction some people receive from being coerced or acting out misogynistic sexual practices on the same level as the value all women receive from dismantling misogyny.<sup>165</sup> Moreover, as much as sex-positivists rightly warn rape reformers not to underestimate women's love of sex, in all its usual and unusual forms, sex-positivists must be sure not to order their normative conclusions by the overestimation of women's (and men's) desire for sex.<sup>166</sup> Even if it were possible to divorce sex from the various social inequities animating it, like all human experiences, sex can produce the highest ecstasy, the lowest forms of self- and other-hatred, mild pleasure, mild pain, contentment, resentment, or nothing at all.<sup>167</sup> In the end, the disconnect may be that mainstream feminists who believe that sex-positivism downplays the harm of rape have largely overlooked sex-positive theorists' important

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163. See *Desperately Seeking*, *supra* note 133, at 4–5 (arguing that Halley's "interpretive construct" is to "assume no harm" of sex no matter the circumstances); see also Mary Anne Franks, Book Note, 30 HARV. J.L. & GENDER 257, 263 (2007) (reviewing JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006)) (criticizing Halley for being "unwilling to articulate harm in any other way other than a lost or missed opportunity for pleasure").

164. See *Queer Theory by Men*, *supra* note 112, at 10 ("Feminism is a project in quest for women's point of view, which, because it is already constituted as its subordination, is not only a profoundly deferred but also a deeply problematic starting place.").

165. Of course, a true post-modernist might not be bothered by this at all. Halley, for example, criticizes the very basis of feminism in prioritizing female (f) over male (m) and "carrying a brief for f." See *SPLIT DECISIONS*, *supra* note 112, at 4–5, 17–20.

166. See Franks, *supra* note 163, at 257 (asserting that Halley "presume[s] [the] good of undifferentiated, decontextualized, and dehistoricized bodily pleasures"). One could imagine a normative project that, in polar opposition to hedonists and sex-positivists, views civilized progression as moving toward asexual Schopenhauerian asceticism, much in the way some penal theories claim that evolution in criminal law consists of moving away from blood lust, vengeance, and the "thrill" of punishment. See, e.g., James Whitman, *A Plea Against Retributivism*, 7 BUFFALO CRIM. L. REV. 85 (2004).

167. Compare Dressler, *supra* note 95, at 429 ("[S]exual contact ordinarily is a pleasurable event that humans generally seek rather than avoid.") with Leo Bersani, *Is the Rectum a Grave?*, 43 OCTOBER 197, 197 (1987), reprinted in AIDS: CULTURAL ANALYSIS, CULTURAL ACTIVISM 197 (Douglas Crimp ed., 1996) ("There is a big secret about sex: most people don't like it.").

warning that moralistic chastity ideals continue to animate rape criminalization and concepts of rape victimhood.

### C. *Criminal Rape Laws Abridge Civil Liberties*

The next progressive concern over feminism's association with criminal law involves the ostensible conflict between realist rape reform and defendants' civil rights.<sup>168</sup> Scholars have noted the apparent hypocrisy of liberal feminists who tout women's rights while simultaneously supporting policies that weaken constitutional guarantees to criminal defendants. One scholar explains that "by and large feminists express empathy and concern for the rights of criminal defendants. . . . Feminists, who champion empathy and connectedness, may logically conclude that they must extend that same ethic of care to criminal defendants."<sup>169</sup> To be sure, there is something unsettling about a group concerned primarily with women's civil rights being the very people behind policies that test the limits of constitutionality in the criminal trial.<sup>170</sup>

The dilemma for progressive feminists is that permitting the introduction of all defense-favorable evidence protects the defendant from the unmitigated police power of the state, but it also allows defendants to exploit unfair hierarchies. Thus, feminists who defend realist reforms argue that defendants' rights in the context of a rape trial are not neutral. Rather, preserving the rape defendant's right to bring in all evidence convincing to the jury allows the defense to capitalize on rape myths and juror prejudice.<sup>171</sup> Feminist critics of liberalism use rape law as an example of the limits of rights discourse. These critics argue that civil libertarians, by protecting defendants' rights from feminist

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168. See, e.g., Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1794-96 (1992) [hereinafter *Beyond Rape Essay*]; Douglas N. Husak & George C. Thomas III, *Date Rape, Social Convention, and Reasonable Mistakes*, 11 LAW & PHIL. 95, 112 (1991); David S. Rudenstein, *Rape Shield Laws: Some Constitutional Problems*, 18 WM. & MARY L. REV. 1 (1976); Alexander Tanford & Anthony Boachio, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 554 (1980); Shawn J. Wallach, *Rape Shield Laws: Protecting the Victim at the Expense of the Defendant's Constitutional Rights*, 13 N.Y.L. SCH. J. HUM. RTS. 485 (1997).

169. Aviva Orenstein, "MY GOD!": A Feminist Critique of the Excited Utterance Exception to the Hearsay Rule, 85 CAL. L. REV. 159, 196 (1997).

170. See *Pink Elephants*, *supra* note 101 (discussing feminist-civil libertarian dilemma).

171. See *supra* notes 96-101 and accompanying text.

reforms, treat rape cases like “any other” criminal case and divorce them from their specific cultural context.<sup>172</sup> Allowing defendants’ due process rights to trump rape shield and affirmative consent laws in fact enables rape defendants to gain an exceptional advantage by capitalizing on sexist social attitudes.<sup>173</sup> Liberal feminists reconcile the civil liberties dilemma by asserting that such reforms do not abridge civil liberties because they focus the jury on proper relevant evidence as opposed to irrelevant and prejudicial evidence.<sup>174</sup>

*D. The Criminal System is Culturally and Structurally Inconsistent with Feminism*

The final feminist concern over criminalization is a meta-critique of the culture and structure of the criminal system and its incongruence with feminist precepts and goals.<sup>175</sup> bell hooks describes the criminal law and its culture as the very embodiment of “the Western philosophical notion of hierarchical rule and coercive authority,” which serves as the “foundation” of male domination of women.<sup>176</sup> Indeed, the current criminal justice system focuses nearly exclusively on punishing criminals and virtually ignores forgiveness, victim healing, elimination of socio-economic predicates of crime, and victim social services.<sup>177</sup> While some recent innovations in criminal law involve collective decision-making through restorative justice programs and mediation initiatives, the criminal law is traditionally and primarily structured as an adversarial power struggle in which there is a bad criminal and a good victim.<sup>178</sup> Thus, feminists argue that the epistemology of the criminal

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172. See *supra* note 93 and accompanying text (discussing cultural context of rape trial).

173. See *supra* notes 91–92 and accompanying text (explaining how social attitudes decrease probability of rape conviction).

174. See *supra* notes 99–101.

175. See Mari J. Matsuda, *Crime and Affirmative Action*, 1 GEO. J. OF GENDER, RACE & JUST. 309, 319 (1998) (stating that “the criminal justice system is a primary location of racist, sexist, homophobic, and class-based oppression in this country”).

176. BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* 118 (1984).

177. See Martin, *supra* note 1, at 153 (maintaining that criminal law’s purpose is to “control the ‘dangerous classes’ and to perpetuate and replicate existing power”).

178. Stephen Schulhofer explains that the binary view of good and evil inherent in modern penology creates a trial atmosphere in which jurors seek to discover the “real” victim. Stephen J. Schulhofer, *The Trouble with Trials; the Trouble with Us*, 105 YALE L.J. 825, 853–54 (1995) [hereinafter *Trouble with Trials*]. Of course, “[t]he unworthy, such as ‘bad’ mothers, ‘bad’ girls, and unruly youth, are never real victims . . . .” Martin, *supra* note 1, at 158.

system, specifically the focus on right versus wrong and winners versus losers, makes it inherently inhospitable to investment with social nuance and understanding.<sup>179</sup>

Given this conception of criminal law, cultural feminists worry that it is oxymoronic, if not hypocritical, for rape reformers to attempt to make the world more woman-friendly by utilizing a system quintessentially “male” in origin.<sup>180</sup> The structural concern is that the criminal law is inherently incapable of being more woman-friendly.<sup>181</sup> Prosecutorial discretion combined with state actors’ drive to win leads law enforcers to abandon “loser” cases, which often involve sexual and racial minority victims.<sup>182</sup> Elizabeth Iglesias observes that “the tenuous nature of legal strategies that expect to eliminate rape by reforming the criminal justice apparatus,” can be explained by the fact that “rape processing practices are embedded in a network of discretionary decisions, [in which] legal agents will enforce the culturally dominant narratives of race and sexuality.”<sup>183</sup>

There are, however, a couple of problematic issues with these meta-level criticisms. First, many feminists would take exception with the concepts that there are distinctly “male” and “female” cultures and that

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179. See Martin, *supra* note 1, at 155 (observing that given its individualistic retributive ethic, the criminal system “is anything but transformative”); see also Lynne Henderson, *Without Narrative: Child Sexual Abuse*, 4 VA. J. SOC. POL’Y & L. 479, 508 (1997) (asserting that feminist intervention is thwarted by “epistemological and narrative assumptions upon which the criminal law is grounded”).

180. See *Man in the State*, *supra* note 2, at 24 (describing displays of police power as “masculinist”).

181. See Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 WIS. L. REV. 1657, 1675–76 (2004) (noting feminist view of state as “the embodiment of institutionalized male power over women, manifested in practice by the disinterest of law enforcement, prosecutors, and the courts in stopping male violence against women”).

182. See Angela J. Davis, *Prosecution and Race: The Power and Privilege of Discretion*, 67 FORDHAM L. REV. 13, 16–17 (1998) (contending that “because prosecutors play such a dominant and commanding role in the criminal justice system through the exercise of broad, unchecked discretion, their role in the complexities of racial inequality in the criminal process is inextricable and profound”); see also Kay L. Levine, *The New Prosecution*, 40 WAKE FOREST L. REV. 1125, 1177 (2005) (discussing the reluctance of prosecutors to work with “difficult” victims). In addition, attempts to bring in evidence of contextual subordination are often written off as “abuse excuses.” See Lynne Henderson, *Co-opting Compassion: The Federal Victims’ Rights Amendment*, 10 ST. THOMAS L. REV. 579, 588 (1998) [hereinafter *Co-opting Compassion*] (noting that such attempts are seen as “manipulative play[s]” to avoid responsibility).

183. Elizabeth M. Iglesias, *Rape, Race, and Representation: The Power of Discourse, Discourses of Power, and the Reconstruction of Heterosexuality*, 49 VAND. L. REV. 869, 890 (1996) (internal quotations omitted).

adversarial processes are quintessentially “male.”<sup>184</sup> Liberal feminists might contend that an adversarial system that vindicates women’s rights could in fact be very useful. Dominance feminists like MacKinnon assert that adversarial processes and police power can be utilized by feminists so long as they counter the patriarchy.<sup>185</sup> More troubling is that both the cultural and structural arguments consider criminal law to be a fixed entity. However, criminal structure can change over time; and thus, despite the system’s apparent drawbacks, feminists might continue to work within the criminal system in the hopes that feminist efforts will help it progress.<sup>186</sup> Alternatively, feminist reformers might reject wholesale the contention that criminal law is inherently anti-feminist because accepting the contention would necessitate total and perpetual abandonment of a potentially useful legal structure.<sup>187</sup>

Casting oneself into the waters of the above debates may leave a feminist hopelessly adrift between surrendering women to the power of the state and abandoning women to private abusers.<sup>188</sup> The remainder of this Article is intended to break the stalemate. It argues that given the current political characteristics of the American criminal system, any perceived promise of criminal justice to further feminism is a false promise. In one sense, understanding the criminal system’s problems and limitations may leave feminists feeling defeated because they will have to turn away from a system, flawed as it may be, that welcomed

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184. There is the potential that insisting on the existence of a special feminine culture, see *Jurisprudence and Gender*, *supra* note 112, can essentialize female experience in a way that disadvantages women who belong to other subordinated groups. For this reason, women of color scholars and queer theorists are particularly wary of cultural feminism. See *Race and Essentialism*, *supra* note 25, at 602–04 (describing how cultural feminist claims about womanhood operatively exclude black women); *SPLIT DECISIONS*, *supra* note 112, at 59–79 (criticizing cultural feminism as both descriptively essentialist and normatively “female supremacist”).

185. See *Man in the State*, *supra* note 2, at 31 (“[M]asculinist state power . . . is something feminists may be able to exploit and subvert . . . in order to strategically outmaneuver its contemporary ruses.”).

186. See generally Aya Gruber, *Navigating Diverse Identities: Building Coalitions Through Redistribution of Academic Capital, An Exercise in Praxis*, 35 SETON HALL L. REV. 1201 (2005) (noting possibility that structures of subordination can be broken down from within).

187. Orly Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 988 (2007) (suggesting that progressives formulate strategies for “redefining the boundaries of legal reform and making visible law’s broad reach” rather than abandoning law).

188. See *Man in the State*, *supra* note 2, at 26 (observing that state power “is often all that stands between women and rape, women and starvation, women and dependence upon brutal mates, in short, women and unattenuated male prerogative”).

them.<sup>189</sup> In another sense, however, this Article's intervention is more hopeful than some of the pre-existing critiques of criminalization. It does not contend that criminal law can never be transformative, but merely asserts that given the larger philosophies currently animating it, the criminal law does not provide a meaningful avenue of feminist change at the present time.<sup>190</sup>

### III. CRIMINALIZATION STRATEGIES SUPPORT CONSERVATIVE POLITICAL IDEOLOGY

The current American criminal justice system is intimately tied to a philosophical program and set of social norms highly antithetical to feminism. Criminal law scholars and civil libertarians widely criticize what they see as the devolution of American criminal justice.<sup>191</sup> Over the last several decades, incapacitating and vengeance-based ideologies, couched in terms of "deserved retribution," have flourished. Beginning with the Nixon Administration, the United States has waged several "wars" on crime,<sup>192</sup> sentences have uniformly increased,<sup>193</sup> and being tough on crime has become a sure-win platform on both sides of the political aisle.<sup>194</sup> The tough-on-crime philosophy that overtook America was not a singular phenomenon, divorced from a larger political and

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189. See *Feminist War*, *supra* note 17, at 819 n.328 (observing that success of criminalization efforts may have been "addictive" to feminists).

190. But see Lobel, *supra* note 187, at 988 (disapproving critical exits from the law).

191. See Stephen P. Garvey, *Punishment as Atonement*, 46 UCLA L. REV. 1801, 1839 (1999) (maintaining that retributive rhetoric in modern America "has tended to sponsor extreme policies and practices that thoughtful retributivists themselves might well renounce").

192. Although Nixon launched the first war on crime, see Annual Message to the Congress on the State of the Union, 1 PUB. PAPERS 8, 12 (Jan. 22, 1970), the anti-crime political platform rose to ultimate prominence during Ronald Reagan's campaign for presidency. Criminals, particularly drug dealers and users, became the very essence of what was wrong with liberal America (along with Reagan's other enemy, welfare mothers). See *infra* notes 198, 203 and accompanying text.

193. During the tough-on-crime era, indeterminate sentencing gave way to sentencing guidelines, which uniformly increased sentences. See Michael Tonry, *Obsolescence and Immanence in Penal Theory and Policy*, 105 COLUM. L. REV. 1233, 1247 (2005) (stating that conservatives saw determinate sentencing as way to control lenient sentencers); see also Frank O. Bowman, III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 STAN. L. REV. 235, 246 (2005) (characterizing sentencing guidelines as "one-way upward ratchet").

194. See Gerald F. Uelman, *Victims' Rights in California*, 8 ST. JOHN'S J. LEGAL COMMENT. 197, 203 (1992) (observing how politicians are "obsessed" with maintaining "tough on crime" media image).



economic program, but a distinct part of a neoliberal<sup>195</sup> paradigm of rampant individualism, minimization of government services, and unconstrained capitalism.<sup>196</sup> The anti-distributive political strategy spring-boarded from dissatisfaction with New Deal and Great Society welfarism,<sup>197</sup> hit a fever pitch during Reagan's presidency,<sup>198</sup> and continues to reign today.<sup>199</sup> The term "neoliberal" signifies more than just economists' dissatisfaction with "embedded liberalism"<sup>200</sup> and

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195. "Neoliberalism" signifies the constructivist project of imbuing market values with a normative quality that prescribes specific modes of individual action. See Wendy Brown, *Neoliberalism and the End of Liberal Democracy*, 7 THEORY & EVENT 1, 6 (2003) [hereinafter Brown, *Neo-liberalism*].

196. See *Feminist War*, *supra* note 17, at 749 (examining relationship between tough-on-crime ideology and conservative economic and social agenda); Angela P. Harris, *From Stonewall to the Suburbs? Toward a Political Economy of Sexuality*, 14 WM. & MARY BILL RTS. J. 1539, 1542 (2006) (maintaining that neoliberalism constructs "a sentimentalized vision of the innocent yet victimized, taxpaying, suburban good citizen and attacking that citizen's purported enemies—reliably, queers, liberals, feminists, and blacks").

197. See Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783, 803 (2003) (observing that "in the 1970s, amidst global economic changes that confounded standard Keynesian policy prescriptions and amidst a white backlash against government support for racial equality, a well-funded neoliberal movement coalesced to position efficiency more firmly against equity").

198. Reagan stated:

Individual wrongdoing, [liberals] told us, was always caused by a lack of material goods, and underprivileged background, or poor socioeconomic conditions. And somehow . . . it was society, not the individual, that was at fault when an act of violence or a crime was committed. Somehow, it wasn't the wrongdoer but all of us who were to blame. Is it any wonder, then, that a new privileged class emerged in America, a class of repeat offenders and career criminals who thought they had the right to victimize their fellow citizens with impunity.

Ronald W. Reagan, President of the United States, Remarks at the Annual Conference of the National Sheriff's Association in Hartford, Connecticut (June 20, 1984), <http://www.reagan.utexas.edu/archives/speeches/publicpapers.html>. See also *G.O.P. Testimony on Violence*, N.Y. TIMES, Aug. 1, 1968, at 20 (quoting then-governor Reagan as stating: "It is time to restore the American precept that each individual is accountable for his actions").

199. See Ahmed A. White, *Capitalism, Social Marginality, and the Rule of Law's Uncertain Fate in Modern Society*, 37 ARIZ. ST. L.J. 759, 819 (2005) (noting the "hegemonic reign of neo-liberalism over American politics of the past several decades").

200. John Ruggie coined this phrase to describe the economic "compromise" in the era of the post-World War II period until the financial crises of the 1970s. He states that the term was "intended to convey the manner by which the capitalist countries learned to combine the efficiency of markets with the broader values of community that socially sustainable markets themselves require." JOHN GERARD RUGGIE, *GLOBAL MARKETS AND GLOBAL GOVERNANCE: THE PROSPECTS FOR CONVERGENCE IN GLOBAL LIBERALISM AND POLITICAL ORDER: TOWARD A NEW GRAND COMPROMISE?* 23 (Bernstein & Pauley, eds. 2007). Embedded liberalism thus "moderat[ed] the volatility of transaction flows across borders and provid[ed] social investments, safety nets, and

rejection of Keynesian precepts.<sup>201</sup> It describes a moral directive in which considerations of nuance, inequality, and social conditions must necessarily yield to reductionist dichotomies of public-versus-private and right-versus-wrong. Scholars explain that the neoliberal philosophy configure[s] morality entirely as a matter of rational deliberation about costs, benefits, and consequences. In so doing, it also carries responsibility for the self to new heights: the rationally calculating individual bears full responsibility for the consequences of his or her actions no matter how severe the constraints on this action, e.g., lack of skills, education, and childcare in a period of high unemployment and limited welfare benefits.<sup>202</sup>

Over the last several decades, the political rhetoric of crime and punishment has gone hand in hand with the trenchant argument against public welfare.<sup>203</sup> Horrendous criminals became the perfect straw men, invaluable as examples of why there should be “no tolerance” for people’s “poor excuses.”<sup>204</sup> The image of the entirely culpable and

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adjustment assistance—but all the while pushing international liberalization within a framework of multilateral principles, norms, and institutions.” *Id.* at 23–24. Unlike the neoliberal international markets of today, however, embedded liberalism was premised on the concept that the international economy was subject to the arms-length bargaining of governments. Today, however, “markets and firms have gone increasingly global, threatening to leave behind merely national social bargains.” *Id.* at 24.

201. Keynesian economics is generally thought of as a departure from classical economics’ obsession with market freedom. Keynes hypothesized that efficiency could be achieved through government interventions that both increased social welfare and controlled the demand for goods. See YUVAL P. YONAY, *THE STRUGGLE OVER THE SOUL OF ECONOMICS* 10–11 (1998).

202. Brown, *Neo-liberalism*, *supra* note 195, at 6. There is a sense of irony, however, in that neoliberals often reject the retributive basis for punishment as a matter of principle, favoring instead a determination of whether the given criminal law is “efficient.” But the neoliberalist program in the Reagan era was made palatable to the public specifically by configuring privatization and “individualist” criminal law as an issue of moral fault. Anti-welfare and anti-rehabilitation programs were not popular because they were efficient in a macro sense, they were popular because lazy welfare queens and evil criminals were at fault. See *Feminist War*, *supra* note 17 (asserting that Reagan’s economic and political philosophy was sold to the public through images of iconic victims and criminals).

203. Reagan’s favorite examples of the failure of welfarism were “enemy” drug dealers and lazy “welfare queens.” See, e.g., Kenneth B. Nunn, *Race, Crime and the Pool of Surplus Criminality: Or Why the “War on Drugs” was a “War on Blacks,”* 6 J. GENDER RACE & JUST. 381, 386 (2002) (discussing Reagan’s “rhetorical strategy”); “Welfare Queen” Becomes Issue in Reagan Campaign, N.Y. TIMES, Feb. 15, 1976, at 51.

204. See Brown, *Neo-liberalism*, *supra* note 195, at 6 (observing that under neoliberalism “a ‘mismanaged life’ becomes a new mode of depoliticizing social and economic powers and at the same time reduces political citizenship to an unprecedented degree of passivity”). The ultimate poster child for “no tolerance” was Willie Horton, a convicted murderer who committed kidnapping

irredeemable criminal allowed society to feel comfortable with ever harsher punishments while denying any responsibility for the root causes of crime.<sup>205</sup> The effort to garner support for an anti-welfare paradigm by publicizing drug dealers and lazy welfare mothers strategically exploited perpetually simmering racial, class, and ethnic biases.<sup>206</sup> Indeed, the public may embrace government programs that benefit true “citizens,” but will abhor “hand-outs” to racial and socio-economic “others.”<sup>207</sup>

Thus, conservative law makers’ and politicians’ efforts to entrench neoliberal individualist values created a specific sociological discourse of criminality and victimhood. Today, politicians who describe themselves as “tough on crime” routinely hyperbolize the danger of

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and rape while out on a forty-eight-hour furlough in Governor Michael Dukakis’s state. Horton took center stage during Dukakis’s bid for presidency against George H.W. Bush and played no small part in his decisive defeat. See David Lauter, *Crime Issue Becoming Election Battleground*, L.A. TIMES, June 13, 1988, at Part I, 18.

205. Markus Dirk Dubber, *The Victim in American Penal Law: A Systematic Overview*, 3 BUFF. CRIM. L. REV. 3, 9 (1999–2000) (noting how sentimental identification with victim allows society to avoid ethical question of punishment); *Feminist War*, *supra* note 17, at 809 (discussing how criminal law attributes social problems to “a distinct group of wicked people,” such that “once these persons are managed, the problem is solved”).

206. Martin Gilens observes:

Although blacks represent only 37% of welfare recipients, perceptions of black welfare mothers dominate whites’ evaluations of welfare and their preferences with regard to welfare spending. Thus, the ‘unspoken agenda’ of racial imagery appears to be more important in shaping public understanding of welfare than are explicit debates over welfare reform that are cast in race-neutral language.

Martin Gilens, “*Race Coding*” and *White Opposition to Welfare*, 90 AM. POL. SCI. REV. 593, 602 (1996). See also Nunn, *supra* note, 203, at 390 (“For the constituency the Reagan Administration was trying to reach, it was easy to construct African Americans, Hispanics, and other people of color as the enemy in the War on Drugs.”).

207. See Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790, 795 (2007) (observing that “[g]overnmental assistance is not treated as welfare when the recipients are considered to be blameless” but “racial stereotypes assigned to blacks, namely being ‘lazy, criminal, [and] irresponsible,’ . . . make it harder for blacks than for whites to be viewed as blameless”); Gilens, *supra* note 206, at 601 (conducting study and concluding that “racial considerations are the single most important factor shaping whites’ views of welfare”). A similar tactic has recently emerged from those opposed to universal healthcare. While one of the most publicized myths is that the elderly will be judged by “death panels,” in fact demonizing potential recipients has been perhaps the more effective way to undermine reform. One poll tracing the declining popularity of reform revealed that a substantial minority of respondents believed the death panel myth, while a majority expressed concerns that healthcare benefits would be given to “illegal aliens.” See Mark Murray, *NBC Poll: Misperceptions Abound on President’s Health Overhaul Initiative*, MSNBC.COM, Aug. 18, 2009, [http://www.msnbc.msn.com/id/32464936/ns/politics-white\\_house/](http://www.msnbc.msn.com/id/32464936/ns/politics-white_house/). In fact, none of the proposals in Congress involve benefits to undocumented immigrants. *Id.*

crime to average Americans<sup>208</sup> and exploit conscious and subconscious race, class, and gender biases to marshal support for ever harsher, ever more invasive criminal policies.<sup>209</sup> Elected officials and media commentators have constructed the criminal as an inhuman bogeyman<sup>210</sup> or autonomous young minority male, who feels no remorse and has no “excuse” for the crimes he commits.<sup>211</sup> The complement to the criminal caricature is the depiction of the pristine innocent victim, preferably a young white female, subjected to violent murder or rape.<sup>212</sup> These images allow “ordinary” members of society to distance themselves from criminals and feel comfortable with the amassing of state punitive power.<sup>213</sup>

The political importance of the innocent victim icon has propelled the victims’ rights movement into a powerful lobby with a critical voice in the justice system.<sup>214</sup> States have widely adopted victims’ bills of rights,<sup>215</sup> and victims’ rights proponents have been instrumental in the

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208. One politician, who supported the Child Safety Act of 2005 as necessary to “stop the epidemic of violence and sexual abuse against our children,” compared the dangers of offenses against children to the then-recent devastation of Hurricane Katrina. He stated, “[T]his past week, we have been reaping the destruction of a hurricane that brought the wind and rain and flooding of a natural and national disaster. But we have been for years reaping the greater destruction of a hurricane that continues to bring the wind, rain, and floods of the effects of child predators on America.” 151 CONG. REC. H8074, H8077 (daily ed. Sept. 15, 2005) (Statement of Rep. Poe).

209. See, e.g., 153 CONG. REC. S12894, S12896 (daily ed. Oct. 16, 2007) (Statement of Rep. Ensign) (calling on federal government to “help the States prosecute and incarcerate people who are here illegally, undocumented criminal aliens who are here illegally who are wreaking havoc on communities around the United States”).

210. See, e.g., 148 CONG. REC. H916 (daily ed. Mar. 14, 2002) (remarks of Rep. Green) (stating that Two Strikes and You’re Out Child Protection Act is “simply about taking these sick monsters off the streets . . . to try to end the cycle of horrific violence that is every parent’s nightmare”).

211. See *Co-opting Compassion*, *supra* note 182, at 586–87 (contending that to society “[d]efendants are subhuman; they are monsters,” and “[a]lternatively, the image of the criminal is the ominous, if undifferentiated, poor, angry, violent, Black, or Latino male”).

212. See *id.* at 584 (observing that victims are “‘blameless,’ innocent, usually attractive, middle class, and white” persons subjected to “particularly brutal homicides”).

213. See Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law’s Response to Racism*, 42 U. MIAMI L. REV. 127, 144 (1987) (observing that society can distance itself from social problems, particularly racism, by inventing a “great public wilderness of other”).

214. See Aya Gruber, *Victim Wrongs: The Case for a General Criminal Defense Based on Wrongful Victim Behavior in an Era of Victims’ Rights*, 76 TEMP. L. REV. 645, 653–60 (2003) [hereinafter *Victim Wrongs*] (discussing impact of victim’s rights movement on American criminal system).

215. See, e.g., ARIZ. CONST. art. 2, § 2.1; ILL. CONST. art. 1, § 8.1; DEL. CODE ANN. tit. 11, § 9402 (2001). According to the National Center for Victims of Crime, every state has a “set of legal

passage of tough-on-crime legislation.<sup>216</sup> The movement, however, does not embrace all victims unconditionally, but rather constructs victimhood in a very specific way. Victims are necessarily passive objects upon whom criminal acts were imposed.<sup>217</sup> A proper victim bears absolutely no responsibility for the crime, abides by all social mores, and always seeks closure through harsh punishment of the offender.<sup>218</sup> Victims' rights rhetoric disfavors victims who advocate mercy,<sup>219</sup> does not tolerate victims who are criminals,<sup>220</sup> and supports policies, like the death penalty, despite their discrimination against certain victims.<sup>221</sup>

This politically-cemented view of crime and victimhood makes it practically impossible for feminists to bestow the concept of sex crime victimhood with appropriate nuance to recognize constrained agency.<sup>222</sup> The binary relationship is between the absolutely culpable criminal (agent) and wholly innocent victim (object). As manifested in the law of

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rights for crime victims in its code of laws." See The National Center for Victims of Crime, *Issues: Victim's Bill of Rights*, <http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32697> (last visited Sept. 27, 2009).

216. See Vik Kanwar, *Capital Punishment as "Closure": The Limits of a Victim-Centered Jurisprudence*, 27 N.Y.U. REV. L. & SOC. CHANGE 215, 231 (2001–2002) (noting trend of laws named after sentimentalized "white female children" victims "who constitute the public's preferred image of a 'victim'").

217. See *Feminist War*, *supra* note 17, at 777 (arguing that tough on crime ideologies "deny the larger social context of crime by treating victims as the passive objects"); see also MARKUS DIRK DUBBER, *VICTIMS IN THE WAR ON CRIME: THE USE AND ABUSE OF VICTIMS' RIGHTS* 194 (2002) (observing prevalence of "helpless" victim image).

218. See *Feminist War*, *supra* note 17, at 777 (noting view that victims must exhibit "righteous anger at every turn").

219. See Elizabeth E. Joh, *Narrating Pain: The Problem with Victim Impact Statements*, 10 S. CAL. INTERDISC. L.J. 17, 28 (2000) (noting that victims' rights movement cannot tolerate "narratives in which victims' families can exercise mercy, kindness, or forgiveness").

220. See Kanwar, *supra* note 216, at 231 (observing that victims' rights rhetoric disqualifies "the most severely affected victims of violent crime, sexism and racism (e.g., prostitutes or teenage black males in the juvenile justice system)").

221. See *McCleskey v. Kemp*, 481 U.S. 279, 286–87 (1987) (citing "Baldus Study" which revealed that murders involving white victims and black defendants disproportionately resulted in the death penalty). Diane Clements, president of the victims' rights group "Justice for All," stated of the Supreme Court's decision banning juvenile executions, "I think it's disgraceful and outrageous for the Supreme Court to say that 16- and 17-year-olds are somehow different and somehow less culpable than adults . . . . Even a 5-year-old knows right from wrong." Mark Hansen, *Ruling May Spur New Death Penalty Challenges*, 3 No. 9 A.B.A. J. E-REP. 1 (Mar. 4, 2005).

222. See *supra* notes 150–52 and accompanying text (discussing "constrained agency"); see also *Sex Wars Redux*, *supra* note 135, at 370 (asserting that feminists should press for "contextuality" in characterizations of rape victims).

rape, the complainant may be a “true” victim if she was the object of a violent attack by a monstrous stranger rapist.<sup>223</sup> However, if she exercises any agency in the encounter, such as being on a date, she is disqualified from the category of innocent victim and is instead cast as the agent who precipitated date rape.<sup>224</sup> This particular view of rape victimhood allows society and the government to ignore the social predicates of rape and sexual subordination. If the rape victim is described as an object of a violent stranger rapist, the full responsibility for the crime can be placed on the criminal agent. If the victim is viewed as an agent, she is wholly responsible for her mistakes.

The current dialectic of criminality and victimhood counsels that crime is a problem of individual criminal pathology and not social hierarchy.<sup>225</sup> In this way, the criminal system obscures the economic and sociological conditions of rape<sup>226</sup> and relieves “pressure on the government and society to remove the constraints on women’s agency.”<sup>227</sup> Criminal law’s unitary concern with victimhood and criminality absolves “[o]thers in a position to predict and prevent rape” and presumes immunity for “those who create an ideological system that makes rape possible.”<sup>228</sup> By engaging in the “false dichotomy” of agency and victimhood, the criminal law has the effect of decontextualizing rape from the larger issue of gender inequality.<sup>229</sup>

In addition to being anti-progressive, the neoliberal ideology is distinctly anti-feminist.<sup>230</sup> It is the very philosophy that discounts

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223. See *supra* notes 72–74 and accompanying text (noting paradigmatic nature of stranger rapes).

224. See *supra* notes 78–82 and accompanying text (discussing victim precipitation).

225. *Sexy Dressing*, *supra* note 52, at 1321 (asserting that it is easy to support tough rape laws when “the only losers are a pathological subclass of men”).

226. See *infra* notes 398–99 and accompanying text (discussing the socio-economic predicates of rape); cf. Ellen M. Bublick, *Citizen No-Duty Rules: Rape Victims and Comparative Fault*, 99 COLUM. L. REV. 1413, 1478–83 (1999) (observing that concentration on risky victims and immoral defendants ensures ordinary citizens bear no costs of rape and have no incentives to prevent it).

227. *Feminist War*, *supra* note 17, at 813.

228. Mari Matsuda, *On Causation*, 100 COLUM. L. REV. 2195, 2202–03 (2000).

229. See ELIZABETH SCHNEIDER, *BATTERED WOMEN AND FEMINIST LAWMAKING* 75 (2000) (noting the “fundamental inadequacy of *either* victimization *or* agency . . . to capture the complexity of struggle in women’s lives” and asserting that this “false dichotomy leads to problematic extremes”).

230. Margaret Thornton and Joanne Bagust observe how neoliberalism is hostile to feminism on another front, stating that “neo-liberalism and the corporatization of universities [have] induced a turning away from feminism and diversity” toward “subjects that facilitate the market.” Margaret

women's failures to break glass ceilings as preference choices<sup>231</sup> and sees claims of sexism as poor excuses for lack of merit (i.e. market worth).<sup>232</sup> Experts also contend that the neoliberal backlash to social welfare had the dramatic effect of feminizing cheap labor globally. Starting in the 1980s, corporate profit maximization strategies, combined with cuts in welfare, created a workforce of women willing to engage in irregular and informal employment for low wages and no benefits.<sup>233</sup> Thus, the anti-distributive characteristics of neoliberalism and the current criminal system are clearly ideologically dissonant with feminism's "commitment to a more egalitarian distributive structure and a greater sense of collective responsibility."<sup>234</sup> Moreover, the belief that criminals are inherently worse than ordinary people is strikingly similar to the idea that women are inherently weaker than men and consequently incapable of occupying high status positions.<sup>235</sup> Finally, the current criminal system's sociological assumptions about female passivity and objectified status are at odds with the feminist goal of securing agency.<sup>236</sup> As a consequence, even if it is theoretically possible for feminists to use the threat and execution of criminal punishment to positively affect women's equality, it does not follow that they should do it now.

The historical moment in which American feminist reformers find themselves is one where criminal law and incarceration has for at least

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Thornton & Joanne Bagust, *The Gender Trap: Flexible Work in Corporate Legal Practice*, 45 OSGOODE HALL L.J. 773, 811 (2007).

231. See, e.g., Lawrence H. Summers, President, Harvard Univ., Remarks at NBER Conference on Diversifying the Science & Engineering Workforce (Jan. 14, 2005), [http://www.president.harvard.edu/speeches/summers\\_2005/nber.php](http://www.president.harvard.edu/speeches/summers_2005/nber.php) (attributing lack of top women scientists to "taste differences between little girls and little boys").

232. See Lisa Philipps, *Taxing the Market Citizen: Fiscal Policy and Inequality in an Age of Privatization*, 63 L. & CONTEMP. PROBS. 111, 118 (2000) (asserting that neoliberalism "intensifies and denies the problem of gendered social inequalities" by attributing them to "private ordering," which is "natural and non-political").

233. See Valentine M. Moghadam, *Globalization and Transnational Feminist Networks (or How Neoliberalism and Fundamentalism Riled the World's Women)*, in CRITICAL GLOBALIZATION STUDIES 351 (Richard P. Appelbaum & William I. Robinson, eds., 2005).

234. Deborah L. Rhode, *Feminism and the State*, 107 HARV. L. REV. 1181, 1184 (1994).

235. See, e.g., *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) ("Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life.").

236. See *supra* notes 217–19, 222 and accompanying text.

three decades been the most acceptable form of government action.<sup>237</sup> This philosophy has devastating effects on the most subordinated segments of society.<sup>238</sup> The feminist movement's continued calls for more and harsher punishment of gendered crimes in this era of vengeance and victims' rights makes it complicit in a neoliberal system that undermines women's equality and economic health and retards equality generally.<sup>239</sup> As a result, it seems that "feminist ideas and credibility are being appropriated to strengthen an apparatus that . . . should be dismantled."<sup>240</sup>

Rather than begin the painful process of disentanglement from criminal law, feminists might simply wish to stick it out and do their best working within an imperfect system.<sup>241</sup> It is possible that over time, rape shield and affirmative consent laws will send enough of a gender equality message to change prevailing cultural beliefs about sexual behavior. Perhaps realist rape laws have produced and will continue to produce significant benefits for individual rape victims. However, the less utility rape reforms produce, the less justified feminists are in supporting them, given the many philosophical inconsistencies between feminism and American criminal justice. The next Part examines criminal rape laws' norming potential and effect on individual rape victims.

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237. See Jonathan Simon, *From a Tight Place: Crime, Punishment, and American Liberalism*, 17 YALE L. & POL'Y REV. 853, 854 (1999) (asserting that crime control was one of the few forms of government action George H. W. Bush and Ronald Reagan found ideologically defensible).

238. See Jonathan Simon, *Megan's Law: Crime and Democracy in Late Modern America*, 25 L. & SOC. INQUIRY 1111, 1143–44 (2000) (observing that "the salience of crime is establishing new relations in terms likely to exacerbate racism [and] promote inequality"); William J. Stuntz, *Unequal Justice*, 121 HARV. L. REV. 1969, 1970–72 (2008) (arguing that criminal system has produced massive inequality).

239. See generally Erin Edmonds, *Mapping the Terrain of Our Resistance: A White Feminist Perspective on the Enforcement of Rape Law*, 9 HARV. BLACKLETTER L.J. 43 (1992) (arguing it is theoretically unsound for feminists to support system infested with racial injustice).

240. Martin, *supra* note 1, at 153.

241. Feminists will likely have great difficulty with and suffer significantly over turning away from what is popularly considered a great feminist achievement and a true feminist legacy. Nonetheless, I believe that "[feminist] strategies and demands should continually be re-examined in the light of experience of law and legal practices." Carol Smart & Julia Brophy, *Locating Law: A Discussion of the Place of Law in Feminist Politics*, in WOMEN-IN-LAW: EXPLORATIONS IN LAW, FAMILY AND SEXUALITY 18 (Julia Brophy & Carol Smart, eds., 1985).



## IV. RAPE REFORM HAS PRODUCED LIMITED BENEFITS

It is generally accepted, even among feminists, that realist reform has not proven practically successful.<sup>242</sup> Rape is still widely underreported, and victims continue to be doubly traumatized by trial.<sup>243</sup> Nevertheless, feminist reformers might still hope that changes in rape law will further the slow and steady transformation of culture over time. In addition, reformers passionate about helping individual victims contend that the answer to the apparent ineffectiveness of rape reform is engaging even more deeply in criminalization efforts. This Part discusses the norming potential of rape reform<sup>244</sup> and its value to individual victims in turn.

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242. See Bryden & Lengnick, *supra* note 15, at 1199 (surveying data and concluding that reforms “have generally had little or no effect on the outcomes of rape cases”); see, e.g., SPOHN & HORNEY, *supra* note 55, at 160 (finding that “the legal changes had limited effects on reports of rape and the processing of rape cases”); Wallace D. Loh, *Q: What Has Reform of Rape Legislation Wrought? A Truth in Criminal Labeling*, 37 J. SOC. ISSUES 28 (1981) (study concluding that rape reform had virtually no effect on law enforcement); Kenneth Polk, *Rape Reform and Criminal Justice Processing*, 31 CRIME & DELINQ. 191, 193–94 (1985) (study finding California’s rape law reforms had little effect). But see Stacy Futter & Walter R. Mebane, Jr., *The Effects of Rape Law Reform on Rape Case Processing*, 16 BERKELEY WOMEN’S L.J. 72, 105 (2001) (twenty-year, multi-jurisdictional study showing that broadened definitions of rape led to increase in reports of “actual rape,” meaning “forcible rape that police believe are well-founded”).

243. See Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 467–68 (2005) (noting lack of data that “rape reform laws have deterred the commission of rape, increased its prosecution, or increased conviction rates”). Rates of sexual assault appear to have remained high. See Alan M. Gross et al., *An Examination of Sexual Violence Against College Women*, 12 VIOLENCE AGAINST WOMEN 288, 292 (2006) (study finding that twenty-seven percent of surveyed college students reported unwanted sexual contact). It is, however, difficult to determine exactly how prevalent date rape is because of variances in data collection and reporting. For example, although the above-mentioned study demonstrates that over a quarter of college women report unwanted sexual contact, the Department of Justice Bureau of Justice Statistics reports a dramatic decrease in rape rates from 1973 to 2005 (although a dramatic increase between 2005 and 2007). See U.S. Dept. of Justice, Bureau of Justice Statistics, Sept. 10, 2006, <http://www.ojp.usdoj.gov/bjs/glance/rape.htm> (last visited Sept. 25, 2009). But these statistics involve “forcible” rape. See *id.*

244. Social norms are informal rules of behavior that, without the threat of legal sanction, compel compliance with their dictates. As Robert D. Cooter explains, “The fact that a law was enacted provides a reason for citizens to do what it requires. Similarly, the fact that a norm was internalized provides a reason for the decisionmaker to do what it requires.” Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643, 1661 (1996).

A. *Rape Reform Has Limited Potential to Change Norms Regarding Date Rape*

Identifying the precise relationship between criminal prohibitions and social norms<sup>245</sup> is a complicated if not impossible task.<sup>246</sup> Some believe that criminal laws do and should merely reflect prevailing norms.<sup>247</sup> Others adhere to criminal law reform's potential to change culture by eliminating or modifying existing laws, like those that reflect unfair hierarchies, or enacting new laws to transform values through negative incentives.<sup>248</sup> The idea is that if enough people refrain from engaging in certain conduct because they fear police power, over time that conduct will become taboo and refraining from doing it will be part of society's culture.<sup>249</sup> In addition, criminal law has the expressive potential to shape social views by positively declaring a practice unacceptable.<sup>250</sup>

The effectiveness of law at shaping norms, however, may depend upon how much the particular law deviates from current social practice. The use of police power to force people to abandon accepted norms may

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245. Of course, identifying what is an accepted cultural norm is a complicated enterprise, especially in a country composed of a multitude of cultures and subcultures. See Elaine M. Chiu, *Culture in Our Midst*, 17 U. FLA. J.L. & PUB. POL'Y 231, 235–36 (2006) (noting the difficulty of ascertaining the dominant American culture).

246. Some assert that history demonstrates that over long periods of time legal systems and social norms tend to progress. However, social progress over decades or centuries is rarely a linear process and often faces significant structural obstacles. There are often times in which legal systems and social norms return to modes society had largely written off as archaic and outmoded. Moreover, attempting to discern the relationship between a particular law and a state of affairs decades later seems like an exercise in futility. A very regressive law, for example, might produce a backlash that over time results in a very progressive status quo. Robert Post explains, “[W]e repeatedly find that the question of how law ought to respond to cultural conflict is deeply dependent upon the specific nature, content and history of proposed legal interventions, as well as their likely consequences.” Robert Post, *Law and Cultural Conflict*, 78 CHI.-KENT L. REV. 485, 508 (2003). See also Chiu, *supra* note 245, at 234 (noting the complex relationship between criminal law and culture). Thus, without commenting on the more complex issue of the development of norms over time, this Article looks at the likely effect of rape reform on culture now and in the near future.

247. See, e.g., PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* 10 (1965) (arguing that law is legitimate because it enforces “the invisible bonds of common thought”). But see Chiu, *supra* note 245, at 232 (rejecting claim that the “law merely serves as enforcement of the common decency, propriety and morality of that culture”).

248. See *supra* notes 110–11 and accompanying text.

249. See *supra* note 110.

250. See generally JOEL FEINBERG, *DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY* 100 (1970) (discussing “symbolic significance” of punishment).

be seen as illegitimate and thus produce backlash.<sup>251</sup> Such laws may also be subject to non-enforcement and jury nullification.<sup>252</sup> Theorist Dan Kahan suggests that, given the reality of “sticky norms,” criminal law should “gently nudge” rather than “shove through” new norms.<sup>253</sup> Thus, criminal prohibitions should be only slightly more progressive than prevailing norms, such that police power will tip the cultural scale.<sup>254</sup> According to this view, radical reforms too far from the status quo are doomed to fail and may even strengthen the disfavored norms.<sup>255</sup>

On the other hand, reforms that are too modest or conform too closely to the status quo may end up reinforcing rather than changing the dominant culture.<sup>256</sup> As prominent feminist Deborah Rhode observes, “[T]o allow what now appears politically palatable to establish [the feminist] agenda is to doom it from the outset.”<sup>257</sup> Nonetheless, Kahan’s observations about “sticky norms” provide a starting point for analyzing whether realist rape reform has or can change sexual courtship attitudes and practices. The first step is to examine the current state of norms. The second step is to discern precisely which messages will filter out into and be understood by society, given these norms. The sections below consider the norm-shaping efficacy of realist rape reform in light of both existing gender customs and the views of criminality and victimhood discussed in Part III.

251. See Bryden, *supra* note 95, at 409 (commenting that “law can help to change folkways, but also . . . folkways can nullify law” and thus “the timing of a reform is critical”).

252. See Dan Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 607 (2000) (discussing “sticky norms” problem that “occurs when the prevalence of a social norm makes decisionmakers reluctant to carry out a law intended to change that norm”).

253. *Id.* at 608 (maintaining that “norms stick when lawmakers try to change them with ‘hard shoves’ but yield when lawmakers apply ‘gentle nudges’”).

254. See *id.* at 609 (asserting that a “gentle nudge” can “initiate a process that culminates in the near eradication of the contested norm and the associated types of behavior”); see also *Beyond Rape Essay*, *supra* note 168, at 1805 (“When the law seeks to change social attitudes, lighter penalties increase the probability that juries will convict.”).

255. See also *After Rape Law*, *supra* note 106, at 958 (asserting jurors will not punish what “elite opinion regards as a serious crime” but “popular opinion regards as nature taking its course”). Some even consider radicalism in criminal law morally unacceptable. See, e.g., Meredith J. Duncan, *Sex Crimes and Sexual Miscues: The Need for a Clearer Line Between Forcible Rape and Nonconsensual Sex*, 42 WAKE FOREST L. REV. 1087, 1112 (2007) (“It is wrong to use the strong arm of the criminal law to impose rules intended to change societal or cultural attitudes when doing so transforms conduct that many members of the community would regard as, at most, unreasonable into one of the worst kinds of criminal offenses.”).

256. See *infra* note 420 and accompanying text.

257. Rhode, *supra* note 234, at 1192.

# 1. *Prevailing Gender Norms Restrict Rape Reform's Expressive Value*

Asking about the current state of women's equality elicits wildly different sentiments ranging from "the law favors women over men" to "women still live in socio-economic bondage." Although a common sentiment is that women have "come a long way baby,"<sup>258</sup> many feminists have started to question whether we are slipping back.<sup>259</sup> In general, theorists have observed an acute backlash against the feminism of the seventies and the ideal of formal equality of men and women in all aspects of life.<sup>260</sup> The depressed state of feminism as a popular concept,

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258. This sentiment, made popular in what many now see as ironic Virginia Slims cigarette ads, is commonly expressed by those in speeches touting how much progress women have made socially and professionally. See, e.g., Karin Crump, *We've Come a Long Way Baby*, 70 TEX. B.J. 261 (2007) (discussing how litigation culture has progressed from "a decade ago" when female lawyers were regularly called "bulldogs with lipstick"); Sarah Duckers, *The First Woman Juror in Texas*, 45-FEB HOUS. LAW 38 (2008) (asserting that considering Texas had its first woman juror in 1954, "we've come a long way, baby"). One scholar notes that the phrase "we've come a long way, baby" was the "anthem of the 1980s." G. Kristian Miccio, *Giles v. California: Is Justice Scalia Hostile to Battered Women?*, 87 TEX. L. REV. SEE ALSO 93, 94 (2009).

259. See Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21, 22 (1999) [hereinafter *Patriarchy and Inequality*] ("Real [gender] equality appears to be an ever-receding chimera."); Harold P. Southerland, "Love for Sale"—Sex and the Second American Revolution, 15 DUKE J. GENDER L. & POL'Y 49, 119 (2008) (contending that men "are still unapologetically reaping the benefits of a paternalistic world which they created" and true change "will require a considerable reorientation of traditional thinking along with a transformation in the way men think of themselves and their roles"); Maureen Dowd, *What's a Modern Girl to Do?*, N.Y. TIMES, Oct. 30, 2005 (Magazine), at 52, available at [http://www.nytimes.com/2005/10/30/magazine/30feminism.html?\\_r=2&pagewanted=1](http://www.nytimes.com/2005/10/30/magazine/30feminism.html?_r=2&pagewanted=1); cf. Cornelia T.L. Pillard, *Our Other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work-Family Policy*, 56 EMORY L.J. 941, 947 (2007) (noting current popularity of gender regressive abstinence-only educational programs).

260. See Linda L. Ammons, *Dealing with the Nastiness: Mixing Feminism and Criminal Law in the Review of Cases of Battered Incarcerated Women—A Tenth-Year Reflection*, 4 BUFF. CRIM. L. REV. 891, 910 (2001) (noting that "[t]oday some view even the label feminist as something akin to a four-letter word"); Ann Bartow, *Some Dumb Girl Syndrome: Challenging and Subverting Destructive Stereotypes of Female Attorneys*, 11 WM. & MARY J. WOMEN & L. 221, 222–23 (2005) ("Feminism as a social construct has been blamed for promulgating terrorism, ruining sexual relationships, causing road rage and traffic congestion, and undermining healthy families."). Some account for the popular rejection of feminism by asserting that second-wave feminists' exhortation that women should be more like men was simply unpalatable to a large number of women. See Crawford, *supra* note 112, at 120 (explaining that young women, so-called "third-wave feminists" embrace being "girly"). Others maintain that feminist insistence on a radical assault on the ubiquitous patriarchy caused mainstream Americans to reject their politics as simply too left of center and even mock feminists as inflexible, judgmental "feminazis." See Klein, *supra* note 35, at 1004 (observing that critics of affirmative consent react with "[o]utrage, shock, disbelief, and

moreover, appears to be accompanied by a stagnation or even regression of gender norms.<sup>261</sup> As mentioned in Part I, many in society still adhere to chastity ideals and believe rape myths.<sup>262</sup> Moreover, there are accepted courtship rituals still widely considered normal that in fact predicate rape.<sup>263</sup>

It is well documented that men, especially young men, are barraged with messages that sex is the ultimate objective of private interactions with women,<sup>264</sup> and many internalize this sentiment.<sup>265</sup> One popular view is that procuring sex is the aim toward which the man must proceed, and achieving sex is a victory, especially with an initially reluctant woman.<sup>266</sup> Researchers note that peer pressure plays a large role in this construction of gender relations.<sup>267</sup> As a result, many young men are conditioned to use subtle coercion, or at least intense persuasion, and are

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mockery”).

261. See *Patriarchy and Inequality*, *supra* note 259, at 21 (asserting that in recent times feminist progress “seems to be at a snail’s pace”).

262. See Tom Lininger, *Bearing the Cross*, 74 *FORDHAM L. REV.* 1353, 1378 (2005) (observing that the Kobe Bryant case “gave new life to myths about accusers’ mendacity and promiscuity”). See also Dowd, *supra* note 259.

263. Let me add a caveat here: The statements in this section are generalizations about some commonly publicized beliefs about gender that are held by some people. Far from being an empirical study on specific norms in given communities, this discussion of gender norms is based on anecdote, expert opinion, and existing empirical studies, which, taken together, provide a surface sketch of prevailing gender views. Moreover, because date rape is largely a phenomenon of the young, much of the research cited involves studies of college students and other young adults.

264. See *Motivational Evidence*, *supra* note 100, at 603 (observing that young men “are bombarded by a culture” that “comodifies women’s sexuality”). Stephen Schulhoffer puts the sentiment bluntly, “Real men want to ‘score.’” *UNWANTED SEX*, *supra* note 6, at 262.

265. See *Forgetting Freud*, *supra* note 77, at 154 (stating that “men structure their understanding of women” through the metaphor of sex achievement).

266. See Bogle, *supra* note 78, at 106 (quoting male college student as stating that “[g]uys . . . want to steer away from girls that do it all the time . . . [and] go for the trophy ones that hook up with people seldomly”); *Motivational Evidence*, *supra* note 100, at 600 (asserting that young boys are “cast by culture into the role of pursuer”); Pillsbury, *supra* note 57, at 865 (noting that “the man pursues a single aim of sexual conquest”).

267. See Bogle, *supra* note 78, at 104 (finding that “men are congratulated by their male peers for sexual conquests” and “[s]tigmatization occurs only for men who cannot ‘get any’”); Steven I. Friedland, *Date Rape and the Culture of Acceptance*, 43 *FLA. L. REV.* 487, 492 (1991) (contending that “the male’s pursuit of sexual relations becomes a competitive venture . . . to win by ‘achieving’ sexual relations”). Studies reveal that date rapists are not more angry or violent than non-date rapists, but are more sexually active and attuned to “closing the deal” on sex. See, e.g., Eugene J. Kanin, *Date Rapists: Differential Sexual Socialization and Relative Deprivation*, 14 *ARCH. SEXUAL BEHAV.* 219, 222–23 (1985); R. Lance Shotland, *A Theory of the Causes of Courtship Rape: Part 2*, 48 *J. SOC. ISSUES* 127, 130 (1992).

sensitized to hear and believe cues indicating consent while downplaying signs of reluctance.<sup>268</sup>

In addition, the cultural pressure on women to obscure their real feelings toward sex creates an omnipresent and substantial risk that communications will be imperfect.<sup>269</sup> Many women believe that even if they want sex, they should appear reluctant, which may lead to displays of token resistance.<sup>270</sup> In turn, these isolated occasions of token resistance provide grounds to believe that “no means yes.”<sup>271</sup> This belief, together with the goal-oriented mindset, can cause men to discount certain signs of resistance altogether.<sup>272</sup> Alternatively, a woman’s internalization of the view that only men should engage in open sexual communication may lead her to remain silent about her ambivalence<sup>273</sup> and just “go through” with sex to avoid an uncomfortable confrontation.<sup>274</sup> Today, the deeply-entrenched cultural paradigm of a

268. See *Forgetting Freud*, *supra* note 77, at 145 (noting that date rapists “engage in cognitive strategies to block their conscious minds from learning the truth”); see also Lani Anne Remick, Comment, *Read Her Lips: An Argument for a Verbal Consent Standard in Rape*, 141 U. PA. L. REV. 1103, 1145 (1993) (observing that men interpret courtship behavior on basis of conquest-oriented assumptions); cf. Angela J. Jacques-Tiura et al., *Why Do Some Men Misperceive Women’s Sexual Intentions More Frequently Than Others Do? An Application of the Confluence Model*, 33 PERSONALITY AND SOC. PSYCHOL. BULL. 1467, 1468–69 (2007) (finding that hostile masculinity is correlated to men’s false belief that women have given a sexual cue).

269. See Michelle Oberman, *Turning Girls Into Women: Re-Evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY 15, 18 n.18 (1994) (stating that teen magazines and television “urge[] girls to embrace and perfect the coy, passive-aggressive sex role”).

270. See, e.g., Charlene L. Muehlenhard & Lisa C. Hollabaugh, *Do Women Sometimes Say No When They Mean Yes? The Prevalence and Correlates of Women’s Token Resistance to Sex*, 54 J. PERSONALITY & SOC. PSYCHOL. 872, 875 (1988) (citing finding that women’s fear of appearing promiscuous leads to token resistance); Pillsbury, *supra* note 57, at 948 (maintaining that “[f]ear of the slut label can inspire illusory sexual refusals”).

271. See Pillard, *supra* note 259, at 952 (“If women are taught to deny their desire, their ‘no’s’ appear ambiguous, making it easier for men to believe that ‘no means yes’ . . . .”); Pillsbury, *supra* note 57, at 948 (observing that “feigned refusals feed the dangerous perception among both sexes that women do not mean it when they say no”).

272. See *No Bad Men*, *supra* note 73, at 680 (contending that “conceptualization of sex as feigned struggle leads to a tolerance of coerced sex”).

273. See Pillsbury, *supra* note 57, at 950 (asserting that gender norms “encourage[] girls and women to enter romantic relationships with only vague ideas of what they want sexually, making it difficult for them to . . . express their desires clearly”).

274. See CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 177 (1989) (arguing that “women are socialized to passive receptivity” and “may prefer [acquiescence] to the escalated risk of injury”); UNWANTED SEX, *supra* note 6, at 269 (observing that a woman’s silence may be explained by confusion or ambivalence).

sex-goal-oriented man and a coy, reticent woman continues to influence basic notions of maleness<sup>275</sup> and femaleness.<sup>276</sup>

Furthermore, some feminists have noted the phenomenon of retrograde values taking over the “modern” woman in her quest for a relationship.<sup>277</sup> Many women order their dating and sexual conduct by the socially interposed belief that emotional and economic well-being is dependent on “catching” a man.<sup>278</sup> *New York Times* columnist Maureen Dowd laments, “I knew things were changing because a succession of my single girlfriends had called, sounding sheepish, to ask if they could borrow my out-of-print copy of ‘How to Catch and Hold a Man.’”<sup>279</sup> In the enterprise of obtaining men, women are told they are buyers in a seller’s market and their main currency is sexual mystique. As a result, catching a man depends on behaving and communicating in a way that is optimally geared toward male appreciation.<sup>280</sup> Since mystique is the touchstone, open and free sexual communication is suboptimal behavior.<sup>281</sup> It is often considered unromantic to be frank, and the woman runs the risk of being thought of as oversexed if she expresses sexual desire, or as a tease or prude if she communicates reluctance.<sup>282</sup>

275. See *Sexy Dressing*, *supra* note 52, at 1332 (observing that “men and women eroticize the relationship of [male] domination so that it is sustained by (socially constructed) *desire*”). There is also the tendency of society to condemn male effeminacy in general. See Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 3 (1995) (arguing that “[t]he man who exhibits feminine qualities is doubly despised, for manifesting the disfavored qualities and for descending from his masculine gender privilege”).

276. See Tammy R. Pettinato, *Transforming Marriage: The Transformation of Intimacy and the Democratizing Potential of Love*, 9 J.L. & FAM. STUD. 101, 116 (2007) (observing that little girls are taught to “avoid[] sexual aggressiveness and general self-assertion and/or cultivat[e] an ideal image of femininity”).

277. See, e.g., Dowd, *supra* note 259, at 52.

278. See Lucie E. White, *No Exit: Rethinking “Welfare Dependency” from a Different Ground*, 81 GEO. L.J. 1961, 1986–87 (1993) (observing conservative efforts to characterize man-catching as a solution to women’s poverty).

279. Dowd, *supra* note 259, at 52.

280. *Id.* (observing that “[i]n this retro world, a woman must play hard to get but stay soft as a kitten”).

281. See Cheryl B. Preston, *Baby Spice: Lost Between Feminine and Feminist*, 9 AM. U. J. GENDER SOC. POL’Y & L. 541, 594 (2001) (observing how “powerful dynamics push women into conformity with, or at least acquiescence in, the woman-child model” (coyness, passivity, and thinly veiled sexuality)).

282. One teenage rape victim explained, “It amazes me to think of the powerful and double-edged fear of not being accepted or of being a prude or of being a ‘slut’.” Pillsbury, *supra* note 57, at 947 (quoting LEORA TANENBAUM, *SLUT! GROWING UP FEMALE WITH A BAD REPUTATION* 165–66).

Today, more than ever, women appear to revel in sexual object status.<sup>283</sup> Many women suffer astonishing amounts of psychological pain and anxiety,<sup>284</sup> wear uncomfortable and dangerous apparel,<sup>285</sup> forego basic sustenance,<sup>286</sup> and some even undergo painful plastic surgery with foreign-object implantation to achieve the idealized sexually exaggerated appearance.<sup>287</sup> One might argue that this signifies a burgeoning trend towards women's embrace of sexual agency.<sup>288</sup> Third-wave feminists,<sup>289</sup> for example, contend that maintaining a sexually provocative appearance empowers women by allowing them to own their sexuality.<sup>290</sup> It is true that today women can obtain various

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(1999) (quoting a high school student)).

283. See *Fashion Magazines and Violence*, *supra* note 148, at 7 (observing that, despite feminism, "women are willing to self-style themselves in counterproductive ways in exchange for being fashionable or, more likely, desirable to men"); Dowd, *supra* note 259, at 55 (noting that "women have moved from fighting objectification to seeking it").

284. See Deborah L. Rhode, *The Injustice of Appearance*, 61 STAN. L. REV. 1033, 1040 (2009) (noting "the ridicule, shame, guilt, and discrimination that social pressures [over appearance] impose").

285. See Marc Linder, *Smart Women, Stupid Shoes, and Cynical Employers: The Unlawfulness and Adverse Health Consequences of Sexually Discriminatory Workplace Footwear Requirements for Female Employees*, 22 J. CORP. L. 295, 296–98 (1997) (discussing health consequences of wearing high heel shoes).

286. See *Patriarchy and Inequality*, *supra* note 259, at 22 ("Women, particularly young women, are more obsessed than in earlier eras with weight and physical appearance as measures of merit").

287. See *id.*; see also MEGAN SEELY, *FIGHT LIKE A GIRL: HOW TO BE A FEARLESS FEMINIST* 124 (2007) (attributing this to the powerful cultural message that authentic women "are not good enough"). The construction of beauty also has a distinctly racial element. See *Race and Essentialism*, *supra* note 25, at 597 ("Beauty is whiteness itself . . ."). These beauty standards may also contribute to women's economic subordination. See Rhode, *supra* note 284, at 1034 ("[O]ur global investment in appearance totals over \$200 billion a year.").

288. Cf. *Sexy Dressing*, *supra* note 52, at 1386 (asserting possibility that sexy dress "eroticiz[es] female autonomy" and "undermine[s] not only the structure that opposes Madonna and whore but also that which opposes straight white bourgeois vanilla sexuality to the (imagined) kinky, animal, androgynous sexuality of the margins").

289. "Third-wave feminism" is an umbrella label used to describe the various feminist theories developed after and largely in response to second-wave feminism. Although cultural feminism, post-feminism, and critical race feminism all fall temporally within the third wave, the term "third-wave feminism" has come to be most closely associated with a set of less theorized ideas about womanhood. Third-wave feminists are seen as embracing "girliness," that is, appearing feminine and sexy, centralizing sexual pleasure, and embracing the power of feminine mystique. See generally Crawford, *supra* note 112.

290. See *id.* at 120–22 (discussing third-wave feminism's embrace of sexy femininity); see, e.g., Paglia, *supra* note 160, at A39 (calling pop star Madonna "the true feminist" who "shows girls how to be attractive, sensual, energetic, ambitious, aggressive and funny—all at the same time").



psychological, social, and economic benefits from appearing sexy.<sup>291</sup> However, society's approval of seductive-looking women does not necessarily translate into women's empowerment to communicate openly about and freely initiate or reject sex.<sup>292</sup> While appearing seductive brings certain benefits, it also sends signals, intended or not, about availability for sex.<sup>293</sup> Without a paradigm of open communication and sexual freedom accompanying the sexy dress phenomenon, a woman's seductive appearance can be just one more factor upon which a goal-oriented man selectively relies in concluding there is consent.<sup>294</sup>

Given widespread gender stereotypes and even retrogression of gender roles, realist reforms faced a significant challenge.<sup>295</sup> Simply, average people do not wish to be "hard shoved," in Kahan's terms, into convicting men who have sex with "loose" women and men who fail to obtain "technical" permission before sex.<sup>296</sup> In the affirmative consent context, popular opinion appears to be that requiring a "yes" before intercourse is totally inappropriate and unfair.<sup>297</sup> Recall the 1993 media storm that surrounded the now-infamous Antioch College code of student conduct requiring unequivocal permission before every stage of

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291. See *Sexy Dressing*, *supra* note 52, at 1348 (noting possibility that social construction of self-esteem compels women to dress sexily).

292. See *Special Issues*, *supra* note 27, at 1588 ("Although to modern ears the requirement of chastity seems obsolete, the tendency to blame victims for 'asking for it' (by flirting, taking a man to her room, or drinking), or to believe that the victim was lying to cover an indiscretion or to gain revenge, still rings true.").

293. See *supra* note 78 (popular opinions on seductive dress and rape).

294. Under these conditions, sexy dressing is the ultimate protection for male sexual license. Women are given various incentives for dressing sexily with only the small tax of the potential for rape and disability from claiming rape. This tax will not overcome women's incentives, and their sexy dress will provide cover for any man wishing to engage in sex of questionable consensual status.

295. See Angela Harris, *Forcible Rape, Date Rape, and Communicative Sexuality: A Legal Perspective*, in *DATE RAPE: FEMINISM, PHILOSOPHY, AND THE LAW* 52 (Leslie Francis, ed. 1996) [hereinafter *Forcible Rape*] (arguing "[f]or date rape to be taken truly seriously as a crime, communicative sexuality must be a social as well as a legal norm").

296. Kahan, *supra* note 252, at 607; see *UNWANTED SEX*, *supra* note 6, at 57–58 (observing that policies that apparently conflate rape and ordinary sex produce "a potent cultural backlash").

297. See Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U.L. REV. 663, 689 (1999) [hereinafter *Sex, Rape, and Shame*] (noting "[t]he popular rejection of verbal communication in the sexual context"). Interestingly, another set of messages sent by affirmative consent, that men should take the lead in sexual relations and women should be passive, fits very well with prevailing cultural beliefs. See *supra* notes 267–68 and accompanying text.

sexual relations.<sup>298</sup> In the public eye, the Antioch code became the very epitome of the ridiculousness of feminism, with both men and women laughing at the idea of a sex “contract.”<sup>299</sup> Today, affirmative consent appears less popular than ever, as both men and women reject the notion of a linguistic prerequisite to sex.<sup>300</sup>

Regarding rape shield laws, feminist supporters hoped the laws would further female sexual subjectivity by sending the message that a woman can have a very sexually active past and still retain the ability to refuse sex and have legal remedies for rape.<sup>301</sup> However, some scholars point out that, to the contrary, rape shield laws can actually reinforce the idea that a woman’s sexuality should be hidden.<sup>302</sup> An examination of the history of rape shield laws reveals two major justifications for them, one of which reinforces patriarchal norms. Initially, some politicians lobbied for reform by analogizing past sexual conduct evidence to inadmissible prior bad acts evidence.<sup>303</sup> They argued that defense attorneys would

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298. Antioch’s Sexual Offense Policy, which among other things required that “[t]he request for consent must be specific to each act,” remained in effect from 1993 until the College’s closing in 2008. Although Antioch’s website is no longer online, a copy of the policy is available at <http://www.mit.edu/activities/safe/data/other/antioch-code>.

299. The Antioch Policy engendered many “vitriolic criticisms”:

*Time Magazine* called it “extreme.” George Will worried that “hormonal heat [would] be chilled by Antioch’s grim seasoning of sex with semicolons.” *Saturday Night Live* parodied the gender differences that arguably make the policy necessary, and *Newsweek*, in a cover story article, complained that the Antioch Policy “seem[s] to stultify relationships between men and women on the cusp of adulthood.”

*Sex, Rape, and Shame*, *supra* note 297, at 687 (footnotes omitted).

300. See Angela Onwuachi-Willig, *GIRL, Fight!*, 22 BERKELEY J. GENDER L. & JUST. 254, 257 (2007) (reviewing MEGAN SEELY, *FIGHT LIKE A GIRL: HOW TO BE A FEARLESS FEMINIST* (2007)) (observing that today’s young women “easily blind themselves to the barriers generally faced by women” and see their choices as free despite the fact that they “are arguably influenced heavily by gendered stereotypes and expectations”). Even academics continue to adhere to antiquated rape beliefs. See, e.g., Subotnik, *supra* note 87, at 864 (asserting that women’s rejection of affirmative consent is explained by “women’s weaknesses” in wanting male pursuers and the fact that women “for 10,000 years . . . have enjoyed men begging for sex”). I remember student sentiment regarding the Antioch policy from my days in law school, and in 2009, after teaching rape law for several years, it seems to me that anti-affirmative consent sentiment has increased. Students are exceedingly reluctant to defend the requirement of an unambiguous yes.

301. See Cristina Carmody Tilley, *A Feminist Repudiation of the Rape Shield Laws*, 51 DRAKE L. REV. 45, 57 (2002) (observing that rape shield “proponents hoped that Congress could influence public opinion about gender equality by permitting women to be as sexually active as men without forfeiting legal protections when victimized”).

302. See, e.g., *id.* at 74–80 (2002) (asserting that rape shield laws prevent meaningful juror discussion of female sexuality).

303. See FED. R. EVID. 404(b).

capitalize on victims' past promiscuous (wrongful) behavior to prejudice juries and embarrass victims.<sup>304</sup> The idea was not so much that the chaste woman/sex object paradigm should be abandoned, but rather that evidence revealing a woman for the sex object she is biases the trial. Such a justification supports rather than counters the view that female sexuality should be kept secret and even condemned.<sup>305</sup>

There is also, however, a more feminist justification of rape shield laws: They are not intended to keep female sexuality a secret, but to make it irrelevant to consent.<sup>306</sup> Shield laws, properly understood, communicate that even the most extensive sexual history has no bearing on whether a woman can refuse sex.<sup>307</sup> Unfortunately, reformers may have miscalculated the ultimate cultural impact of rape shields when filtered through the prism of existing norms.<sup>308</sup> When one speaks of rape shields, the conversation often centers on victims' all-important privacy.<sup>309</sup> The common belief is that a woman's very sense of well-being is intimately intertwined with her ability to hide her sexuality.<sup>310</sup>

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304. See, e.g., Privacy Protection for Rape Victims Act, 124 CONG. REC. 36,256 (Oct. 12, 1978) (Statement of Sen. Biden) ("The enactment of this legislation will eliminate the traditional defense strategy . . . of placing the victim and her reputation on trial . . .").

305. See *Chastity Requirement*, *supra* note 22, at 94 ("Instead of championing women's sexual autonomy, drafters concentrated on how degrading and embarrassing it was for women to have to discuss publicly their private sexual affairs.").

306. *Id.* at 147 ("What women need is the right to say 'yes' to sexual behavior, to say 'no' to sexual behavior, to change their minds either way, and to have the law honor each of those decisions . . .").

307. See, e.g., *id.* at 141 (proposing that broader shield laws protect woman's prerogative to be promiscuous); Sakthi Murthy, Comment, *Rejecting Unreasonable Sexual Expectations: Limits On Using A Rape Victim's Sexual History To Show The Defendant's Mistaken Belief In Consent*, 79 CAL. L. REV. 541, 552 (1991) (observing that rape shield laws protect "a woman's choice of sexual lifestyle").

308. Cf. *Sex Wars Redux*, *supra* note 135, at 316 (discussing argument that "the discovery and iteration of a complex and highly individuated women's sexuality" is not "likely to be implemented by direct legal effort").

309. See, e.g., Jeffrey J. Pokorak, *Rape Victims and Prosecutors: The Inevitable Ethical Conflict of De Facto Client/Attorney Relationships*, 48 S. TEX. L. REV. 695, 713 (2007) [hereinafter *Rape Victims and Prosecutors*] ("The first need of rape victims, both personal and legal, is privacy."); Seideman & Vickers, *supra* note 243, at 473 (stating that "[f]or most sexual assault victims, privacy is like oxygen; it is a pervasive, consistent need").

310. See *Chastity Requirement*, *supra* note 22, at 93-94 (arguing that concept of sexual privacy "implies an appropriate sexual modesty"); see also Anita L. Allen, *Taking Liberties: Privacy, Private Choice, and Social Contract Theory*, 56 U. CIN. L. REV. 461, 471 (1987) ("Conventions of female chastity and modesty have shielded women in a mantle of privacy at a high cost to sexual choice and self-expression."). In addition, one scholar argues that rape shield laws reinforce the

Consequently, while not denying that victims value sexual secrecy in a world that impugns female sexuality, the dialectic of privacy proves a very real obstacle to changing norms about women's sexual freedom.<sup>311</sup> Thus, "anyone who takes up the weapon of privacy in the cause of women's equality must be aware that it is a double-edged weapon."<sup>312</sup>

## 2. *Prevailing Criminality Discourse Thwarts Rape Reform's Norming Potential*

The sociological messages sent by the current criminal system also create serious impediments to realist reforms' norming capability. First, the general discourse of American criminal justice effectively prevents members of society from hearing the message to "take date rape seriously," even as they ardently support other sex offender laws. Second, the political reality of the criminal system limits feminists' ability to send transformative messages about gender through the criminal rape law. Turning to the first effect, one might initially think any law that puts more criminals in jail and "protects" victims would thrive in the current political climate. Yet tougher date rape laws never engendered the widespread public support of tough drug laws and anti-pedophile measures.<sup>313</sup> The reason is that reforms aimed at countering racial and gender stereotypes within the criminal system have very little purchase among those who advocate retribution and victims' rights.<sup>314</sup>

Some "feminist" reforms fit well within the victims' rights paradigm. After the O.J. Simpson trial, society had no problem putting batterers in

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view that rape victims are fundamentally different from "real" victims and therefore require a special legal regime. Tracey A. Berry, *Prior Untruthful Allegations Under Wisconsin's Rape Shield Law: Will Those Words Come Back to Haunt You?*, 2002 WIS. L. REV. 1237, 1240.

311. See Harris, *supra* note 196, at 1577-78 (warning that dialectic of "privacy rights" has tendency to turn focus away from larger transformations of socio-economic structures).

312. Martha C. Nussbaum, *Is Privacy Bad for Women?*, BOSTON REV., Apr./May 2000, <http://www.bostonreview.net/BR25.2/nussbaum.html>; see also Larry Catá Backer, *Exposing the Perversions of Toleration: The Decriminalization of Private Sexual Conduct, the Model Penal Code, and the Oxymoron of Liberal Toleration*, 45 FLA. L. REV. 755, 796 (1993) (asserting that toleration and protection of private sexuality came at expense of sexual equality).

313. See *supra* notes 295-300 and accompanying text (discussing unpopularity of date rape reforms).

314. See *Feminist War*, *supra* note 17, at 775 (characterizing victim's rights movement as example of "powerful privileged groups using stereotypes to affect policy in a way that expressly decreases the rights of the worst-off and legitimizes, rather than challenges, subordinating institutions").

the category of irredeemable, evil criminal.<sup>315</sup> Although there is certainly a distinct caricature of a minority abuser,<sup>316</sup> through movies like *The Burning Bed*, society could even see white men as repulsive batterers, so long as they committed atrocious crimes against their innocent white wives.<sup>317</sup> Concurrent with the image of the horrible batterer was the helpless, infantile, emotionally fragile wife in desperate need of government intervention.<sup>318</sup> Domestic violence reforms incorporating these bipolar images, such as forced separation and mandatory prosecution, enjoy wide-spread popularity.<sup>319</sup> Even the most conservative political players have characterized abusers as horrific criminals at whom the state needs to “throw the book.”<sup>320</sup>

Similarly, paradigmatic rape victims, especially children, and their hideous violators, are the very archetypes around which many modern-day narratives of victimhood and criminality are constructed.<sup>321</sup> Society

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315. See G. Kristian Miccio, *A House Divided: Mandatory Arrest, Domestic Violence, and the Conservatization of the Battered Women's Movement*, 42 HOUS. L. REV. 237, 238 (2005) (“With the death of Nicole Brown, politicians raced to the state house to invoke domestic violence laws, jumping on the ‘zero tolerance’ bandwagon.”).

316. See Rashmi Goel, *Can I Call Kimura Crazy? Ethical Tensions in the Cultural Defense*, 3 SEATTLE J. SOC. JUST. 443, 454 (2004) (noting the “strong stereotype[] that Latino males are macho and hot tempered”).

317. See Donna Coker, *Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color*, 33 U.C. DAVIS L. REV. 1009, 1028–29 (2000) (observing battered women’s movement’s primary focus on white women); Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 2–3 (1991) (asserting that the movie *The Burning Bed*, which included a white male antagonist, helped build the cultural image of weak battered women subjected to terrorism-like violence).

318. See Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1086 (1991) (contending that domestic violence reformers stereotype battered women as helpless and defective); Miccio, *supra* note 315, at 242 (maintaining that mandatory policies “reify[] the cultural stereotypes of the incapacitated and irrational woman”). See generally *Feminist War*, *supra* note 17, at 801–20 (criticizing domestic violence criminalization for objectifying women).

319. One need only browse the internet for a minute to find ultimate contempt for batterers. A post on Yahoo Answers (U.S.) asks, “What is your opinion on men who hit women?” The replies from (apparently) men include: “i [sic] personally think they are the lowest of form of the human race,” and “Subhuman. Lowlives [sic]. Beneath contempt.” Yahoo! Answers, *What Is Your Opinion on Men Who Hit Women?*, <http://answers.yahoo.com/question/index?qid=20070405135336AANYPOJ&show=7> (last visited Sept. 15, 2009) [hereinafter *Yahoo Abuse Answers*].

320. See, e.g., President George W. Bush, *President Bush Proclaims October Domestic Violence Awareness Month: Remarks by the President on Domestic Violence Prevention* (Oct. 8, 2003), <http://georgewbush-whitehouse.archives.gov/news/releases/2003/10/20031008-5.html> (declaring “fight against domestic violence” and prescribing “faith based programs” as solution).

321. See 148 CONG. REC. H916 (daily ed. Mar. 14, 2002) (remarks of Rep. Green). Experts note

largely demands the highest and most severe forms of punishment for paradigmatic rapists.<sup>322</sup> Over the past several years, politicians bolstered by victims' rights allies have proposed newer and better ways of making sex offenders suffer, testing the very limits of constitutionality.<sup>323</sup> Prosecutors defended such policies all the way up to the Supreme Court, which in turn put its stamp of approval on public registration and indefinite detention of sex offenders.<sup>324</sup> Far from being archaic constructions from days past, images of paradigmatic rapists as unscrupulous minorities<sup>325</sup> or predatory sickos hanging out in the shadows are as popular as ever.<sup>326</sup>

Although throwing the book at sexual predators is a surefire rhetorical ace for the savvy politician, few find it politically expedient to be "tough" on date rape.<sup>327</sup> Despite an embarrassing history of sex offenses

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that characterizing rapists as abnormal has historical roots. See Wells & Motley, *supra* note 59, at 154 (noting that early twentieth century psychiatrists described "sex offenders as mental deviants with little ability to control their behavior").

322. See Nora V. Demleitner, *First Peoples, First Principles: The Sentencing Commission's Obligation to Reject False Images of Criminal Offenders*, 87 IOWA L. REV. 563, 567–68 (2002) (observing how publicity of such cases elevated crime against women and children to "national crises"); see also Simon, *Megan's Law*, *supra* note 238, at 1135 (discussing "moral panic" surrounding child rape cases). The "predator" category gives the public some certainty in what is perceived as a world of random ubiquitous criminality. See Joseph E. Kennedy, *Monstrous Offenders and the Search for Solidarity Through Modern Punishment*, 51 HASTINGS L.J. 829, 884 (2000) [hereinafter *Monstrous Offenders*] ("The sexual predator of children provides 'a vision of crime that lawmakers fervently want to believe: a place where . . . the evil lurking in the land can be corralled and eliminated . . .'" (quoting Matthew Stadler, *Stalking the Predator*, N.Y. TIMES, Nov. 7, 1995, at A23)).

323. See *supra* note 74 and accompanying text (discussing harsh sex offender policies).

324. See, e.g., Conn. Dep't of Pub. Safety v. Doe, 538 U.S. 1 (2003) (finding that placing sex offender on public registry without hearing complied with procedural due process); Kansas v. Hendricks, 521 U.S. 346 (1997) (holding indefinite civil commitment of "sexually violent predators" with mental "abnormalities" constitutional, despite fact that detention was not for the purpose of treatment).

325. See N. Jeremi Duru, *The Central Park Five, the Scottsboro Boys, and the Myth of the Bestial Black Man*, 25 CARDOZO L. REV. 1315, 1345 (2004) (noting continued characterization of black men as sexually predatory); see also Jeffrey J. Pokorak, *Rape as a Badge of Slavery: The Legal History of, and Remedies for, Prosecutorial Race-of-Victim Charging Disparities*, 7 NEV. L.J. 1, 1, 40–43 (2006) (citing studies demonstrating that the "rape meta-narrative of a stranger who is a Black man violently assaulting a White woman continues to infect prosecutorial decisions").

326. See Stevi Jackson, *The Social Context of Rape: Sexual Scripts and Motivation*, in RAPE & SOC'Y 16 (Patricia Searles & Ronald J. Berger eds., 1995) (noting lingering image of rapists as "psychopaths lurking in dark alleys waiting to pounce on any likely victim and inflict their uncontrollable desires").

327. In a telling article, the *Boulder Daily Camera* reports district attorney candidates' responses

on American university campuses,<sup>328</sup> the date rape issue, with its descriptive nuance, has little political appeal.<sup>329</sup> The narratives justifying sex offender registration, civil commitment, residency requirements, and harsh punishments paint a picture of criminals that look nothing like the average college date rapist.<sup>330</sup> For this reason, the concept that date rapists have to register as sex offenders causes even the most conservative anti-crime supporters to question whether registration is over-inclusive.<sup>331</sup> Today, hatred of criminals is dependent on criminals being wholly unlike average persons and therefore disentitled to empathy, sympathy, compassion, or humane treatment.<sup>332</sup> The language used by politicians and victims' rights advocates describing sex

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to the question of how they would treat a date rape allegation. Christopher Anderson, *DA Candidates Voice Views on Date Rape*, BOULDER DAILY CAMERA, May 14, 2000, at 1B. In stark contrast to typical political rhetoric about sexual predators, each DA candidate emphasized the importance of investigating the complainant's credibility. *Id.* Compare this to political stances on sex offenders generally. See Emily Ramshaw, *Child Sex Bills Raising Concern: Victims' Groups Think Death Penalty, Other Ideas Could Backfire*, DALLAS MORNING NEWS, Jan. 5, 2007, at 2A (reporting that "[s]ex offenders were a hot topic during the 2006 [Texas] governor's race, with all four contenders . . . open to the death sentence").

328. See CHRISTOPHER P. KREBS ET AL., NAT'L INST. OF JUST., CAMPUS SEXUAL ASSAULT (CSA) STUDY, FINAL REPORT 64 (2007), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf> (finding that over thirteen percent of university student respondents indicated they had been raped); *Crime on College Campuses: Institutional Liability for Acquaintance Rape*, Association of Trial Lawyers of America Annual Convention Reference Materials, 1 Ann.2004 ATLA-CLE 499 (2004) (concluding that women in college are more likely to be raped than women in same age group not attending college); Carmody, *supra* note 301, at A1 (reporting that "officials say rape has surpassed theft as the principal security concern at colleges and universities").

329. Cf. Judith Resnik, *Reconstructing Equality: Of Justice, Justicia, and the Gender of Jurisdiction*, 14 YALE J.L. & FEMINISM 393, 404 (2002) (attributing support for the Violence Against Women Act partly to the press' characterization of the Act as a statute "about 'rape' rather than about [women's] 'civil rights'").

330. See *No Bad Men*, *supra* note 73, at 678 (observing the American cultural paradigm that "'nice' (well educated, white, middle class, employed) men do not rape" (footnote omitted)); see, e.g., Duncan, *supra* note 255, at 1112 (asserting that men engaging in nonconsensual sex should not be punished as "rapists" because "society regards rapists as some of its worst criminals").

331. See Wells & Motley, *supra* note 59, at 164 (noting that "[s]ociety may tolerate the questionable aspects of registration and notification laws as long as the defendant appears monstrous," but not when offender is "a college student convicted of raping a young woman at a fraternity party"); see, e.g., Kathleen Parker, *When Date Rape is a Life Sentence*, TOWNHALL.COM, May 10, 2006, [http://www.townhall.com/columnists/KathleenParker/2006/05/10/when\\_date\\_rape\\_is\\_a\\_life\\_sentence](http://www.townhall.com/columnists/KathleenParker/2006/05/10/when_date_rape_is_a_life_sentence) ("In our justifiable repulsion in the face of monsters . . . we have used too broad a brush.").

332. See *Trouble with Trials*, *supra* note 178, at 852 (describing the tough-on-crime "view of the criminal offender [as] someone hostile to civilized values, devoid of human sensibilities, utterly 'other'").

offenders as monsters and predators had much to do with dehumanizing criminals in the eyes of the public.<sup>333</sup> To the extent that rape reformers supported the victims' rights movement and its construction of rapists as inhuman and abnormal,<sup>334</sup> they planted the seeds of realist reform's demise.<sup>335</sup> How can a white, clean-cut college boy who did no more than assume when the girl said "no" she was playing coy be considered a horrible monster?<sup>336</sup>

In addition, a date rape victim is often not an idealized victim like the innocent child subject to a brutal violent attack.<sup>337</sup> Date rape victims do not always readily appear weak or perpetually damaged,<sup>338</sup> and the circumstance of being on a date itself conveys a certain level of sexual agency.<sup>339</sup> As a result, in the minds of jurors and the public, college date

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333. See Terrence Stutz, *Dewhurst Focuses on Program to Fight Child Sexual Predators: Inaugural Address also Mentions Immigration, Environment, Education*, DALLAS MORNING NEWS, Jan. 17, 2007, at 9A (reporting that Texas Lt. Governor David Dewhurst supported harsher sex-offender legislation "to bring justice to these monsters," adding "we'll show you what Texas tough means"); see also 142 CONG. REC. 10,312 (May 7, 1996) (statement of Rep. Schumer) (discussing sex offenders' "restless and unrelenting prowling for children").

334. Feminists have often been supportive of or agnostic to the victim's rights movement. See, e.g., Alice Koskela, Note, *Victim's Rights Amendments: An Irresistible Political Force Transforms the Criminal Justice System*, 34 IDAHO L. REV. 157, 163 (1997) (tracing victims' rights movement in part to feminist criminal law efforts); Martin, *supra* note 1, at 159 (noting intertwining of victims' rights and feminist law reform); Wells & Motley, *supra* note 59, at 189-90 (criticizing feminist's lackluster response to tough sex-offender legislation). Of course, this does not mean that all feminists supporting rape laws espouse binary views of criminality and victimhood. Nonetheless, the feminist argument that date rapists are "bad" like "other" rapists and should be punished accordingly seems at odds with a feminist deconstruction of the prevailing essentialist discourse of criminality and victimhood.

335. See *Motivational Evidence*, *supra* note 100, at 597 (criticizing rape "measures that exploit white fear of the minority rapist and perpetuate myths of its prevalence").

336. One juror explained an acquittal, stating that because the defendant was "[a] nice-looking young fellow," "[n]ice[ly] dressed, like a college boy" with a "[n]eat haircut," she "couldn't believe he would be capable of something like this." GARY LAFREE, *RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT* 219 (1989) (quoting rape juror); see also *No Bad Men*, *supra* note 73, at 677-78 (noting that jurors expect a rapist to be "a sex-crazed, deviant sociopath" or "a 'loser' who has no girlfriend").

337. See *Feminist War*, *supra* note 17, at 775 (noting victims' rights movement's characterization of victims as "weak, innocent, and helpless").

338. See Bryden & Lengnick, *supra* note 15, at 1272 n.487 (citing C. Neil MacRae & John W. Shephard, *Sex Differences in the Perception of Rape Victims*, 4 J. INTERPERSONAL VIOLENCE 278, 284 tbl. 2 (1989), which reports that mock jurors rated defendants more culpable for raping virgins because of increased psychological damage); Seidman & Vickers, *supra* note 243, at 469 (noting that jurors want victims to act like "someone who has really suffered the trauma of assault").

339. See *No Bad Men*, *supra* note 73, at 681 (asserting that jurors disbelieve "[w]omen who push the limits of their sex roles").



rape complainants are not “real” victims,<sup>340</sup> the preferred victim often being the “unjustly accused” defendant.<sup>341</sup> The absurd result of hysteria over pedophilia in a *Girls Gone Wild* world is that a fifteen-year-old girl has absolutely no ability to consent to sex,<sup>342</sup> although three years later as a sexy co-ed, she has absolutely no ability to refuse.<sup>343</sup>

Feminists trusted realist reforms to send society a message that coerced sex and sex in the absence of unambiguous permission (seemingly “normal” behavior) are grave wrongs.<sup>344</sup> However, as currently constructed, criminal law conveys the general position that criminals are pathological deviants who engage in wholly aberrant conduct. The beliefs and behaviors predating date rape, including male goal-orientation and female coyness, are clearly sexist but they are far from deviant.<sup>345</sup> Experts note that date rapists are really no more than men who take very seriously the goal of sex and their roles as aggressors.<sup>346</sup> Even without indulging slut and shrew stereotypes, people

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340. See *supra* notes 76–82 and accompanying text (discussing rape stereotypes). In fact, it is extremely difficult for rape victims to ever claim “real” victimhood: “The married woman assumes the risk of rape because she is married. The single woman assumes the risk of rape because she is single and on a date. The loose woman assumes the risk of rape because she is loose. The virgin is assumed to be fabricating rape charges to protect her virginity. Arguably, assumption of risk of rape, in its most basic form, attaches not to any external behavior but to womanhood.” *Pink Elephants*, *supra* note 101, at 249–50.

341. See *supra* note 87 and accompanying text.

342. See, e.g., CAL. PENAL CODE § 261.5 (West 1999 & Supp. 2006) (statutory rape law); OHIO REV. CODE ANN. § 2907.04 (West 1997 & Supp. 2005) (same); see also David P. Bryden, *Reason and Guesswork in the Definition of Rape*, 3 BUFF. CRIM. L. REV. 585, 586 (2000) (asserting that harsh statutory rape laws “are due to the unique horror with which we view pedophiles”).

343. See *supra* notes 40–41 and accompanying text.

344. See Katharine K. Baker, *Gender and Emotion in Criminal Law*, 28 HARV. J.L. & GENDER 447, 454 (2005) [hereinafter *Gender and Emotion*] (asserting that rape reform sends “a clear message” that sex must be “voluntarily given”).

345. See Judith Lewis Herman, *Considering Sex Offenders: A Model of Addiction*, in RAPE & SOC’Y 74, 77 (Patricia Searles & Ronald J. Berger, eds., 1995) (observing that “young rapists in college-student surveys [are] demonstrably sexist, but not demonstrably ‘sick’”); Megan R. Yost & Eileen L. Zurbriggen, *Gender Differences in the Enactment of Sociosexuality: An Examination of Implicit Social Motives, Sexual Fantasies, Coercive Sexual Attitudes, and Aggressive Sexual Behavior*, 43 J. SEX RES. 163, 163 (2006), available at <https://www.sexscience.org/uploads/media/JSR-articleYost.pdf> (finding that male “sociosexuality,” which means “a person’s willingness to engage in sexual activity with a variety of partners outside of a romantic relationship” is linked to “higher levels of rape myth acceptance and adversarial sexual beliefs; more conservative attitudes toward women; higher levels of power motivation and lower levels of affiliation-intimacy motivation; and past use of sexual aggression”).

346. See *Sex, Rape, and Shame*, *supra* note 297, at 688 (concluding that sex and masculinity norms account for date rapists’ inclination to bypass consent).

reject criminalizing date rape because they view the conduct simply as an imperfect sexual encounter<sup>347</sup> or in some cases successful seduction.<sup>348</sup> Indeed, nonparadigmatic rape is something which, like more subtle forms of domestic control, society cannot condemn without a re-evaluation of entrenched gender norms. Taking date rape “seriously” requires people to believe that a wrong can occur in the absence of social, racial, or psychological divergence and to critically reexamine “normal” male sexual aggression and female passivity. These are Herculean demands to put on jurors in the context of a criminal trial. It is no wonder that experts believe affirmative consent “invites jury nullification.”<sup>349</sup>

The nonparadigmatic rape convictions that do occur, moreover, will be filtered through the lens of prevailing social narratives.<sup>350</sup> Juries are more likely to convict only those date rapists who have displayed behavior consistent with paradigmatic rape.<sup>351</sup> Moreover, it is probable that society at large simply assumes that the majority of convicted rapists did engage in conduct divergent from noncriminal courtship behavior. It comes as no surprise, then, that the media and public have largely interpreted the anti-date-rape message as simply a tough-on-prototypical-rape message, rather than a caution against gender stereotypes.<sup>352</sup> In this sense, the criminal justice system has not furthered a feminist agenda. Rather, feminism has furthered criminal justice’s agenda. Additionally, addressing the date rape problem by jailing a few

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347. See *REAL RAPE*, *supra* note 89, at 13 (noting that “many young women believe that sexual pressure, including physical pressure, is simply not aberrant or illegal behavior if it takes place in a dating situation”).

348. See *Sex, Rape, and Shame*, *supra* note 297, at 684–85 (citing studies finding that men often believe sexually coercive behavior is normal successful seduction).

349. Dressler, *supra* note 95, at 423; see also *After Rape Law*, *supra* note 106, at 958.

350. See Lise Gotell, *Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women*, 41 AKRON L. REV. 865, 884 (2008) (observing that neoliberalism constructs “violence enacted on the bodies of vulnerable women [as] personalized and individualized”).

351. See Bryden, *supra* note 95, at 418–26 (asserting that reforms have little empirical effect because jurors continue to look for signs of resistance, force, nonconsent, and corroboration).

352. See *Monstrous Offenders*, *supra* note 322, at 876–78 (noting that conservatives were more successful at characterizing rape as problem of street predators than feminists were at characterizing rape as inequality); see also Kosse, *supra* note 80, at 276 (conducting study of media reports of Duke Lacrosse rape case and finding that reporting largely ignored “underlying causes of rape including sexism and misogyny” and instead focused on “the facts of the event which promotes the idea that the crime is rare and thus newsworthy”).

“bad” rapists obscures the reality that date rape’s cultural and socio-economic predicates are widespread and seemingly ordinary.<sup>353</sup> In sum, features of current American criminal law and gender norms render the transformative potential of realist rape reform a paltry pay-off given the inconsistency of feminist philosophy with current American criminal justice politics.

*B. Rape Reform Does Not Substantially Benefit Victims*

One more question must be addressed before definitively concluding that feminists should disengage from criminal law, and this question is generally singularly important to on-the-ground reformers: Do the laws improve the lives of individual rape victims? Many rape reformers account for the apparent failure of realist rape laws by asserting they have not been implemented as widely or strictly as necessary.<sup>354</sup> These reformers stress that society needs stricter criminal laws and more exacting prosecutions.<sup>355</sup> The contention that rape victims will benefit from more restrictive and uniform rape shield and affirmative consent laws rests on two basic assumptions. First, it assumes that if realist reforms are broader and more regularly implemented, they will make trials fairer and increase reporting rates. Second, it assumes that encouraging reporting and prosecution of date rapes, in the reformed criminal system, is in fact best for women victims. The next two subsections analyze these assumptions in turn.

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353. See *Sexy Dressing*, *supra* note 52, at 1321 (asserting that deviance discourse allows people to “live in a universe where legal rules about sexual abuse are irrelevant because the relations between men and women, however, screwed up they may be . . . are basically pacific and friendly”); see also *Rape Panel*, *supra* note 21, at 156 (recognizing that focus on criminal law “may distort rather than enlighten our understanding of harms done to women by men in our routine, normal, day-to-day heterosexual transactions”).

354. See *Chastity Requirement*, *supra* note 22, at 96 (criticizing shield laws for containing too many exceptions).

355. See Stephen J. Schulhofer, *Rape in the Twilight Zone: When Sex is Unwanted But Not Illegal*, 38 SUFFOLK U. L. REV. 415, 416–17 (2005) (arguing for wider adoption and stricter application of affirmative consent); Seidman & Vickers, *supra* note 243, at 484–90 (calling for uniform adoption of affirmative consent).

### 1. *Broader Date Rape Criminalization Will Not Solve the Problem*

Today, all states and the federal government have implemented some form of rape shield law.<sup>356</sup> Reformers accordingly praise the broad adoption of shield laws, but complain that they contain too many exceptions.<sup>357</sup> They assert eliminating such exceptions will rid rape trials of sexist myths and increase convictions and reporting.<sup>358</sup> However, it seems feminists underestimated the multitude of ways in which rape myths infect the criminal system. First, shield laws only protect against embarrassment and prejudice at the trial level. Other institutional actors, from police to prosecutors, are free to act on the basis of stereotypes.<sup>359</sup> The continued use of rape mythology by these state actors has the effect of discouraging victim reporting and participation.<sup>360</sup> In addition, prosecutors are culturally oriented toward winning trials, which may lead them to dismiss cases involving nonparadigmatic victims because the chances of victory are low.<sup>361</sup> Experts also note that some rape complainants, like Kobe Bryant's accuser,<sup>362</sup> can be traumatized by actions of purely non-state actors.<sup>363</sup>

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356. See *Chastity Requirement*, *supra* note 22 (citing cases and statutes); see *supra* notes 96–97 and accompanying text.

357. See, e.g., *Chastity Requirement*, *supra* note 22, at 96 (advocating stricter rape shield law).

358. See *supra* notes 99–101 and accompanying text.

359. See SPOHN & HORNEY, *supra* note 55, at 116 (finding rape reforms ineffective “because they failed to alter officials’ evaluations of rape cases and rape victims”); *Chastity Requirement*, *supra* note 22, at 95–96 (noting that rape stereotypes are likely most operational at pretrial stages); Seidman & Vickers, *supra* note 243, at 468 (contending that state actors and jurors continue to be hostile to rape claims).

360. See Andrea A. Curcio, *The Georgia Roundtable Discussion Model: Another Way to Approach Reforming Rape Laws*, 20 GA. ST. U. L. REV. 565, 570 (2004) (noting that “scholars believe that the rape victims’ unwillingness to prosecute cases is, at least in part, the result of poor treatment by the police and the prosecutors”).

361. Sarah Goodrum, *Victims’ Rights, Victims’ Expectations, and Law Enforcement Workers’ Constraints in Cases of Murder*, 32 LAW & SOC. INQUIRY 725, 730 (2007) (observing that in rape context prosecutors’ “responsibility to build a strong case for the state” requires them to “hold a ‘downstream [or end result] orientation’”); Nicholas J. Little, *From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law*, 58 VAND. L. REV. 1321, 1326 (2005) (observing that “prosecutors seek the ‘ideal’ rape victim to maximize their chance of achieving a conviction”).

362. See *supra* note 79 (discussing Kobe Bryant case).

363. See *Special Issues*, *supra* note 27, at 1600.

Moreover, during trial, the very fact of an accusation of acquaintance rape can trigger sex object and vindictive shrew narratives.<sup>364</sup> Even when the court fully shields the jury from particular evidence that the victim is “loose” or lying, stereotypes and heuristics continue to operate.<sup>365</sup> Looking at it hermeneutically, the rape trial proceeds on a backdrop of narratives surrounding all the players involved—from police, to defendants, to victims.<sup>366</sup> The background narrative of the date rape victim necessarily integrates the lingering image of the slut or shrew.<sup>367</sup> Thus, total elimination of such myths from the trial through legal reform is a practical impossibility.<sup>368</sup> As a consequence, notwithstanding rape shield laws, date rape conviction rates remain low, not only because myths creep into the trial, but also because shields do not prevent jurors from focusing on other aspects of nonparadigmatic rapes (like whether she was voluntarily in his bedroom, whether she said “no,” etc.).<sup>369</sup> So long as conviction rates remain low, rape victims, police, and prosecutors will continue to be reluctant to pursue date rape cases through trial.

Perhaps, then, affirmative consent laws can fill the gap by decisively forcing juries to focus on the sole question of whether the victim said “yes.” Reformers certainly argue that date rape prosecutions would be far more frequent and successful if affirmative consent laws were adopted in every jurisdiction.<sup>370</sup> However, given the “sticky norms”

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364. See Douglas D. Koski, *Jury Decisionmaking in Rape Trials: A Review & Empirical Assessment*, 38 CRIM. L. BULL. 21, 128 (2002) (study finding that jurors who are forced to reach consensus “converge[] on whatever stereotypic-consistent imagery and information is available”).

365. See Ann Althouse, *Thelma and Louise and the Law: Do Rape Shield Rules Matter?*, 25 LOY. L.A. L. REV. 757, 764 (1992) (cataloging ways gendered narratives enter trial, despite shield laws); see also Rayburn, *supra* note 6, at 460–65 (noting that “performances” within rape trial, from defense questions to victim’s manner, trigger stereotypes); Seidman & Vickers, *supra* note 243, at 485.

366. See Coombs, *supra* note 50, at 291 (asserting that “cultural scripts that the jurors bring to the court indirectly influence the stories they will be told”); *No Bad Men*, *supra* note 73, at 682 (observing that criminal prosecutions proceed against a backdrop of “the patriarchal tale of rape that our culture inculcates and that we use to measure the credibility of any given charge of rape”).

367. See *Special Issues*, *supra* note 27, at 1592 (noting “cultural atmosphere” supporting rape myths).

368. See *Forgetting Freud*, *supra* note 77, at 154–55 (observing that subtle word choices trigger metaphors used by jurors as “epistemology filters”).

369. See also Friedland, *supra* note 267, at 519 (noting that shield laws do not address jurors’ acceptance of defendants’ claims of nonverbal consent).

370. See *supra* note 355 (articles calling for uniform application of affirmative consent).

problem identified by Dan Kahan, and the widespread popular rejection of an objective linguistic prerequisite to sex, one could expect that widespread adoption of affirmative consent laws would likely lead to widespread jury nullification.<sup>371</sup> Alternatively, defendants will simply argue that there was affirmative consent.<sup>372</sup> In questionable cases of affirmative consent, jurors will continue to fit the law to their preexisting beliefs about rape by defining affirmative consent to include things like foreplay or other verbal and nonverbal cues.<sup>373</sup>

But let us assume *arguendo* that jurors and judges did take affirmative consent laws very seriously and put a large number of young men in jail for date rape under such laws. One might think that this state of affairs would be beneficial for victims and potential victims because it would force men to procure a “yes” before sexual intercourse. Upon further reflection, however, one is left to wonder whether inserting affirmative consent into the botched sex equation will affect a real change.<sup>374</sup> Women would continue to believe they must play coy, and men would still be goal-oriented toward sex,<sup>375</sup> just with “getting to yes” inserted into the effort. Men would continue to pressure women in order to procure a “yes,” and women would say “yes” out of fear or aversion to confrontation.<sup>376</sup> In the end, the “fix” of affirmative consent is no more than an ineffective insertion of language into a highly psychologically and culturally ordered scenario.<sup>377</sup>

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371. See Kahan, *supra* note 252, at 623 (observing that in jurisdictions that have adopted affirmative consent “prosecutors are no more likely to charge men who disregard a woman’s verbal protestations, and juries no more likely to convict them, than are prosecutors and juries in other states”).

372. See Bryden, *supra* note 95, at 425 (contending that accused rapists will simply “testify that the victim affirmatively expressed her consent”).

373. See *id.* at 409 (stating that in the “absence of some sort of physical or at least verbal resistance by the woman few observers would say that the man’s conduct was so unusual and immoral that it warrants the extreme sanction of imprisonment”).

374. See Barrie Bondurant & Patricia L. N. Donat, *Perceptions of Women’s Sexual Interest and Acquaintance Rape: The Role of Sexual Overperception and Affective Attitudes*, 23 PSYCH. OF WOMEN Q. 691, 700 (1999) (finding that certain mens’ pre-existing rape-supportive attitudes lead to date rape).

375. See *supra* notes 269–71 and accompanying text.

376. See *supra* note 274 and accompanying text.

377. See Bryden, *supra* note 95, at 425; Dan Subotnik, “Hands Off”: Sex, Feminism, Affirmative Consent, and the Law of Foreplay, 16 S. CAL. REV. L. & SOC. JUST. 249, 294 (2007) (arguing that affirmative consent “will not induce the male to make himself ‘a more agreeable companion’”).

## 2. *Encouraging Punitiveness May Harm Victims*

The next assumption that reformers make is that rape victims are best served by engaging the criminal justice system. For now, let us put aside the argument that all women are harmed by the neoliberal order, including individual rape victims. General feminist objections to the criminal justice system's macro-philosophy are unlikely to persuade a victim that prosecuting the rapist is not the best course of action. Thus, the question is whether feminist reformers are correct in assuming that encouraging the prosecutorial route best serves victims' interests.<sup>378</sup> Of course, what is best for a victim depends on the specific circumstances of the case and her life. Nonetheless, with the caveat that each person has innumerable individual interests, one can make some general observations on the effect of the push toward prosecution.

This issue has arisen with some urgency in the domestic violence context. Many jurisdictions have adopted "hard no-drop" policies that mandate prosecution of abusers, even if the victims do not wish to proceed.<sup>379</sup> Several feminist scholars, including this Author, argue that such policies often inure to the great detriment of abuse survivors.<sup>380</sup> Because of mandatory policies, women victims are arrested by resentful officers as mutual combatants,<sup>381</sup> jailed as material witnesses,<sup>382</sup> and

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378. See Seideman & Vickers, *supra* note 243, at 473 (cataloging rape victims' needs, including privacy, immigration status, medical benefits, education, employment, and safe housing, and concluding that criminal prosecution "does not meet [victims'] primary needs at the time it is offered, and does not protect them from the most traumatic and devastating consequences to their well-being after the assault").

379. See generally Hanna, *supra* note 154 (describing mandatory domestic violence policies); *Feminist War*, *supra* note 17, at 760 n.90 (citing mandatory prosecution statutes).

380. See, e.g., *Feminist War*, *supra* note 17, at 801–20; Miccio, *supra* note 315, at 293–320; Suk, *supra* note 128, at 42–66.

381. See L. Kevin Hamberger & Theresa Potente, *Counseling Heterosexual Women Arrested for Domestic Violence: Implications for Theory and Practice*, 9 VICTIMS & VIOLENCE 125, 126 (1994) (finding that Wisconsin mandatory arrest law resulted in twelve-fold increase in arrests of women compared to two-fold increase for men); see also Andrea D. Lyon, *Be Careful What You Wish For: An Examination of Arrest and Prosecution Patterns of Domestic Violence Cases in Two Cities in Michigan*, 5 MICH. J. GENDER & L. 253, 298 (1999) (asserting that police "inevitably become resentful and may end up 'retaliating' by arresting a battered woman who returns to her batterer"); James O. Clifford, *Domestic Case Arrests of Women Rise*, AP WIRE, Nov. 24, 1999, <http://www.fact.on.ca/newspaper/ap99112a.htm> (observing that after California mandatory arrest policy was instituted total domestic violence arrests decreased but percentage of women domestic arrestees rose from five to sixteen percent).

382. See Hanna, *supra* note 154, at 1866 (discussing Maudie Wall case).

otherwise prosecuted by the very system to which they turned for relief.<sup>383</sup> Moreover, mandatory prosecution causes women to suffer loss of economic support,<sup>384</sup> immigration problems,<sup>385</sup> denial of public benefits,<sup>386</sup> broken families, and emotional trauma.<sup>387</sup> Finally, some experts assert that mandatory arrest and prosecution create more, not less, danger for certain victims.<sup>388</sup>

Similarly, rape reform and its general goal of encouraging date rape reporting to trigger the operation of the criminal system may have negative repercussions on the very victims they are meant to serve. Pushing rape victims toward prosecution, even in a "reformed" system, may lead them to enter unwittingly into an ultimately traumatizing process.<sup>389</sup> Believing that rape shield and affirmative consent laws will protect her, a woman may be unprepared for the way she is treated by

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383. See Coker, *supra* note 317, at 1044 n.144 (discussing arrests of battered women for child abuse and neglect).

384. See *id.* at 1017–18 (examining economic burdens of separation).

385. See *Feminist War*, *supra* note 17, at 806 ("Immigrant victims were torn between reporting domestic violence, which may result in deportation . . . and cause emotional and financial hardship, and allowing abuse to continue."). See generally Hannah R. Shapiro, *Battered Immigrant Women Caught in the Intersection of U.S. Criminal and Immigration Laws: Consequences and Remedies*, 16 TEMP. INT'L & COMP. L.J. 27, 28 (2002) (discussing adverse impact of mandatory domestic violence policies on immigrants).

386. See, e.g., Lenora M. Lapidus, *Doubly Victimized: Housing Discrimination Against Victims of Domestic Violence*, 11 AM. U. J. GENDER SOC. POL'Y & L. 377, 378–82 (2003) (citing an administrative proceeding in which a domestic violence victim was evicted from public housing under "zero-tolerance" policy, *Alvera v. Creekside Village Apts.*, HUD ALJ No. 10-99-0538-8 (U.S. Dep't of Hous. & Urban Dev., Portland, Or., Oct. 22, 1999)).

387. See Judith G. Greenberg, *Domestic Violence and the Danger of Joint Custody Presumptions*, 25 N. ILL. U. L. REV. 403, 415 (2005) (discussing numerous reasons, including "desire to keep the family unit intact," for victim reluctance to prosecute).

388. Compare Sack, *supra* note 181, at 1673–74 (asserting that no-drop policies increase convictions and lower recidivism), with Deborah Epstein et al., *Transforming Aggressive Prosecution Policies: Prioritizing Victims' Long-Term Safety in the Prosecution of Domestic Violence Cases*, 11 AM. U. J. GENDER SOC. POL'Y & L. 465, 469 (2003) (arguing mandatory policies endanger women). There is also conflicting empirical evidence on whether mandatory arrest and prosecution laws create more danger for victims. Compare Lawrence Sherman and Richard Ber, *The Minneapolis Domestic Violence Experiment*, in MILLER & WRIGHT, CRIM. PROC. 299–303 (2d ed. 2000) (finding mandatory arrest lowered short-term re-arrest rates), with Lawrence W. Sherman et al., *Crime, Punishment, and Stake in Conformity: Legal and Informal Control of Domestic Violence*, 57 AM. SOC. REV. 680, 686 (1992) (finding that among unmarried and unemployed batterers, arrest increased subsequent violence).

389. See *Rape Victims and Prosecutors*, *supra* note 309, at 713–15 (listing ways in which a criminal prosecution can traumatize rape victims).



institutional actors and others.<sup>390</sup> Reporting to police and prosecutors standing alone may be extremely distressing depending on how the state actors treat the victim and whether they pursue her case.<sup>391</sup> The victim may also be damaged by the operation of subtle sexism within the trial and upset by an eventual acquittal.<sup>392</sup> Thus, one significant problem is that realist reformers seek to shuttle women into a system that is structurally, philosophically, and culturally adverse to them.<sup>393</sup>

Realist reforms, furthermore, can harm victims by pushing a retributive model over other modes of addressing crime victimhood.<sup>394</sup> Experts argue that true closure does not come through vengeance and punishment.<sup>395</sup> Victims are benefitted by engaging in forgiveness and understanding the contextuality of the crime, including their own role in it.<sup>396</sup> Victims may also end up so engaged in the prosecutorial aspects of their criminal cases that they fail to explore therapy and other avenues of healing.<sup>397</sup> In addition, an exclusive focus on criminal punishment can deflect attention from other social circumstances that contributed to the crime.<sup>398</sup> By viewing a rape solely as an event between two individuals,

390. Philadelphia rape victims were likely unprepared to deal with the sex crime investigator who called his department the "Lying Bitches Unit." See Craig R. McCoy, *From Old Report, 4 New Charges*, PHILADELPHIA INQUIRER, June 23, 2003, at A1.

391. See Goodrum, *supra* note 361, at 730 ("Detectives and prosecutors view their role, the victim's role, and criminal cases from a perspective that conflicts with and may even harm victims.").

392. See *supra* notes 366–69 and accompanying text.

393. See *supra* notes 175–77 and accompanying text (discussing criminal trial's structural disconnect with feminism); Cahn, *supra* note 117, at 821 (observing ways in which criminal system is unsupportive of women's issue and rests on "nonneutral" assumptions); cf. Tom Lininger, *Is it Wrong to Sue for Rape?*, 57 DUKE L.J. 1557, 1559 n.1 (2008) (noting how after Kobe Bryant case publicized harms of engaging criminal system, rape victims became reluctant to report (citing Cathy Maestri & Ben Goad, *Activists Decry Bryant Decision*, PRESS-ENTERPRISE (Riverside, Cal.), Sept. 3, 2004, at A1)).

394. Martin, *supra* note 1, at 155–56 (1998) (criticizing "ubiquitous" concept that "the criminal trial, and the punishment that it justifies, [is] an occasion of healing and closure").

395. See, e.g., Lynne N. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 966 (1985) (asserting that when the criminal system focuses on "blame and denial, [it] proceeds on the basis of mistaken normative assumptions about victims").

396. See *id.* at 998 ("Forgiveness alone retains the uncontested authorship essential to responsibility and resolution. Forgiveness, rather than vengeance may, therefore, be the act that eventually frees the victim from the event, the means by which the victim may put the experience behind her.").

397. See Seideman & Vickers, *supra* note 243, at 472–81 (providing laundry list of rape victims' needs which are unaddressed by the criminal system).

398. See Lea VanderVelde, *The Legal Ways of Seduction*, 48 STAN. L. REV. 817, 842–46 (1996)

the criminal system ignores that the victim may have various psychological, social, and economic needs that made her particularly vulnerable to rape.<sup>399</sup> Finally, the more criminal rape law becomes associated with pro-woman reform, the more rape victims may be stigmatized or denigrated as lying shrews when they decline to engage the criminal system or when their cases result in acquittals.<sup>400</sup> This puts date rape victims in the precarious position of either having to go through a process that continues to be hostile or forego that process and be disbelieved about the rape because society thinks that the law now takes date rape seriously.

Consequently, realist rape reform has had questionable empirical effect on rape reporting and conviction rates. Its norming potential, moreover, is severely limited by the prevalence of culturally embedded sexism and the conflicting messages sent by criminal law in general. The state of gender norms and the criminal system also lessens rape law's ability to benefit individual victims. Further, the little protection victims can obtain from realist reforms at trial must be weighed against possible negative consequences, including luring victims into a traumatic process, obscuring other methods of healing, denying social contextuality, and stigmatizing unsuccessful or reluctant victims. In the end, realist reform produces marginal gain to individual women and little change in public opinion. Moreover, by spending academic, political, and financial capital pushing for tougher date rape laws, the feminist movement has bolstered a criminal system that operates in a manner highly antithetical to feminism generally.

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(criticizing legal regimes that "provide rape victims only with vengeance . . . rather than compensation that would improve their lives").

399. See Gotell, *supra* note 350, at 863–64 (2008) (noting how neoliberal philosophy obscures social realities of "risky" rape victims); cf. *Feminist War*, *supra* note 17, 818–19 (arguing that focus on domestic violence criminalization has left battered women's needs unaddressed).

400. Deborah M. Weissman, *Gender-Based Violence as Judicial Anomaly: Between "The Truly National and the Truly Local,"* 42 B.C. L. REV. 1081, 1133–34 (2001) (stating in domestic violence context that "attention to criminal remedies actually contributes to skepticism that battered women continue to face difficulties in the courts" and "a view that women have undeserved advantages").

## V. FEMINISTS SHOULD DISENGAGE FROM RAPE REFORMS THAT STRENGTHEN THE PENAL STATE

This Article has waded into what Elizabeth Schneider calls the “murky middle ground” between women’s desperate desire for liberation from bonds of gender violence and the problems of engaging coercive state penal authority.<sup>401</sup> No answers here are easy precisely because the very inchoateness and ubiquity of female subordination within law and society create a world in which women are at the mercy of individual male abusers or the patriarchal state. However, while neither the abandonment of criminal law nor continued engagement is ideal, they are not equally situated. At this particular moment, feminists ought to be consistent in critiquing the enormity and inhumanity of our criminal justice system, as well as its flawed premises.<sup>402</sup> Women should not “walk the halls of power”<sup>403</sup> in the criminal justice system but should rather begin the complicated process of disentangling feminism and its important anti-sexual coercion stance from a hierarchy-reinforcing criminal system that is unable to produce social justice.<sup>404</sup>

Even feminists persuaded that the criminal route is ideologically and materially flawed might nevertheless have some lingering doubt about receding from the criminal law. First, they might worry that feminist exit from criminal law will signal that sexual violence, particularly date rape, is not a pressing social problem.<sup>405</sup> Minority scholars often feel

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401. Schneider, *supra* note 229, at 196.

402. See *Feminist War*, *supra* note 17, at 824 (“Feminists should not be channeling their efforts into helping the government find new, better, and easier ways to incarcerate people.”); see also *supra* notes 7–8 and accompanying text (discussing punitive nature of American criminal system).

403. See SPLIT DECISIONS, *supra* note 165, at 20–21 (criticizing “governance” feminists who “walk the halls of [mainstream] power”).

404. See Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 848 (1990) (contending that feminists should engage in a “deeper inquiry into the consequences of overlapping forms of oppression”); Martin, *supra* note 1, at 160 (stating that “[t]he criminal justice apparatus is about order and its reproduction, and about maintaining the existing hierarchy of status and privilege”).

405. I, myself, have been disturbed to see bits and pieces of *Feminist War*, an article I wrote setting forth a progressive argument against mandatory domestic violence policies, placed prominently on uber-conservative and so-called men’s rights websites and blogs as prima facie evidence that the “feminazis” have “gone wild.” See, e.g., Carey Roberts, *Harsh Domestic Violence Laws Recall Jim Crow Abuses*, RENEW AMERICA (Mar. 10, 2008), <http://www.renewamerica.us/columns/roberts/080310> (last visited Sept. 27, 2009). Apparently, Mr. Robert’s article is reprinted on a number of conservative and men’s rights sites. See, e.g., Postings to Yahoo Answers, *Feminists: Would You Defend VAWA if it were VAMA Instead?* (2008),

compelled to show no weakness by perpetually supporting the strategic and philosophical positions of the group and avoiding internal critique.<sup>406</sup> Indeed, there is always the risk that “attacks on liberal legalism” from the left “ultimately will do more to advance right-wing anti-liberal legalism and less to advance progressive alternatives.”<sup>407</sup> Yet it is highly unlikely that sexists will premise or justify their views of date rape on progressives’ internal critique,<sup>408</sup> especially if feminists make clear that the problem is with the criminal justice system and not with the concept that coerced and unconsensual sex is wrongful.<sup>409</sup> Further, many critical scholars recognize that internal critique’s costs are far outweighed by its aptitude for “confronting complex subordination.”<sup>410</sup>

Second, the turn away from criminal law may leave feminists feeling defeated because doing “something,” even if within criminal law, is better than doing nothing. However, continuing to engage in punitive discourse and pro-prosecution reform is arguably more damaging to all subordinated groups, including women, than doing nothing. Moreover, this Article is more hopeful than many critical projects because it does

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<http://answers.yahoo.com/question/index?qid=20080607184301AAfKz1b> (last visited Sept. 27, 2009) (stating that “[t]he domestic violence laws are prejudiced against men because they were promoted by feminists (see Prof [sic] Gruber’s paper),” and “Professor Aya Gruber’s research (2007 isn’t too long ago) proves that VAWA was a sexist law”). Interestingly, *Feminist War* does not address VAWA.

406. For example, progressives who criticize certain African American groups for ignoring the interests of black women or gays fear that they might fuel racists’ claims that black men are sexist and homophobic. See Darren Lenard Hutchinson, *Beyond the Rhetoric of “Dirty Laundry”: Examining the Value of Internal Criticism Within Progressive Social Movements and Oppressed Communities*, 5 MICH. J. RACE & L. 185, 195 (1999) (noting argument that internal criticism “exacerbate[s] the negative construction of oppressed individuals”). Internal critique is also seen as somewhat traitorous. See *Feminist War*, *supra* note 17, at 819 (observing that some pro-prosecution feminists characterize theorists who criticize gender crime enforcement as “allies of batterers and pseudofeminists . . . who wish to send the women’s movement back twenty years”).

407. Martha T. McCluskey, *Thinking with Wolves: Left Legal Theory After the Right’s Rise*, 54 BUFF. L. REV. 1191, 1196 (2007).

408. Cf. *Navigating Diverse Identities*, *supra* note 186, at 1225 (observing that “those who wish to marginalize and stereotype minorities will find a way to do so” and will not likely rely on critical scholarship); Angela Onwuachi-Willig et al., *Cracking the Egg: Which Came First—Stigma or Affirmative Action?*, 96 CAL. L. REV. 1299 (2008) (study demonstrating that affirmative action does not cause racial bias, pre-existing racial bias causes people to stigmatize blacks as unfair recipients of affirmative action).

409. See Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 626 (1990) (observing that “factors that divide [feminists] can also be a basis for enriching our theoretical perspectives and expanding our political alliances”).

410. Hutchinson, *supra* note 406, at 197.

not take the position that law can never be a mechanism of true feminist progress.<sup>411</sup> Critical, feminist, and minority scholars have long objected to the singular reliance on positive law to achieve social justice ends.<sup>412</sup> Drawing on insights about the limits of legal rules from Critical Legal Studies, many minority theorists have concluded that legal proposals provide limited potential for securing group justice because American law manifests primarily in a liberal form.<sup>413</sup> Feminist scholars in particular have suggested that legal proposals inevitably reinforce patriarchy because “women are cast as requiring protection from the world of male violence while the superior status of men is secured by their supposed ability to offer such protection.”<sup>414</sup>

By contrast, this Article leaves open the possibility that changes in labor and employment law, public benefits law, immigration law, and the construction of educational, vocational, and other programs could, in fact, lead to women’s economic and social empowerment and have a positive effect on curbing sexual violence.<sup>415</sup> There is even a possibility that under different political conditions, criminal law could be part of a

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411. Indeed, many recognize the great progressive promise of law. Cornel West, *Reassessing the Critical Legal Studies Movement*, in *KEEPING FAITH: PHILOSOPHY AND RACE IN AMERICA* 195, 203 (1993) (noting “the creative ways in which oppressed and marginalized persons have forged traditions of resistance by appropriating aspects of liberalism for democratic and egalitarian ends”). But see Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1384 (1984) (asserting that “the pragmatic argument to which defenders of rights retreat when pressed is much less powerful than they normally think”).

412. See Paul Butler, *Racially Based Jury Nullification: Black Power in the Criminal Justice System*, 105 YALE L.J. 677, 679 (1995) (making racial case for non-enforcement of criminal laws); cf. Tushnet, *supra* note 411, at 1392–93 (“By abstracting from real experiences and reifying the idea of rights, [liberal discourse] creates a sphere of autonomy stripped of any social context and counterposes to it a sphere of social life stripped of any content.”).

413. See Audre Lorde, *The Master’s Tools Will Never Dismantle the Master’s House*, in *SISTER OUTSIDER: ESSAYS AND SPEECHES* 110, 112 (1984) (asserting that the master’s tools “may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change”).

414. *Man in the State*, *supra* note 2, at 25 (interpreting MAX WEBER, *ECONOMY AND SOCIETY* 357–59 (1978)). See also Hilary Charlesworth et al., *Feminist Approaches to International Law*, 85 AM. J. INT’L L. 613, 634 (1991) (noting feminist critique of liberalism that “continuing to focus on the acquisition of rights may not be beneficial to women”).

415. Many argue that legal strategies should not be written off. See, e.g., Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, in *CRITICAL RACE THEORY: THE CUTTING EDGE* 84, 89 (Richard Delgado ed., 1995) (“The argument that rights are disutile, even harmful, trivializes [the experience] . . . of any person or group whose genuine vulnerability has been protected by that measure of actual entitlement which rights provide.”).

feminist agenda.<sup>416</sup> Thus, this Article is not a call for decriminalization of date rape. Civil libertarians and others suggest that nonconsensual sex or sex in the absence of affirmative consent should be punished as a minor misdemeanor,<sup>417</sup> diverted into mediation programs,<sup>418</sup> or subject to minimally punitive shaming punishments.<sup>419</sup> These proposals, however, tend to make the problematic assumption that date rapes are not as “serious” as “normal” crimes.<sup>420</sup> Constructions of “serious” criminality and “true” victimhood are not neutral, but products of specific social and political belief systems.<sup>421</sup> Date rape is a phenomenon intimately entwined with gender inequality and, as such, is properly a matter of serious feminist concern.<sup>422</sup> Further, in this age of massive

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416. Cf. Sally Engle Merry, *Wife Battering and the Ambiguities of Rights*, in IDENTITIES, POLITICS, AND RIGHTS 271, 275 (Austin Sarat & Thomas R. Kearns eds., 1995) (discussing study of domestic violence court in Hawaii that proved empowering to women victims and, as such, was a place “women [could] turn [to] for protection rather than a place that reinforces male authority”).

417. See Ian Ayres & Katharine K. Baker, *A Separate Crime of Reckless Sex*, 72 U. CHI. L. REV. 599, 599 (2005) (proposing a misdemeanor crime of first-time sex without a condom); Dressler, *supra* note 95, at 423 (maintaining that the law should not treat “the rapist who jumps out from the bushes with a knife” like “the teenage boy who has ordinary intercourse . . . without obtaining permission”); Duncan, *supra* note 255, at 1112 (contending that acquaintance rape should be a lesser crime).

418. See, e.g., Kerry M. Hodak, Note, *Court Sanctioned Mediation in Cases of Acquaintance Rape: A Beneficial Alternative to Traditional Prosecution*, 19 OHIO ST. J. ON DISP. RESOL. 1089 (2004) (proposing mediation in cases of acquaintance rape); Ingram, *supra* note 51, at 35 (1993) (suggesting use of mediation in date rape).

419. See *Sex, Rape, and Shame*, *supra* note 297, at 695–714 (noting “[t]he popular rejection of verbal communication in the sexual context” and prescribing shaming punishments in school disciplinary proceedings); Kahan, *supra* note 252, at 625 (endorsing the proposal for shaming punishments in school disciplinary proceedings).

420. It is one thing to recognize date rape as a “real” problem but argue that decriminalization is a rational strategy of increasing prosecution levels and shaping norms. It is wholly another thing to single out date rape as the crime which somehow best represents the unfair exercise of state punitive authority. Moreover, to the extent that law reform can send a message, active decriminalization of nonparadigmatic rape is not necessarily the right one. A visible and vocal feminist call for reversing date rape reform would likely reinforce prevailing beliefs that courtship norms are as they should be, that gender subordinating sexual practices are normal and desirable, and that the feminist effort against date rape was just a regrettable instance of “feminazi” judgmentalism. See Kimberly Kessler Ferzan, *A Reckless Response to Rape: A Reply to Ayres and Baker*, 39 U.C. DAVIS L. REV. 637, 667 (2006) (“Slight punishments may gradually affect the norm so that our society becomes more willing to punish acquaintance rape, but such punishments may also reinforce the view that acquaintance rapes are not *real* rapes.”).

421. See *Toward a Feminist Jurisprudence*, *supra* note 3, at 645 (observing that objective epistemology “ensures that the law will most reinforce existing distributions of power when it most closely adheres to its own highest ideal of fairness”).

422. In addition, although many of these proposals minimize the invasiveness of criminal

overcriminalization, it appears both unfair and gender biased to select date rape, out of all other crimes that are overprosecuted and overpunished, for decriminalization.<sup>423</sup>

The argument here is not that date rape is not a “real” crime, but rather that addressing sexualized violence through increasing the prosecutorial power of the state is an endeavor in which, at this particular moment, feminists should no longer enlist.<sup>424</sup> Activists should turn their attention to investigating methods of addressing rape and gender inequality<sup>425</sup> outside of a system that carries so much political and practical baggage.<sup>426</sup> However, those proposing non-criminal anti-

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intervention, they often serve to broaden the reach of the problematic penal system.

423. See *Rape*, *supra* note 62, at 1141–42 (asserting that men argue for date rape decriminalization out of a pervasive but empirically unsupported “nightmare” involving lying complainants, overzealous prosecutors, and bumbling judges and juries, resulting in wrongful rape convictions).

424. This might lead one to ask, “If feminists should stop talking about date rape as a crime, even though date rape conduct is arguably criminal, should they stop talking about all forms of rapes and all crimes?” In answering, let me clarify that my position is not that gender crimes are not “harms.” In fact it is just the opposite—these crimes are not only harms of individual criminality, they are also problems of social structure. Feminist concern arises precisely because certain “harms” are linked to gender inequality. The feminist agenda is not aimed broadly at countering all “bad” conduct, and thus feminists should not prioritize, say, ending wild animal poaching. This does not imply, however, that feminists should say or think poaching is good. To bring it back to stranger rape, society is in a moment when support for punishing stranger rapists is greater than that for most other criminals. When a particular stranger rapist is acquitted, it does not necessarily raise a “feminist” issue because it is unlikely a product of a social tolerance for stranger rape. If anything, feminists should worry about the overpunishment of paradigmatic rapists and the objectifying and tunnel-visioned views implicated by it. As a consequence, feminists need not and do not really involve themselves in advocating greater punishment of paradigmatic rape—that terrain is now amply occupied by conservative politicians, many of whom are male. Date rape is different, however, because it is an issue that continues to reflect a deep gender divide and both stems from and reifies gender hierarchy. Thus, feminists do and should fight against this form of sexual coercion. My argument is that, given the exact moment in our political history and the current characteristics of criminal law, feminists should not seek to remedy this gender problem through the criminal system.

425. See Ann E. Freedman, *Fact-Finding in Civil Domestic Violence Cases: Secondary Traumatic Stress and the Need for Compassionate Witnesses*, 11 AM. U. J. GENDER SOC. POL’Y & L. 567, 588–89 (2003) (asserting that criminalization is easier than social restructuring).

426. See Sharon Marcus, *Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention*, in GENDER STRUGGLES: PRACTICAL APPROACHES TO CONTEMPORARY FEMINISM 167, 169 (Constance L. Mui & Julien S. Murphy, eds. 2002) (noting that the “almost exclusive insistence on equitable reparation and vindication in the courts has [had] limited effectiveness for a politics of rape intervention”); Miccio, *supra* note 315, at 290 (asserting that feminist focus on criminal strategies has diverted resources from violence prevention, education, and economic security programs); see also *Feminist War*, *supra* note 17, at 758 (arguing that criminal system is “infested with racial, socioeconomic, and gender biases that manifest[] every time criminal enforcement [i]s

rape projects should be wary that other strategies “come complete with their own perpetual perils.”<sup>427</sup> Any feminist policy could pose theoretical problems or have unintended negative consequences and, as such, would likely benefit from the rigorous balancing analysis to which this Article subjects criminal rape reform.<sup>428</sup>

Nevertheless, the possibilities for feminist exploration outside criminal law appear extensive and exciting. Feminists can undertake to shape norms through political activism and legal scholarship expressly directed toward dispelling stereotypes and sexist practices. Engaging in scholarly, social, and political efforts to encourage unity between women could go far in changing the cultural preconditions of date rape.<sup>429</sup> Feminists can also counteract the rape-permissive gender norms largely enforced by women instead of relentlessly focusing on the

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increased”).

427. Lobel, *supra* note 187, at 974.

428. For example, one intervention that is advocated often and believed to significantly impact norms is education. Education proposals range from teaching rape awareness in primary and secondary schools, see, e.g., Sarah Gill, Essay, *Dismantling Gender and Race Stereotypes: Using Education to Prevent Date Rape*, 7 UCLA WOMEN’S L.J. 27, 70 (1996) (proposing rape education programs for teenagers), to special programs that train criminal justice officials on dealing with rape myths, see, e.g., Curcio, *supra* note 360, at 595–96 (advocating such education of judges, prosecutors, and police). However, depending on the messages educators send, the ideas students hear, and other aspects of the educational environment, rape awareness programs could possibly cause more problems than they remedy. In a conservative school system, for example, the anti-rape message might simply be given as an anti-sexuality abstinence message. See Pillard, *supra* note 259, at 947 (observing the popularity of abstinence-only education). Education of criminal justice actors may end up entrenching the belief that date rape prosecutions are “top prosecutorial priority” to be pursued at all costs, regardless of nuances of the case. See *Feminist War*, *supra* note 17, at 823, n.352 (observing that “educated” domestic violence judges believed that “men were guilty, the women scared or incapacitated, and release of the men would lead to an eventual murder”); see also Mary Becker, Keynote Address, Symposium, *Domestic Violence and Victimization the Victim: Relief, Results, Reform*, 23 N. ILL. U. L. REV. 477, 488 (2003) (“Education is not necessarily effective and can reinforce stereotypes and actually do harm.”).

429. Of course, one should not make judgments about the world based solely on bathroom graffiti, but I cannot help recounting this experience. I first encountered the word “womyn” as a seventeen-year-old freshman at Berkeley in 1989. I was absolutely engrossed by the extensive stall writings declaring a “womyn’s revolution,” “pussy power,” and “♀♀.” Recently, I was in a heavily graffitied bathroom stall at a local college bar at the University of Iowa, except this time, the wall proclaimed sentiments like “Drunk bitches watch out,” and “Sluts stay away from my man.” In less than two decades, college women had transformed from allies into bitter enemies in the sex war. Moreover, women sometimes adopt methodologies for catching men, including coyness, sexual reticence, and promiscuous dress, that put them at greater risk of rape. See *supra* notes 277–94 and accompanying text.



criminality of men.<sup>430</sup> In addition, reformers may turn their attention to publicizing how sexist cultural attitudes harmfully construct male sexuality and masculinity.<sup>431</sup> But in order to begin a dialogue with men, especially young men, about their interests in dismantling the behavioral and cultural predicates of date rape, feminists must talk to them as people, not just seek to incarcerate them as criminals.<sup>432</sup>

## CONCLUSION

At this moment of punitive excess, at this “time we will look back on in shame,”<sup>433</sup> and in this era of devolved gender norms, feminists should turn away from prosecutorial power and toward the principles of solidarity and distributive equality Catharine MacKinnon espoused over a quarter century ago. Of course, all the inspired reformers who have worked tirelessly for rape reform within the criminal law are true feminist heroes. Their story is a thread in the larger tapestry of the women’s movement, and its constitutive importance cannot be denied. Feminists, however, have reached the limit of that effort, and the current criminal law no longer provides a meaningful avenue for transformation. The lonely voice of women’s empowerment cannot and will not be heard above the sound and fury of the criminal system’s other

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430. Women themselves can reify stereotypes that underlie rape myths. When a sexy woman appears popular to men, it is often other women who whisper that she is a “slut” who has sex with anyone and has no right to complain about being raped. Moreover, women, not men, publish “the rules” that counsel sexual flirtation combined with sexual reticence as the methodology for obtaining a relationship. See Pettinato, *supra* note 276, at 116.

431. See Bartlett, *supra* note 404, at 841 (asserting that male gender roles harm men by “construct[ing] sexuality in limiting and dangerous ways” and cataloging other ways men are harmed by assumption of aggression) (internal quotations omitted). Indeed, experts attribute men’s goal-oriented attitude toward sex, not to biological or internal psychological needs, but to peer pressure. See John Tierney, *The Whys of Mating: 237 Reasons and Counting*, N.Y. TIMES, July 31, 2007, at F1 (citing study at University of Texas revealing that men are more likely to have sex for “status” reasons than women).

432. See Nancy Levit, *Feminism for Men: Legal Ideology and the Construction of Maleness*, 43 UCLA L. REV. 1037, 1079–90 (1996) (urging feminists to abandon the “retributive approach” to men and suggesting consciousness-raising methodologies for dismantling patriarchy); cf. John Foubert & Jonathan T. Newberry, *Effects of Two Versions of an Empathy-Based Rape Prevention Program on Fraternity Men’s Survivor Empathy, Attitudes, and Behavioral Intent to Commit Rape or Sexual Assault*, 47 J. C. STUDENT DEV. 133 (2006) (describing rape education program for men that resulted in significant increases in participants’ self-described empathy for rape victims and discrediting of rape myths when compared to control group).

433. Smith, *supra* note 10, at 396 (critiquing this “extraordinarily harsh and punitive time”).

messages—messages that reinforce stereotypes, construct racial and socio-economic binaries, and unmoor crime from issues of social justice. Now is the time for us to step back, change directions, and reclaim the feminist movement from the hands of mainstream power and conservative ideology. It is time for feminists to leave the halls of criminal power and return to the streets where violence occurs, roll up our sleeves, and begin the process of formulating the next wave of feminist intervention.