RAPE AND THE FEMINIST WAR ON CRIME

Aya Gruber*

Abstract

This Article is the second in a series setting forth a novel feminist critique of gender crime reform. The Feminist War on Crime, 92 IOWA L. REV. 742 (2007) [Feminist War], argues that by expending significant amounts of intellectual, financial, and political capital on criminalizing domestic violence, feminism became far removed from its populist, anti-subordination origins. This Article contends that, like domestic violence reform, criminal rape reform did little to further feminism theoretically and practically, albeit for very different reasons. Notwithstanding the few post-feminists who criticize affirmative consent laws as overly formal and paternalistic, feminist critique of rape reform is virtually absent in legal and social literature. The principal left critique of rape reform comes from civil libertarians concerned with defendants’ due process rights. This Article’s assessment of rape reform does not rely on the prioritization of liberal rights over gender equality, but rather asserts that rape criminalization has not and cannot remedy gender subordination given the current political bent of American criminal justice, the ubiquity of sexist attitudes, and the pervasiveness of neoliberal ideology. While recognizing the admirable nature of reforms targeted toward decreasing women victims’ discomfort, the Article nonetheless demonstrates how rape shield and affirmative consent laws actually reinforce the gender norms that underlie date rapes and ineffectual rape trials. Perhaps more importantly, addressing sexualized violence solely through criminal law supports the view that sexual abuse is a problem of individual deviance and obscures how women’s impoverished socio-economic status and men’s “normal” behavioral practices predicate rape. In the end, the Article posits that feminists should abandon the self-defeating agenda of seeking social transformation through increasing police power and responds to potential objections to the general program of feminist disengagement from criminal law.

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* Visiting Professor of Law, University of Iowa College of Law Fall (2008), Associate Professor of Law, Florida International University College of Law. I would like to thank Jorge Esquirol, Janet Halley, Paola Bergano, Karen Pita Loor, Angela Onwachi-Willig, Jeannie Suk, Laura Rosenbury and Song Richardson for their helpful insights. I am also grateful to the participants of the Iowa Legal Studies Workshop for their thoughtful contributions. Finally, I praise the diligent work of my research assistants Tom Werge (FIU) and Lacee Oliver (UI).
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PROLOGUE

March 2001, I am again standing in the D.C. superior court hallway. The cast of regular characters are present, as always, engaged in the complicated enterprise of life. There lies the drunk slumped over a row of strangely happy orange chairs. Eager-eyed attorneys chatter, oblivious to the surrounding young children who display that sadly familiar look of fear and confusion, having just seen mommy or daddy lectured by an old man in a robe and taken away to places unknown. Here, on the gray fluorescent-lit second floor, I can peer over the industrial railing and see the steady flow of humanity pouring through the metal detectors and into law’s fate. Just to the right of the entrance is the specialized domestic violence court\(^1\) – a place I have previously described as a revolving door of incarceration, misery, and despair.\(^2\) “DV court” swarms with driven domestic violence advocates and specially-trained judges who have internalized a paradigm of being tough-on-abusers and severing relationships.\(^3\) A DV victim is

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\(^3\) See id. at 750-751 (noting that domestic violence advocates “have embraced incarceration and separation models”). See also Donna Coker, Shifting Power for Battered Women: Law, Material Resources, and Poor Women of Color, 33 U.C. DAVIS L. REV. 1009, 1017–18 (2000) (criticizing separation paradigm).
engulfed in this sea of government actors who know what is best for her because the state has decided to “take domestic violence seriously.”

But today I am at felony court, where there are no victim advocates or judges especially sensitive to women’s issues. This is a court like any other – one where stories of pain will be told, judgment will come, and scores of minority men will be sent to live in cages. I enter the bland courtroom, desperately in demand of updating from its 1970s aesthetic, where a rape trial is well in progress. The defendant, José, a twenty-eight year old Mexican maintenance worker at a University apartment complex, has been accused of raping a young co-ed, Tammy. The case has been the talk of the campus, with many dubbing Tammy a false accuser and “slut,” and others decrying José as “scum,” who they “knew” was a rapist “as soon as I saw him.” Tammy sits alone behind the prosecution table waiting to take the stand.

Some things about the case are not in dispute – the couple had sex on the night in question; a bloody knife was at the scene; and both had cuts on their hands. Witnesses claimed to have seen Tammy and José talking together many times before, and, on the night of the incident, several tenants saw Tammy run out of her apartment after José, knife in hand, shouting. As in the majority of acquaintance rape cases, the prosecution and defense stories wildly differ. The prosecution claims that José came into Tammy’s room on the pretense of checking bathroom

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4 See, e.g., Cheryl Hanna, No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions, 109 HARV. L. REV. 1850, 1898 (1996) (asserting mandatory policies “send a clear message that domestic violence is criminally unacceptable”).
6 This narrative largely mirrors the facts of an actual rape case handled by the D.C. Public Defender in 2001. For privacy and clarity, the names have been changed, and some facts altered.
pipes and proceeded to threaten her with a knife and rape her. At some point during the attack, Tammy gained control of the knife, injuring herself in the process. She cut José, and he fled. The defense asserts that José and Tammy had been having a secret affair for weeks. On the day in question, José tried to end the relationship after the sex, at which point Tammy became angry and attacked him with a knife. After the attack, fearing that her college boyfriend would discover her relationship with José, a lowly janitor, she fabricated a rape. As can be expected, there were neither eye witnesses to the attack, nor corroborating witness to the alleged affair.

Certainly this isn’t a case where the defense can present a “parade of horribles” about Tammy to the jury. There are no facts like a notorious history of kinky sex, engagement in sex work, or routine substance abuse to exploit. However, the defense has two aces in the hold: There was another man’s semen in Tammy’s bed, and when police arrived, a dildo was on the floor. The judge found the evidence admissible under D.C.’s rape shield law as supportive of the defense theory that Tammy’s fear of discovery by her current boyfriend provided motive to cover-up the consensual relationship. The defense was not permitted to present evidence that Tammy had sex with four different men in the two weeks preceding the rape.

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8 See infra note 89 and accompanying text (discussing defense strategy of embarrassing victim with sexual conduct evidence).
9 See State v. Gonzalez, 757 P.2d 925, 929 (Wash. 1988) (asserting that “in the extreme case of the indiscriminately promiscuous woman . . . evidence of prior consensual sexual relations could be probative”) (internal quotation omitted).
13 The D.C. rape shield law has a constitutional “catch all” provision allowing admission of sexual conduct evidence whenever, after a hearing, the court determines its probative value outweighs the danger of prejudice.” D.C. CODE § 22-3022(b)(3) (1995). See also in re J.W.Y., 363 A.2d 674 (D.C. 1976) (finding complainant’s “extrinsic sexual behavior” relevant to consent).
As I watch Tammy take the stand, something immediately strikes me – she is beautiful. My first instinct is to think that the prosecution has a slam dunk, as studies show that jurors respond well to attractive rape complainants. Upon further examination, however, I am not so sure. Her dark hair is tousled and cascades down around her shoulders, and she is wearing a sheer shirt so tight that the outline of her bra is visible. She does not look like a prostitute or even a twenty-something out for a night of clubbing – her styling is simply not that provocative. She does, however, look like a sexy young co-ed – the kind who knows how to party. And if there’s one thing late-night commercials have drummed into the mind of the general public, it’s that the girls have gone WILD. As a self-proclaimed feminist and an elite educated lawyer, I can barely banish from my mind a picture of Tammy flashing for the Girls Gone Wild crew with cheerful calypso music in the background.

Tammy tells her side of the story on direct examination dry-eyed and in a frank and explanatory manner. She is calm, and quite possibly less destroyed than one might believe the

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14 Some studies show jurors are more likely to believe an unattractive woman is fabricating rape. See generally David P. Bryden & Sonja Lengnick, Rape in the Criminal Justice System, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1273 n.492-93 (1997) (citing studies on rape victim attractiveness). Bryden & Lengnick speculate that jurors believe “rape of an attractive woman seems more plausible.” Id. at 1273.

15 See Mark A. Whately, Victim Characteristics Influencing Attributions of Responsibility to Rape Victims: A Meta-Analysis, 1 AGGRESSION & VIOLENT BEHAV. 81, 91 (1996) (discussing report that respondents blame provocatively dressed victims more); 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 38% of men and 37% of women indicated seductively dressed woman is partly responsible for rape).


17 See Andrew E. Taslitz, Forgetting Freud: The Courts’ Fear of the Subconscious in Date Rape (and Other) Cases, 16 B.U. INT. L.J. 145, 156 (2007) [hereinafter Forgetting Freud] (observing that “even the most well-meaning, ‘feminist’ jurors” may doubt rape claim “if the tale told fits cultural stories about ‘sluttish women’”).
victim of violent rape should be. The jurors listen attentively and seemingly sympathetically. During cross-examination, with much pomp and circumstance, the defense attorney introduces evidence of the semen and dildo. There is audible chatter, as several jurors whisper excitedly.

Tammy starts to say defensively that it is no big deal, but then catches sight of several of the older women jurors shaking their heads. Tammy looks down as color rushes to her cheeks and replies in a small, shaky voice that she has a boyfriend, and they sometimes use the sex toy. Her reaction is certainly attributable to nervousness and embarrassment. Nonetheless, at this very moment, there is something quite undeniable – Tammy looks like a liar. The rest of the trial is less eventful, as the case lives or dies on Tammy’s testimony. Finally, the jury retires to decide José and Tammy’s fates.

INTRODUCTION

Tammy and José are among the thousands of people who have been affected feminist rape reform. After over thirty years of reform, the time is ripe to examine whether the enormous investment of feminist intellectual and political capital into cases like Tammy and José’s has actually furthered female empowerment. This Article sets forth the argument, virtually absent in legal literature, that criminal rape reform is inconsistent on many levels with the basic tenets

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18 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, 469-70 (2005) (noting jurors want victims to act like “someone who has really suffered the trauma of assault”); Bryden & Lengnick, supra note 14, at 1272 n.487 (citing report that mock jurors rated defendant more culpable for raping virgin because of increased psychologically damage) (citing C. Neil MacRae & John W. Shephard, Sex Differences in the Perception of Rape Victims, 4 J. INTERPERSONAL VIOLENCE 278, 284 tbl. 2 (1989)).


20 I deliberately choose this narrow frame as part of my strategy to critique mainstream feminism on its own terms and self-consciously avoid the thorny issues of the genealogy and existentialism of identity (gender and sex), and the “paralysis” considering such issues may produce. For a thoughtful effort to counter feminism’s essentialist assumptions and propose a theoretical foundation that splits from feminist identitarianism, see generally JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM (2006) [hereinafter SPLIT DECISIONS].
of feminist philosophy. The first paper in this series, *The Feminist War on Crime* (“Feminist War”) argues that by expending significant energy pushing for tougher domestic violence criminal laws, feminism became far removed from its progressive, populist origins. *Feminist War* contends what began as a grassroots movement to provide women means to escape abusive relationships, if they so chose, morphed into an anti-crime lobby that forced victims to be tools of state power. In short, reform did not lead the criminal justice system to adopt a feminist agenda – feminism adopted the criminal justice system’s agenda. In the end, *Feminist War* makes the bold suggestion that feminists simply stop advocating incarceration as the solution to domestic violence and focus efforts elsewhere.

After *Feminist War*, I was often asked whether the article’s analysis applies to the other great feminist criminal law effort, rape reform. Undoubtedly, the idea of criminal law “taking over” the feminist movement involves both domestic violence and rape reform. Even though scholars often discuss rape and domestic violence in tandem when analyzing the feminist legal reform agenda, the issues are in fact quite distinct in nearly every way. They address discrete problems, different manifestations of patriarchy, and disparate female/male relationships. As a

21 See generally *Feminist War*, supra note 2, passim.
23 *Feminist War*, supra note 2, at 750-51.
24 I assert, “[T]he net effect of domestic violence reform has been a subsumption of the feminist movement into the state’s goal of managing undesirables.” *Feminist War, supra* note 2, at 825.
25 Id. at 823 (“If feminists were to stop advocating for criminalization policies tomorrow, judges, prosecutors, politicians and victims’ rights reformers would likely take up the mantle of that fight.”).
result, rape law’s relationship to traditional feminist goals is extremely different from that of domestic violence reform.

Both domestic violence and rape law’s evolution can be roughly divided into two stages: formalist and realist reforms. Formalist reforms seek formal equality by ensuring that battering and rape are crimes “on the books,” prosecuted like other crimes. Realist reforms create laws that account for social realities that make prosecutions impossible or unlikely, despite formal equality. In the abuse context, the primary realist reforms involve mandating arrest and prosecution, even against victims’ wishes. In rape law, realist reforms include “shielding” against past sexual conduct evidence and creating legal standards focusing on the language of consent. The critiques in Feminist War and the present article are mainly targeted toward realist reforms.

Feminist War’s assessment of mandatory policies is arguably not a radical departure from basic feminist tenets. Even an ardent feminist can fairly criticize a system that ignores women’s choices, jails poor minorities, and simultaneously undermines the focus on economic distributions that perpetuate abuse. However, it would be less than candid to deny my deep confliction over critiquing realist rape reforms. Rape shield laws and affirmative consent standards neither force women to testify against their wills nor particularly objectify them as

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29 See, e.g., ALASKA STAT. § 18.65.530 (2004); CAL. PENAL CODE § 836(c)(1) (West 1985); COLO. REV. STAT. § 18-6-803.6(1) (2006); CONN. GEN. STAT. § 46b-38b(a) (2005); WASH. REV. CODE § 10.31.100 (2006), and mandatory prosecution schemes. See, e.g., MINN. STAT. § 611A.0311(b)(4) (2003); UTAH CODE ANN. § 77-36-2.7 (2003).

30 See infra Part I.B.

31 Many domestic violence reformers have started to question whether mandatory reforms go too far. See, e.g. ELIZABETH M. SCHNEIDER, BATTERED WOMEN AND FEMINIST LAWMAKING 182-88 (2000) (expressing serious concerns); MaGuigan, supra note 22, at 443-44 (advocating moratorium on mandatory policies).
damaged and scared. By contrast, they appear valiant efforts to make rape trials more comfortable for victims like Tammy, with little other practical costs to women.

In addition, I am sympathetic to the potentially transformative and still-grassroots nature of the date rape reform movement, which has not gained widespread popularity in mainstream anti-crime society. While it is now common to decry the domestic abuser as evil or cowardly, like any prototypical criminal, the accused date rapist often plays the role of folk hero in popular consciousness - the innocent boy tragically accused by a vindictive woman. Today, well respected media commentators feel no hesitation in slinging bafflingly sexist attacks at high profile rape complainants. Kobe Bryant’s accuser was no more than “mountain trash slut,” and the Duke complainant just a lying “crypto-hooker.” Opinion polls show that people view domestic violence and rape wildly differently, with most vigorously condemning domestic violence but approving behavior that amounts to date rape.

Perhaps the nascent nature of the movement has caused feminists to strongly unite on the rape issue, explaining why the main left critiques come from civil libertarians concerned with

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32 See infra notes 88-95 and accompanying text.
33 One need only browse the internet for a minute to find this sentiment. A post on Yahoo Answers (U.S.) asks, “What is your opinion on men who hit women??” The replies include “i [sic] personally think they are the lowest of form of the human race” and “Subhuman. Lowlives [sic]. Beneath contempt.” Yahoo Answers, http://answers.yahoo.com/question/index?qid=20070405135336AANyPOJ&show=7 (last visited Sept. 2, 2008) [hereinafter Yahoo Abuse Answers].
34 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, ASSOCIATED PRESS (Aug. 7, 2003). Even scholars indulge in such characterizations. See, e.g., Dan Subotnik, Copulemus in Pace: A Meditation on Rape, Affirmative Consent to Sex, and Sexual Autonomy, 41 AKRON L. REV. 847, 848 (“I never want to see a man’s life devastated through a bad rap from some vindictive woman”).
35 Conservative radio commentator, Michael Savage, informed his approximately six million listeners that Kobe’s accuser was “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, THE TIMES (LONDON), Sept. 2, 2003, available at http://www.timesonline.co.uk/tol/life_and_style/article1154449.ece.
Nonetheless, there is a decisive feminist critique to be lodged. It is true that unlike domestic violence reform, rape reform has not divested victims of agency and has not resulted in economic, physical, and social harm to individual victims. However, in addition to empirically failing to increase reporting and conviction, rape criminalization has effectively diverted attention away from a critical assessment of the “normal courtship behavior” that makes date rape inevitable. In many ways, rape shield laws and affirmative consent standards actually reinforce patriarchal ideologies that allow rape to occur without censure. Further, as a philosophical matter, the alignment of feminists with criminal law actors is troubling given the neoliberal bent of current American criminal justice system.

This Article contends that rape law is another example of how feminist investment in the criminal law yielded marginal returns. Of course, an exhaustive examination of every legal reform related to rape is not possible. Consequently, Part I discusses only a few formalist reforms as vehicles to understanding rape stereotypes, and examines two critical realist reforms: rape shield and affirmative consent. Part II distinguishes this Article’s critique of rape reform from civil libertarian oppositions to date rape law grounded in “neutral” defendant’s rights. Part III analyzes the failure of realist reforms in light of prevalent gender norms and current attitudes towards crime. Part IV sets forth the feminist argument against rape criminalization with a comparison to Feminist War’s critique of domestic violence reform. Finally, Part V responds to feminist and post-feminist objections to the thesis that feminists should abandon the criminal law path and seek to otherwise influence gender norms.

A. Formalist Rape Reforms

Formalist reforms were products of early feminist efforts to ensure that injurious stranger rapes (“paradigmatic rapes”) were criminalized to the same extent as other violent crimes, by eliminating capricious obstacles to prosecution like resistance and corroboration requirements. The resistance standard compelled the prosecution to prove that the victim “resisted to the utmost” as part of its case in chief. As a consequence, in the absence of ultimate resistance, even a stranger who used force or weapons would be acquitted. Although feminists succeeded in eliminating resistance as a formal requirement, jurors continue to police female sexuality, particularly in noninjurious acquaintance rape (“nonparadigmatic rape”) cases, by punishing victims for lack of resistance and other indications of unchastity.

The resistance requirement was born out of a patriarchal mindset creating what I will refer to as the “chaste lady-sex object dichotomy,” which proved an ultimate catch-22 for rape victims, and continues to exist today. Historically, rape law incorporated the ideal of a chaste

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39 I use the terms “paradigmatic” and “nonparadigmatic” to distinguish between a crime that many see as the “worst of the worst” and one that many feel is not criminal. 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] (observing that “stranger rapes are perceived to be prototypical”); Samuel H. Pillsbury, Crimes Against the Heart: Recognizing the Wrongs of Forced Sex, 35 LOY. L.A. L. REV. 845, 865 (2002) (“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.”).

40 See Klein, supra note 28, at 983-90 (noting these laws “made it quite difficult to convict even the guilty”).


42 See People v. Scott, 95 N.E.2d 315, 317 (Ill. 1950) (overturning conviction of violent stranger 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. Fearing AIDS, she convinced her attacker to wear a condom. Later, a grand jury refused to indict, and jurors explained they believed there was consent. See Ross E. Milloy, Furor Over a Decision Not to Indict in a Rape Case, N.Y. TIMES, Oct. 25, 1992, at 30.

lady, a person who could not exercise sexual choice, either inside or outside of marriage, never displayed sensuality in dress or demeanor, and would go to great lengths, preferably her own death, to protect her “delicate womanhood.”\footnote{See Michelle J. Anderson, From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law, 70 GEO. WASH. L. REV. 51, 53 (2002) [hereinafter Chastity Requirement] (observing rape law’s “informal, though powerful, normative command that women maintain an ideal of sexual abstinence”).} Of course, a real woman is unlikely to satisfy such stringent criteria, and in that case, she finds herself recast as a purely sexual actor.\footnote{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.”).} 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.\footnote{See Chastity Requirement, supra note 44, at 56 (noting requirement that women engage in no extramarital sexual behavior to be protected against rape “by someone other than her husband”).}

The recasting of “unchaste” women as purely sexual beings, however, is not a move that recognizes sexual agency. Rather, dual objectification is necessary to 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 ability to refuse. Today, these are the Girls Gone Wild stereotypes – perpetually sexual beings with neither inclination nor right to deny sex.\footnote{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 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 16.} Minority and lower class women have historically occupied this position. Black women, for example, had (and often continue to have) no right to claim rape because of their very nature as “sexual savages.”\footnote{See bell hooks, AIN’T I A WOMAN: BLACK WOMEN AND FEMINISM 52 (1981); Chastity Requirement, supra note 44, at 68-69 (adding that “[w]omen of other races, slaves, indentured servants, and Native Americans, as well as ‘outsiders’ such as ‘rebellious women,’” were definitionally unchaste). Racialized constructions of chastity persist. See Darren Lenard Hutchinson, Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics, 47 BUFF. L. REV. 1, 85 (1999) (observing that today “the construction of black women as promiscuous causes jurors in sexual assault prosecutions to doubt black women’s credibility”).}

At the same time, men desire to be eventually officially linked to a woman who is not a sexual savage. This
necessitates another type of woman who only the husband or a few privileged others has known intimately – the chaste (or today relatively chaste) lady.\textsuperscript{49}

Reporting\textsuperscript{50} and corroboration requirements\textsuperscript{51} also created formal barriers to rape prosecutions by placing specific credibility burdens on complainants.\textsuperscript{52} The law presumed a rape complainant not credible unless she had evidence independent of her testimony.\textsuperscript{53} Any rape defendant could take advantage of this codified presumption of incredibility.\textsuperscript{54} While feminists characterize such requirements as arbitrary obstacles, many still believe that they are needed to protect innocent defendants because, empirically, rape victims are liars.\textsuperscript{55}

The lying vindictive shrew image is quite deeply embedded in American psychology, but its application is crime-specific.\textsuperscript{56} Women who testify in other capacities, like burglary or robbery victims, do not implicate the caricature and are accordingly not subject to corroboration requirements.\textsuperscript{57} The vindictive shrew image is the product of a set of socially-embedded beliefs

\textsuperscript{49}Today, men may not require virginity, but they still balk at the idea of marrying a “slut.” See Chastity Requirement, supra note 44, at 56 (noting persistence of “[r]etrograde notions of sexual propriety”).


\textsuperscript{51}See Allison v. United States, 409 F.2d 445, 448 (D.C. Cir. 1969) (holding 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); People v. Masse, 156 N.E.2d 452, 453 (N.Y. 1959); State v. Garza, 191 N.W.2d 454, 457 (Neb. 1971).

\textsuperscript{52}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 . . . .”).

\textsuperscript{53}See Strickland v. State, 61 S.E. 2d 118, 121 (Ga. 1950) (stating that corroboration “furnish[es] the jury a criterion for ascertaining” credibility); Allison, 490 F.2d at 449 n.10 (asserting that “danger of a fabricated rape is of greater magnitude than the danger of erroneous identification”).

\textsuperscript{54}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 requirement, where there were 18 convictions out of 1,085 rape arrests) (citing Leslie Oelsner, Because Ladies Lie, N.Y. TIMES, May 14, 1972, § 4, at 5).

\textsuperscript{55}See, e.g., infra notes 61-65.

\textsuperscript{56}See Mary I. Combs, Telling the Victim’s Story, 2 TEX. J. WOMEN & L. 277, 282 (1993) (noting pervasive myth of lying complainant); Brownmiller, supra note, at 369 (observing “the cherished male assumption that female persons tend to lie”).

\textsuperscript{57}See, e.g., John D. Ingram, Date Rape: It’s Time for “No” to Really Mean “No,” 21 AM. J. CRIM. L. 3, 7 (1993) (stating that burglary victims’ credibility is not tested like rape victim’s); ANDREW E. TASLITZ, RAPE AND THE CULTURE OF THE COURTROOM 6 (1999) [hereinafter COURTROOM CULTURE] (stating that robbery “victim’s
that women are jealous, desire to make men suffer for leaving or mistreating them, and fabricate specifically rapes as revenge.\textsuperscript{58} Despite formal elimination of the corroboration requirement, the vindictive shrew myth continues to pervade nonparadigmatic rape trials, casting victims as liars even when there is no evidence of motive for revenge.\textsuperscript{59}

Why is there a widespread belief that women lie about rape? Some argue that it is no more than a “Bayesian” conclusion based on empirical realities and not a product of sexism.\textsuperscript{60} Yet most jurors and non-academics have had little opportunity to research rape and false testimony.\textsuperscript{61} I have tried to find conclusive statistics with little success. Either the statistics reveal false rape claims to be surprisingly infrequent, like the oft-cited contention that only two percent of rape claims are false,\textsuperscript{62} or astoundingly frequent, like Eugene Kanin’s study of one small town in which 41% of “disposed” rape cases involved victim recantation.\textsuperscript{63} Kanin’s paper is cited with glee by so-called “men’s rights” activists bent on showing that false rape accusation is at crisis levels,\textsuperscript{64} despite the fact that the author, himself, warned of the study’s limits.\textsuperscript{65}

\footnotesize{identification of the defendant alone results in conviction” while rape “victim’s truthfulness is almost always challenged”).\textsuperscript{58} See COURTROOM CULTURE, supra note 57, at 6 (observing “a widespread belief that the female gender is rife with spiteful shrews who often falsely accuse men of sexual attacks”) (internal quotations omitted).\textsuperscript{59} See id. at 7 (maintaining that despite elimination requirement, juries still demand corroboration). See also Klein, supra note 28, at 1049 (noting that jurors want more than victim’s word).\textsuperscript{60} Bayesian theory posits that conditional probabilities can be calculated mathematically. See Stanford Encyclopedia of Philosophy, Bayes’ Theorem (June 28, 2003), available at http://plato.stanford.edu/entries/bayes-theorem/#3. I use “Bayesian” in a manner similar to Jody D. Armour in Race Ipsa Loquitur: Of Reasonable Racists, Intelligent Bayesians, and Involuntary Negrophobes, 46 STAN. L. REV. 781 (1994), as a description of the “logic” that fear of African Americans is a necessary and non-racist consequence of probabilistic reasoning about blacks and crime. Id. at 790-91.\textsuperscript{61} Even with statistics, gender stereotypes may cause men to overestimate the relationship between statistics and probability of lying. See Armour, supra note 60, at 792 (arguing that Bayesian conclusions on race are constructed by flawed statistical methods and entrench stereotypes).\textsuperscript{62} See Susan Brownmiller, AGAINST OUR WILL: MEN, WOMEN AND RAPE 410 (1976).\textsuperscript{63} Eugene J. Kanin, False Rape Allegations, 23 ARCHIVES SEXUAL BEHAV. 81 (1994), available at http://www.sexcriminals.com/library/doc-1002-1.pdf.\textsuperscript{64} See, e.g., False Accusation Issues, MEN’S RIGHTS ONLINE, http://www.mens-rights.net/law/accusations.htm (last visited Sept. 2, 2008) (citing Kanin’s study to show “rabid feminists” have “intimidated a lot of law enforcement officers into believing a woman’s word must be taken as fact”); Marc Angelucci and Glenn Sacks, Research Shows False Accusations of Rape Common (September 15, 2004), http://www.glennsacks.com/blog/?page_id=1334 (last visited Sept. 2, 2008); Modern Day American Women Love
However, the 41% figure is difficult to reconcile with the FBI’s statistic that only 8% of rapes are “unfounded,” which does not mean false but only that police decided the case was not pursuable, a decision that itself could have been influenced by gender stereotypes. Michelle Anderson sums up the statistical war as a draw: “[N]either side’s numbers in the debate over the rate of false complaints of rape lodged with the police appear to be supported by the kind of empirical evidence upon which one might feel confident. As a scientific matter, the frequency of false rape complaints to police or other legal authorities remains unknown.” Of course, continued adherence to the shrew myth may be just a product of media obsession with false rape reports. Typing “false accusations of rape” into Google will produce far more articles with headlines screaming that false reporting is an “alarming national trend” than articles targeted toward dispelling the myth. One website goes 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.”

Formalist reforms virtually eliminated legal barriers to paradigmatic rape prosecution. As a consequence, today, it is rare indeed for a violent stranger rapist to be acquitted by a jury because there was no resistance or corroboration. Consent is seldom used in paradigmatic rape cases, the preferred defense being mistaken identity. In fact, paradigmatic rapists are punished more severely than other criminals, and they provoke immediate reactions of disgust and outrage in the general public. One undeniable face of rape reform is the series of laws subjecting sex offenders to registration requirements, residency restrictions, and civil commitment. Consequently, modern rape reforms were highly successful in bringing the strong arm of the government down on paradigmatic, “deviant” rapists.

B. Realist Rape Reforms

 alarming national trend: Statistics: False Accusations of Rape;” “Salon Newsreal Who says women never lie about rape?” No websites on the first page involve establishing false rape reporting is a myth.


75 See Bryden & Lengnick, supra note 14, at 1272 n.487 (asserting that usual defense to stranger rape is misidentification).

76 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).

77 See ALA. CODE § 15-20-26 (2000) (sex offenders may not live or work within 2,000 feet of school or child-care facility); GA. CODE ANN. § 42-1-13 (2007) (sex offenders may not reside within 1,000 feet of childcare facility, school, or area where minors congregate); OKLA. STAT., tit. 57, § 590 (2003) (sex offenders may not reside within 2,000 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 [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.

Formalist rape reforms effectively mobilized society against violent stranger rapists but did little to advance the cause of victims of noninjurious rapes, victims acquainted with defendants, and victims in sexual professions. Eliminating formal barriers had little effect because such complainants face largely de facto obstacles to prosecution. Although today only a few criminal codes, like the Model Penal Code, formally distinguish between acquaintance and stranger rapes, nonparadigmatic rapes are still widely underreported and undersanctioned. Realist reforms sought to counter the informal and subtle sexism that continues to thwart prosecution of nonparadigmatic rapists.

In the 1980s, feminists linked the phenomenon of vast underreporting to pervasive “rape myths.” Myths like that of the chaste lady, sex object, and vindictive shrew, served as primary reasons why, despite nonconsensual sex being a crime “on the books,” date rapists remained beyond the law’s purview. Reformers hypothesized that complainants were reticent because the date rape trial had become known as a locus of victim trauma and embarrassment, more

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80 See Model Penal Code § 213.1(1) (creating lesser crime of second degree rape when victim was “a voluntary social companion” or “previously permitted [defendant] sexual liberties”).
81 See Shannon M. Catalano, U.S. Dep’t of Justice, Criminal Victimization, 2004 10 (Bureau of Justice Statistics No. NCJ-210674, 2005) (only 36% 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) (fewer than 10% are reported); Tracy Wilkinson, Violence Against Women Pervasive, Panel Told, L.A. Times, Oct. 17, 1990, at B1 (discussing Los Angeles study finding that only 3% report rape); Paul Marcus & Tara L. McMahon, Limiting Disclosure of Rape Victims’ Identities, 64 S. Cal. L. Rev. 1020, 1049-50 (1991) (asserting that “rape remains the most underreported crime within the criminal justice system”); Susan Estrich, Real Rape 10-15 (same).
82 See Aviva Orenstein, Special Issues Raised by Rape Trials, 76 Fordham L. Rev. 1585, 1599 (2007) [hereinafter Special Issues] (observing that rape shield counters prejudice against “the woman’s activities, dress, or sexual history.”).
83 See 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”).
85 See Estrich, supra note 84, at 1094 (arguing that rape cases put victim on trial). See also Sedeille Katz & Mary Ann Mazur, M.D., Understanding the Rape Victim: A Synthesis of Research Findings 203 (1979) (maintaining that trial “may be more traumatic than the rape”). See generally Vernon R. Wiehe & Ann L.
concerned with reinforcing myths than determining consent or force.\textsuperscript{86} Moreover, prevalent rape myths led juries to unfairly acquit either because they mistakenly concluded there was consent or believed the victim “deserved” it.\textsuperscript{87}

Feminists pushed for change in two main areas of the law, evidentiary prohibitions (shield laws) and \textit{actus reus} standards.\textsuperscript{88} Rape shield laws are a subject well covered in the legal literature so an extended discussion is not necessary here. In a nutshell, rape shields create specific rules preventing the defense from presenting evidence of complainants’ past sexual conduct or “precipitation” evidence, like dress.\textsuperscript{89} However, there are many exceptions. For example, most shield laws permit the introduction of past sexual conduct evidence relevant to identity,\textsuperscript{90} and many incorporate catch-all provisions that allow the introduction of otherwise prohibited evidence whenever a judge deems it “highly corroborative of consent.”\textsuperscript{91}

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{\small \textit{Richards, Intimate Betrayal: Understanding and Responding to the Trauma of Acquaintance Rape} 32 (1995).}
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\textsuperscript{86} See, e.g., 124 CONG. REC. 34,913 (daily ed. Oct. 10, 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, \textit{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 (2005) (asserting that “defense attorneys, in an effort to exonerate their clients, challenge rape victims’ testimony and credibility through an attack on the victims’ sexuality”).

\textsuperscript{87} See, e.g., \textit{Gary LaFree, Rape and Criminal Justice: The Social Construction of Sexual Assault} 56 (1989) (study finding that 11.8\% of rape reports resulted in conviction); Deborah Fineblum Raub, \textit{Sure, People are Aware of Rape, Especially Now. But ...}, ROCHESTER DEMOCRAT \& CHRON., Apr. 15, 1999, at 1C (citing 1993 finding that 2\% of reported rapes result in conviction).

\textsuperscript{88} See, e.g., CAL. EVID. CODE § 1103(c)(1) (West Supp. 2007); N.Y. CRIM. PROC. LAW § 60.42 (McKinney 2004); 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 (Michie Supp. 2000); MASS. GEN. LAWS ANN. CH. 233, § 21B (West 2000); MO. ANN. STAT. § 491.015 (West 1996); N.C. GEN. STAT. § 8C-1, R. 412 (1999); OKLA. STAT. ANN. TIT. 12, § 2412 (West Supp. 2000); VT. STAT. ANN. TIT. 13, § 3255 (1998); VA. CODE ANN. § 18-2-67.7 (Michie 1996). \textit{See generally Chastity Requirement, supra} note 44, at 81-86 (describing and categorizing rape shield statutes).

\textsuperscript{89} 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 specific instances of a victim’s sexual conduct”).

\textsuperscript{90} 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”).

Feminists argued that shield laws would not only lessen victim discomfort, they would prevent juror sexism from influencing verdicts. They observed that without shield laws, jurors would acquit because of distaste for the victim’s lifestyle or the belief that her behavior entitled the defendant to sex. Reformers also identified the inferential problem of jurors drawing too strong a correlative connection between the fact of past consensual sex and consent in the present case. Shield laws, reformers contended, would prevent the jurors from nullifying or imbuing consent “pattern” evidence with empirical relevance it simply does not have.

The second major realist reform was the effort to reconstitute rape actus reus standards. Reformers asserted that requiring external force had the effect of permitting rape whenever the rapist used psychological force, implied force, subtle coercive tactics, or relied on his size and demeanor as inducement. As a consequence, many jurisdictions moved from an external force to a nonconsent standard, either through revisions of criminal codes or changes in judicial

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92 See Special Issues, supra note 82, at 1599 (noting that rape shield sought to “spar[e] women humiliation and trauma”).
93 See Special Issues, supra note 82, at 1599 (contending that rape shield counters “the rape myth that the victim ‘asked’ to be raped”); 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”).
98 See, e.g., ALASKA STAT. § 11.41.410(a) (1996) (defining sexual assault as “sexual penetration with another person without consent”).
interpretation of “force.” 99 Next, reformers pushed for a reinterpretation of consent actus reus to focus almost exclusively on language, namely “no” or “yes,” and their functional equivalents. 100 This has been the single reform causing the most outrage among students, men, and civil libertarians. 101

When a statute prohibits nonconsensual sex, it is normally up to the jury to evaluate what kinds and amounts of evidence support an inference of consent or nonconsent. 102 In turn, defense attorneys routinely present and jurors consider a range of victim conduct – conduct relevant, marginally relevant, and sometimes irrelevant to consent. Reformers pushed for actus reus formulations that would reduce juror ability to focus on past sexual and precipitating behavior as part of the consent inquiry. Milder reforms created a presumption of nonconsent whenever the victim expressed a “no.” 103 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. 104

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100 See ESTRICH, supra note 81, at 102 (“‘Consent’ should be defined so that no means no”; Feminist Challenge, supra note 96, at 2154-55 (1995) (arguing that consent should mean “affirmative permission clearly signaled”).

101 See, e.g., Klein, supra note 28, 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.


104 See Lynne Henderson, Rape and Responsibility, 11 LAW & PHILOS. 127, 215 (1992) (contending that believing “no means yes” assumes that male persistence “is in fact what women desire”).
The stronger reform was the creation of an affirmative consent actus reus, in which rape occurred whenever there was sex in the absence of affirmative permission – a “yes” or its equivalent. 105 This reform had two purported benefits: First, it focused the jury squarely on the issue of linguistic (or functionally linguistic) communication;106 and second, it placed the burden of communication properly on the person desiring the sex.107 Not surprisingly, such realist reforms have been wildly controversial, engendering the wrath of angry men who believe the “feminazis” are out of control108 and virtually splitting the progressive legal community.109

PART II: REALIST REFORMS AND GENDER NEUTRALITY

It is important to understand what this Article is and is not saying. Although it ultimately criticizes realist rape reform, it does not assert the usual set of critiques. It advances neither the civil libertarian argument that such reforms impermissibly infringement defendants’ rights,110 nor the “outraged ordinary guy” argument that feminists have gone “too far” in seeking to criminalize acceptable behavior.111 Civil libertarians express concern that shield laws prevent

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

107 See Feminist Challenge, supra note 96, at 2181 (analogizing person who desires sex to surgeon who must get permission before bodily invasion); UNWANTED SEX, supra note 105, at 271.

108 Nick Erickson, British National Party’s London Organizer stated, “To suggest that rape, when conducted without violence, is a serious crime is like suggesting that forcefeeding a woman chocolate cake is a heinous offence. . . . The demonisation of rape is all part of the feminazi desire to obtain power and mastery over men.” Andrew Gilligan, Women more troubled by bag theft than rape, BNP candidate claims, EVENING STANDARD (UK) (January 4, 2008), available at +theft+than+rape,+BNP+candidate+claims/article.do.

109 See Klein, supra note 28, at 1004 (observing that critics of affirmative consent react with “[o]utrage, shock, disbelief, and mockery”).


111 See, e.g., Klein, supra note 28, at 1053 (criticizing affirmative consent for going farther than strict liability); 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) (querying whether law should “go so far as” as to
accuseds from defending adequately against state power\textsuperscript{112} and affirmative consent standards punish defendants even when they reasonably believed there was consent, or worse, when the victim consented in her mind but did not say “yes.”\textsuperscript{113} Others object that affirmative consent standards destroy the “romantically equivocal” nature of sexual communications.\textsuperscript{114}

Any criminal reform that makes incarceration more likely or severe, especially in our already overly-punitive system, will run into civil libertarian criticism.\textsuperscript{115} Given the criminal system’s tendency to disadvantage racial and socioeconomic minorities, abusiveness, overbreadth, and far removal from utilitarian good, one should be skeptical of any reform that broadens the system’s reach over individuals.\textsuperscript{116} The problem is that when there is bias against a certain class of victims, whether because of racism, sexism, or other bigotry,\textsuperscript{117} the apparent anti-subordination solution is to compel criminal justice actors to enforce criminal laws, although this also may have the consequence of exacerbating other systemic biases.\textsuperscript{118} The only other option

\begin{itemize}
\item Galvin, \textit{supra} note 94, at 769 (discussing argument that rape shield infringes sixth amendment rights). Defense attorneys had been accustomed to using the “full moral force of their evidence.” Justice O’Connor used this phrase in the strangely analogous context of characterizing emotional victim impact statements as an important part of the government’s case during death sentencings. \textit{Payne v. Tennessee}, 501 U.S. 808, 830-33 (1991) (O’Connor, J., concurring).
\item Dressler, \textit{supra} note 111, at 425 (criticizing affirmative consent for punishing sex with girl who cannot express her consent because of “sexually conservative upbringing”).
\item \textit{Pink Elephants, supra} note 94, at 251 (noting argument that affirmative consent “prevent[s] the ‘sexy silence’ that occurs before intercourse”).
\item Donald Dripps states, “[I]f the objection is that a proposed [rape] sentence is too lenient compared to our current practice, one good rejoinder is that our current practice is too harsh.” \textit{After Rape Law, supra} note 103, at 977.
\item Stephen J. Schulhofer asserts, “Only the most determined Polyanna or bar association cheerleader can continue to lavish unbridled praise on modern America’s criminal trial system. The distortions are clear and recurring, but the solutions are elusive.” \textit{The Trouble with Trials; the Trouble with Us}, 105 YALE L.J. 825, 855 (1995) [hereinafter \textit{Trouble with Trials}].
\item For example, African American victims are unequally treated by the criminal system. \textit{See} McClesky v. Kemp, 481 U.S. 279 (1987) (death penalty case revealing race of victim significant factor in death sentence). \textit{See also} RANDALL KENNEDY, \textit{Race, Crime, and the Law} 19 (1997) (claiming that “the principal injury suffered by African Americans in relation to criminal matters is not overenforcement but underenforcement”).
\item For example, any push to take black victim’s cases seriously, would likely result in more prosecution and mistreatment of black defendants. \textit{See} Erin Edmonds, \textit{Mapping the Terrain of Our Resistance: A White Feminist Perspective on the Enforcement of Rape Law}, 9 HARV. BLACKLETTER J. 43, 45 (1992) (arguing that “a
is to abandon the criminal path all together and push for transformation of external structures that lead to biased under-enforcement. In fact, this paper will advocate the latter option, but not on the sole basis that increased criminalization hurts defendants and bolsters a deeply flawed system. While these are well taken criticisms, liberals fail to articulate why it is acceptable to minimize state intervention through selective under-enforcement of only the criminal laws that dismantle male privilege.\textsuperscript{119} Should the macro-argument against the criminal justice system outweigh women’s interests in this particular instance?\textsuperscript{120}

One problem is that many critics of realist rape reform do not engage in such balancing because they view date rape under-prosecution as distinct from gender inequality. In any contemporary discussion of rape, one hears arguments implying or openly asserting that there are neutral reasons for under-enforcement and under-reporting. Some argue date rape convictions occur at lower frequencies simply because the cases boil down to “he said – she said” contests with little or no corroborating evidence on either side, making it difficult to find guilt beyond a reasonable doubt.\textsuperscript{121} The infrequency of conviction, which is not based on sexism, then creates an inevitable disincentive to reporting.\textsuperscript{122}


\textsuperscript{120} Civil liberties are important, but rape “has meanings at the deepest level of human symbolism, and serves as an excruciating reminder of how a culture that disinhibits the aggressive exercise of power fosters callous oppression at the cost of female autonomy.” Owen D. Jones, Sex, Culture and the Biology of Rape: Toward Explanation and Prevention, 87 Cal. L. Rev. 827, 830 (1999).

\textsuperscript{121} See, e.g., Klein, supra note 28, at 1048 (“In any ‘He said, She said’ battle, the prosecutor’s burden of proof creates a very real obstacle.”); 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, 1113 (2007) (arguing that in date rape the “facts to come down to his word against hers”). See Bryden & Lengnick, supra note 14, at 1200 (noting possibility that underenforcement is “attributable to genuinely reasonable doubts about the defendant’s guilt, rather than unfair biases”).

However, date rape cases are not treated the same way as other cases in which testimony is the main evidence. Victim contributory behavior and past “pattern” evidence concern jurors far more in rape cases than in garden variety criminal cases resting solely on testimony.\textsuperscript{123} When a woman accuses a defendant of burglary, the jury tends not to focus on whether she has a habit of opening her home to strangers,\textsuperscript{124} or precipitated the crime by leaving her doors unlocked or alarm off.\textsuperscript{125} Rape law, by contrast, is rife with instances of defense attorneys exploiting victim contributory behavior and past sexual conduct,\textsuperscript{126} and popular culture cautions women that engaging in activities like making-out or getting drunk puts them at risk of rape.\textsuperscript{127}

The neutrality advocate, however, is ready with several rejoinders, the first being that precipitation behavior and past sexual conduct known to the defendant is especially relevant in rape cases because jurors must determine defendant’s \textit{mens rea}.\textsuperscript{128} Jurors are required to consider such evidence to resolve whether the defendant believed or reasonably believed the

\textsuperscript{123} See HUBERT S. FEILD & LEIGH B. BIENEN, JURORS AND RAPE: A STUDY IN PSYCHOLOGY & LAW 54 (1980) (finding that 66% of respondents believed woman’s behavior or appearance provokes rape).

\textsuperscript{124} One might respond that victims and burglars are not generally acquaintances, so one cannot infer special motive to lie or that previous interactions implied consent. See, e.g., Dressler, \textit{supra} note 111, at. However, in my experience, many burglary charges do involve acquainted parties, and juries nonetheless seek specific motive to lie.

\textsuperscript{125} This is not to say women aren’t generally blamed more for crime. During an interview, Oprah Winfrey told the central park jogging victim, “You had to be the kind of person who either thought you were invincible or who was just nuts.” The victim has recently stated she believes Oprah’s comment was sexist, asking, “What about all those young men who were out there at that time?” Tracy Connor, \textit{Question from Oprah Angers Central Park Rape Victim}, N.Y. DAILY NEWS, Nov. 15, 2007, available at http://www.nydailynews.com/gossip/2007/11/15/2007-11-15_question_from_oprah_angers_central_park .html.

\textsuperscript{126} Anecdotes of victim contribution arguments are legion. See, e.g., CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 171-83 (1989) (discussing famous New Bedford gang rape case in which defense attorney asked what victim was doing “running around the streets getting raped”); Lani Anne Remick, Comment, \textit{Read Her Lips: An Argument for a Verbal Consent Standard in Rape}, 141 U. PA. L. REV. 1103, 1127 n.95 (1993) (citing \textit{Tyson Takes the Count}, NATION, Mar. 2, 1992, at 253) (noting that Mike Tyson’s lawyer argued because of Tyson’s known violent nature, “to date him was to consent to sex”); \textit{Motivational Evidence}, \textit{supra} note 93, at 587 (citing \textit{Jury: Woman in Rape Case ‘Asked For It’}, CHI. TRIB., Oct. 6, 1989, at 11) (reporting that foreman of jury that acquitted defendant who stabbed and violently raped victim wearing lace miniskirt, stated, “We felt she . . . asked for it for the way she was dressed”).

\textsuperscript{127} Ann Landers warned that “the woman who repairs to some private place for a few drinks and a little shared affection has, by her acceptance of such a cozy invitation, given the man reason to believe she is a candidate for whatever he might have in mind.” Ingram, \textit{supra} note 57.

\textsuperscript{128} See Andrew E. Taslitz, \textit{Willfully Blinded: On Date Rape and Self-Deception}, 28 HARV. J. OF L. & GENDER 381, 400 (2005) [hereinafter \textit{Willfully Blinded}] (noting that defendants argue “even if inquiring, sensitive men might have seen the problem, the defendant did not”).
victim consented. However, the jury’s synthesis of the relationship between victim conduct and *mens rea* is only gender neutral if the jury is predisposed to be gender neutral. While some jurors may restrict the use of precipitation evidence to a good faith determination of state of mind or reasonableness, as required by law, others may acquit regardless of defendant’s knowledge because the victim “deserved it” or “led him on.” Moreover, a jury’s determination that a defendant was not negligent puts a normative stamp of approval on the defendant’s sexist presumptions that the victim’s attire or other behavior entitles him to sex.

When jurors rely on victim conduct to acquit under a knowledge standard, one could claim they are neutral because it is possible (although unlikely) they acquitted the defendant even though they morally condemn his thought processes. In that case, the gender problem occurs at the level of the law, similar to provocation cases in which the “actual” emotional distress standards allows defendants to kill wives who attempt to leave them or gay men who hit on them. The provocation wisdom established nearly a century ago that “no defendant may set

129 See Bryden & Lengnick, *supra* note 14, at 1380 (“There is no way to engage in [the reasonable mistake] inquiry without examining both parties’ alleged behavior.”).

130 See id. at 1317 (observing that “legitimate burden of proof concerns and excessive suspicion [of victims] are often hard to disentangle”).

131 See *Chastity Requirement, supra* note 44, at 112 (arguing that “law must declare that it is ‘normatively unreasonable’ to infer consent based on a woman’s prior sexual experiences”).


up his own standard of conduct and justify or excuse himself because in fact his passions were aroused." It appears to apply both literally and figuratively to rape.

Critics also contend that jurors justifiably consider past sexual conduct evidence because it is, in fact, statistically relevant to the issue of consent. They claim very specific or unusual past practices are relevant to whether a present similar practice occurred. Yet unless one indulges the chastity paradigm, the practice of having had consensual sex is not specific or unusual. Acquitting on the basis of past sexual behavior is more akin to acquiting a thief because the victim has lent money in the past. Moreover, even a “pattern” of particularly adventurous sex, standing alone, is of little evidentiary value, because it cannot establish that the victim has falsely claimed rape. In fact, it seems to substantiate the opposite — the victim engages in kinky sex and does not lie about it. Finally, like with predisposition evidence, the

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135 People v. Logan, 164 P. 1121, 1122 (Cal. 1917).
136 See supra note 94, and accompanying text (discussing inferential error problem).
137 See Chastity Requirement, supra note 44, at 98-110 (examining rape shield exception for “specific” pattern of consensual sex). There is, however, the dilemma that jurors’ internalization of sexual “rules” could cause them to automatically disbelieve the defendant’s account of “kinky” consensual sex, assuming no woman would agree to such acts. In that case, past sexual conduct evidence is necessary to show that defendant’s version of events is not wild and made up. The problem is as soon as this evidence is presented, the jury may believe that the complainant always consents to “kinky” sex.
138 See id. at 100 (observing that admission of past “pattern” of sex assumes other women “are relatively chaste as a point of meaningful comparison”).
139 The idea that consent to past sex does not constitute consent to sex in perpetuity has been reiterated over generations, see, e.g., Vivian Berger, Man’s Trial, Woman’s Tribulation: Rape Cases in the Courtroom, 77 COLUM. L. REV. 1, 58 (1977) (noting “unique nontransferable character” of sexual consent), and yet, jurors and others still advance its relevance. See also studies in Bryden & Lengnick, supra note 14.
140 But see Bryden & Lengnick, supra note 14, at 1355 (arguing that admitting evidence of woman’s propensity to consent to sex is like admitting evidence of witness’s propensity to lie). However, having consensual sex is not illegal or unusual like perjury or habitual lying. Moreover, once a person has been found to be a consistent liar, relevance is established. Even if a victim is a pattern consenting, the defense still has to show she deviated from the pattern of consenting and not lying.
assessment of past sexual conduct evidence is only neutral if the jury is already gender unbiased.\textsuperscript{142}

Another purportedly neutral explanation of date rape under-enforcement is that juries refuse to convict because they believe nonviolent date rape is less severe or “minor” crime compared to violent stranger rape.\textsuperscript{143} However, the phenomenon of date rape underenforcement occurs across the board, both in jurisdictions that grade rape and those that do not.\textsuperscript{144} Moreover, although it appears neutral to believe that rape causing injury should be a greater crime than noninjurious rape,\textsuperscript{145} the same cannot be said of the argument that, regardless of violence and injury, acquaintance rape should be punished less severely than stranger rape.\textsuperscript{146}

There are also those who claim that it is not sexist to question affirmative consent because of legitimate concerns about putting a person in jail for “poor communication.”\textsuperscript{147}

\textsuperscript{142} See Chastity Requirement, supra note 44, at 106 (arguing that sexual conduct evidence “subverts the truth-seeking process by biasing jurors”).

\textsuperscript{143} See Dressler, supra note 111, at 423 (maintaining that 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”). See also 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); Duncan, supra note 121 (contending that acquaintance rape should be lesser crime). But see Kimberley Kessler Ferzan, A Reckless Response to Rape: A Reply to Ayres and Baker, 39 U.C. DAVIS L. REV. 637 (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.”).


\textsuperscript{145} See, e.g., Duncan, supra note 121 (arguing that rape with force should be treated differently than consensual sex); After Rape Law, supra note 103. Donald Dripps states that “[s]ex may be unpleasant, but it is not the equal of a physical assault” and “people generally, male and female, would rather be subjected to unwanted sex than be shot, slashed or beaten with a tire iron.” Donald Dripps, Panel Discussion, Men, Women and Rape, 63 FORDHAM L. REV. 125, 171 (1994) [hereinafter Rape Panel]. However, there are many men who would much rather take a beating than suffer unwanted sexual penetration, albeit perhaps for very unprogressive reasons.

\textsuperscript{146} See Helen Power, Towards a Redefinition of the Mens Rea of Rape, 23 Oxford J. Legal Stud. 379, 382 (2003) ("emphatically" rejecting a “system of grading, whereby stranger rape is a more serious crime than intimate and acquaintance rape"). Some characterize the harm of acquaintance rape as greater than stranger rape. See, e.g., DEBORAH L. RHODE, SPEAKING OF SEX: THE DENIAL OF GENDER INEQUALITY 123 (1997) (asserting that date rape “calls into question a woman’s behavior, judgment, and sense of trust in ways that random acts by strangers do not”).

\textsuperscript{147} See Matthew Silliman, The Antioch Policy, a Community Experiment in Communicative Sexuality, in DATE RAPE 167, 172 (Leslie Francis ed., 1996) [hereinafter DATE RAPE] (noting argument that affirmative consent
Equivocal sexual communications, especially ones that culminate in date rape accusations, however, are deeply gendered. There appear to be three main predicates that lead to the “confusing” sexual communications that culminate in date rape prosecutions.\textsuperscript{148} The first is men’s socialization toward treating sex as a goal.\textsuperscript{149} Young men are barraged with messages that sex is the ultimate objective of all private interactions with women.\textsuperscript{150} The popular sentiment 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.\textsuperscript{151} As a result, many men are conditioned toward aggression and sensitized to hear and believe cues indicating consent and ignore or downplay signs of reluctance.\textsuperscript{152} Consequently, a defendant’s subjective belief that the victim consented is not gender neutral.\textsuperscript{153}

The second predicate is the repressed nature of female sexual communication. The cultural pressure on women to obscure their real feelings toward sex creates an omnipresent

\textsuperscript{148} Even “perfect” date rape cases for civil libertarians - date rapes without coercion or intoxication - present important gender issues.

\textsuperscript{149} Stephen Schuhlhofer puts the sentiment bluntly, “Real men want to score.” UNWANTED SEX, supra note 105, at 262.

\textsuperscript{150} See Katharine K. Baker, Sex, Rape, and Shame, 79 B.U. L. Rev. 663, 688 (1999) [hereinafter Sex, Rape, and Shame] (concluding that about sex and masculinity norms account for date rapists’ inclination to bypassing consent); Pillsbury, supra note 39, at 865 (noting that “the man pursues a single aim of sexual conquest”); Motivational Evidence, supra note 93, at 600-05 (observing that young men “are bombarded by a culture” that “comodifies women’s sexuality”).

\textsuperscript{151} See Motivational Evidence, supra note 150, at 600 (asserting that young boys are “cast by culture into the role of pursuer”); Forgetting Freud, supra note 17, at 154 (stating that “men structure their understanding of women” through metaphor of sex achievement); See 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., R. Lance Shotland, A Theory of Courtship Rape: Part 2, 48 J. SOC. ISSUES 127, 130 (1992); Eugene J. Kanin, Date Rapists: Differential Sexual Socialization, 14 ARCH. SEXUAL BEHAV. 219, 222-23 (1985). Experts also conclude that date rapists are “products of highly erotic-oriented peer group socialization.” Eugene Kanin, Date Rape: Unofficial Criminals and Victims, 9 VICTIMOLOGY 95, 97 (1984).

\textsuperscript{152} See Forgetting Freud, supra note 17, at 145 (noting that date rapists “engage in cognitive strategies to block their conscious minds from learning the truth”). See also Lani Anne Remick, supra note 126, at 1445 (observing that men interpret courtship behavior on basis of conquest-oriented assumptions).

\textsuperscript{153} See generally Forgetting Freud, supra note 17 (proposing reformation of mens rea to account for male self-deception).
substantial risk that communications will be imperfect. Women adhere to the notion that even if they want sex, they are supposed to appear reluctant, which may lead to displays of token resistance. Men, in turn, take isolated occasions of token resistance, as *prima facie* evidence that the “no means yes” phenomenon is widespread. This belief, together with the goal-oriented mindset, causes men to discount signs of resistance all together. Alternatively, a woman’s belief that only men can engage in open sexual communications may lead her to remain silent about her ambivalence toward sex. As a consequence, she might just “go through” with sex to avoid an uncomfortable confrontation. At this point the third factor comes into play, which is the woman’s uncomfortable relationship to sexuality. Not only will she feel bad about the unconsensual sex, she may also feel guilty over having had casual sex. The imbued feeling of guilt about sex adds another layer of injury over almost every imperfect sexual encounter. The combination of a sex-goal-oriented man and a sexually conflicted woman is an explosive combination that has led to the psychologically injury of innumerable women and criminal prosecutions devastating to men.

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155 See, e.g., Pillsbury, supra note 39, at 948 (maintaining that “[f]ear of the slut label can inspire illusory sexual refusals”); 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 AND SOC. PSYCHOL. 872, 875 (1988) (citing finding that women’s fear of appearing promiscuous leads to token resistance).

156 See Cornelia T.L. Pillard, *Our Other Reproductive Choices: Equality in Sex Education, Contraceptive Access, and Work-Family Policy*, 56 EMORY L.J. 941, 952 (2007). (“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 39, at 948 (observing that “feigned refusals feed the dangerous perception among both sexes that women do not mean it when they say no”).

157 See *No Bad Men*, supra note 39, at 679 (contending that “conceptualization of sex as feigned struggle leads to a tolerance of coerced sex”).

158 See Pillsbury, supra note 39, 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”).

159 See *Theory of the State*, supra note 126, at 177 (arguing that “women are socialized to passive receptivity” and “may prefer [acquiescence] to escalated risk”); *Unwanted Sex*, supra note 105, at 269 (observing that woman’s silence may be explained by confusion or ambivalence).
Nonetheless, many adhere to the idea that the law has “gone to far” in requiring affirmative consent. The common assertion is that affirmative consent makes sex strict liability whenever a “yes” is absent.\textsuperscript{160} The apparently objective argument that follows is that it is only fair to treat rape like “any other crime” involving consent – the absence or presence of “yes” is one of many relevant factors.\textsuperscript{161} Otherwise, a woman could claim rape even when the defendant reasonably thought there was consent and the woman had consented in her mind.

However, the neutrality of this facially-reasonable argument becomes suspect when one considers that civil libertarians obsessively detest the risks posed by affirmative consent but seem relatively unconcerned about every other criminal law in which consent causes risk to people with close associations. People in trust relationships, who share spaces and property, constantly run the risk that failure to formally ask permission could be exploited by the other person in the relationship. Nonetheless, we tend to be comfortable with such ambiguity because we believe in the basic solidity of our trust relationships. If my neighbor strays into my yard, I could call the police and have him arrested for trespass. Of course, there are no neighborhood groups arguing for reform of trespass laws because the chances of exploitation are low.\textsuperscript{162}

Bringing it back to affirmative consent in rape, one is left to wonder why critics widely entertain the belief that in this context, ambiguity is particularly unacceptable. Do they assume women will engage in widespread exploitation of the sexual trust relationship by claiming wanted sex is rape because of the absence of a technical yes and such cases will be successful?\textsuperscript{163}

\textsuperscript{160} See Dressler, supra note 111, at 424.
\textsuperscript{161} See, e.g., George E. Panichas, Rape, Autonomy, and Consent, 35 LAW & SOC’Y REV. 231, 268 (2001) (advocating admission of “broad range of evidence” on consent); Bryden & Lengnick, supra note 14, at 408 (criticizing affirmative consent on ground that strict liability is reserved for minor regulatory offenses).
\textsuperscript{162} See Ingram, supra note 57, at 8 (arguing that, like sex, “visiting friends, having surgery, and engaging in acts of philanthropy” are common occurrences that “might well be criminal acts (trespass, battery, robbery) if done without consent”).
\textsuperscript{163} See Bryden & Lengnick, supra note 14, at 407-08 (expressing concern that affirmative consent standards are unfair because men are not on notice to ask before sex). However, if no trust relationship exists, men
Is there empirical evidence that men in solid trust relationships, who could fairly presume a "yes" on the basis of past practice, are the ones being unfairly jailed by affirmative consent?\textsuperscript{164} In reality, affirmative consent laws make sex rape as much as the law makes a long time neighbor’s borrowing of hedge clippers burglary and theft. Because there is simply no non-gendered reason to be more alarmed at the possibility of exploitation of affirmative consent laws than other laws that create uncertainty among people of trust, the neutrality of the ardent objection to affirmative consent is suspect.

Subsequently, it seems clear that date rape underreporting and underenforcement are not just neutral phenomena based on the factual ambiguities of nonparadigmatic rape cases. Rather, the date rape issue is such an important feminist issue precisely because it exposes the deeply gendered assumptions, practices, and characterizations that surround sexual communications and activities. Realist reform was an effort to counter patriarchy by shielding the jury from learning facts that trigger sexist condemnation and creating objective linguistic paradigms to govern sexual communications. However, today, everyone seems to agree that these reforms have failed to produce the results desired, at least in bare empirical terms.

\textbf{PART III: RAPE REFORM’S FAILURES: INADEQUACIES AND ICONS}

It is fairly uncontroversial, even among feminists, that realist reform has not been a practical success.\textsuperscript{165} Rape is still widely underreported, and victims continue to be doubly

\begin{footnotesize}
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\item \textsuperscript{164} See Estrich, supra note 84, at 1141-42 (asserting that men have pervasive but empirically unsupported “nightmare” involving lying complainants, overzealous prosecutors, and bumbling judges and juries, resulting in wrongful rape convictions).
\item \textsuperscript{165} See Seidman & Vickers, supra note 18, at 467-68 (noting lack of data that “rape reform laws have deterred the commission of rape, increased its prosecution, or increased conviction rates”); Bryden & Lengnick,
\end{itemize}
\end{footnotesize}
traumatized by trial. Many feminists account for this failure by arguing reforms have not been implemented as widely or strictly as they should be. They stress society needs more criminal law and more exacting prosecutions. By contrast, this section sets forth two main conditions of rape reform’s failure that cannot be remedied through more criminal law and may be exacerbated by the continued deployment of criminal law.

A. Society Gone Wild

Realist reforms have failed in part because patriarchal beliefs about sexuality are embedded so deeply that shields and consent reforms, no matter how strict or uniform, cannot control their influence. The feminist effort within the rape trial was to guard rather than cure by establishing legal barriers between the jury and victim’s sexuality. Likely operating on the logical assumption that it is impossible to rid society of rape mythology, feminists supported the compromise solution of preventing defense attorneys from capitalizing on the victim’s embarrassment and jury’s prejudice from myth-supportive evidence.

However, feminists seem to have underestimated other ways in which rape myths infect the criminal system. First, shields 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

\textit{supra} note 14, at 1199 (concluding that reforms “have generally had little or no effect on the outcomes of rape cases”).


\textsuperscript{167} See, e.g. Stephen J. Schulhofer, \textit{Rape in the Twilight Zone: When Sex is Unwanted But Not Illegal}, 38 SUFFOLK U. L. REV. 415, 416-17 (arguing for wider adoption and stricter application of affirmative consent); Seidman & Vickers, \textit{supra} note 18, at 484-90 (calling for uniform adoption of affirmative consent).

\textsuperscript{168} See, e.g., \textit{Chastity Requirement, supra} note 44, at 141-47 (advocating stricter rape shield law).

\textsuperscript{169} See CASSIA SPOHN & JULIE HORNEY, \textit{RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT} 164 (1992) (observing that stronger laws have limited effect because of small number of cases affected); Bryden & Lengnick, \textit{supra} note 14.
situations. A victim could be severely embarrassed and traumatized by pre-trial state agents treating her as an unchaste woman or vindictive shrew, and such agents have the power to make sure cases receive no further legal attention. 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.”

In addition, rape myths do not enter the trial only by way of specific evidence of past sexual conduct or precipitation. The very fact of an accusation of acquaintance rape can trigger sex object and vindictive shrew narratives. Even when the court shields the jury from particular evidence that the victim is “loose” or lying, stereotypes and heuristics continue to operate. Looking at it hermeneutically, the rape trial proceeds on a backdrop of narratives surrounding all the players involved – from police, to defendants, to victims. The background

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170 See Chastity Requirement, supra note 44, at 95-96 (noting that rape stereotypes are likely most operational at pretrial stages); Seidman & Vickers, supra note 18, at 468 (contending that state actors and jurors continue to be hostile to rape claims).
171 See SPOHN & HORMAN, supra note 169, at 176 (finding rape reforms ineffective “because they failed to alter officials’ evaluations of rape cases and rape victims”).
173 See Douglas D. Koski, Jury Decisionmaking in Rape Trials: A Review & Empirical Assessment, 38 Crim. L. Bull. 21 (2002) (study finding jurors forced to reach consensus “converge[] on whatever stereotypic-consistent imagery and information is available”). See also Friedland, supra note 151, at 519 (noting that shield laws do not address juror’s acceptance of defendants’ claims of nonverbal consent).
175 See Combs, supra note, at 292 (asserting that “cultural scripts that the jurors bring to the court indirectly influence the stories they will be told”); No Bad Men, supra note 39, at 682 (observing that criminal process proceeds against backdrop of “patriarchal tale of rape that our culture inculcates and that we use to measure the credibility of any given charge of rape”).
narrative of the date rape victim necessarily integrates the lingering image of the slut or shrew.\footnote{See Special Issues, supra note 82, at 1592 (noting “cultural atmosphere” supporting rape myths).} As a consequence, total elimination of such myths from the trial is a practical impossibility.\footnote{See Forgetting Freud, supra note 17, at 154-55 (observing that subtle word choices trigger metaphors used by jurors as “epistemology filters”).}

Rape shield laws and affirmative consent standards are also wholly inadequate at addressing the predicates of equivocal sexual communications. The attempt to create a paradigm through law in which the sexual seeker must get prior permission was doomed to fail in the absence of a massive change in social mindset.\footnote{See Angela Harris, Forcible Rape, Date Rape, and Communicative Sexuality: A Legal Perspective, in DATE RAPE, supra note 147, at 52 (arguing “[f]or date rape to be taken truly seriously as a crime, communicative sexuality must be a social as well as legal norm”).} Of course, reformers hoped widespread implementation of affirmative consent would effectively signal to young men that sex absent free and clear permission is not a valid goal.\footnote{See, e.g., Katharine K. Baker, Gender and Emotion in Criminal Law, 28 HARV. J. L. & GENDER 447, 454 (2005) [hereinafter Gender and Emotion] (noting that affirmative consent sends “a clear message” that sex must be “voluntarily given”).} But popular opinion continues to be that requiring a “yes” is totally inappropriate and unfair.\footnote{See Sex, Rape, and Shame, supra note 150, at 689 (noting “[t]he popular rejection of verbal communication in the sexual context”).} Recall the famed Antioch College code of student conduct requiring unequivocal permission before every stage of sexual relations.\footnote{The Antioch College Sexual Offense Prevention Policy (2006), available at http://www.antioch-college.edu/campus/SOPP. It required “[t]he request for consent [to] be specific to each act.” Id. at para. 3.} 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.”\footnote{The Antioch Policy engendered many “vitiolic 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 150, at 687 (footnotes omitted).}
I recall student sentiment on Antioch from my days as a law student, and now, having taught rape for several years, affirmative consent seems less popular than ever. It is difficult to find even one student willing to defend the requirement of an unambiguous “yes.” Why is the idea that a man should respect a partner enough to be communicative and cautious such anathema? Why do women characterize men who act tentatively toward sex as “wimps” to whom they would unlikely be sexually attracted? The answer seems to be that the goal-oriented sex paradigm is such a deeply entrenched cultural norm that it influences basic notions of maleness. Both men and women believe that a large part of what makes “a man a man” is his relentless pursuit of sex. How much can a few jurisdictions legally requiring a “yes” before intercourse do to change such an entrenched belief?

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183 Consider one incident at William and Mary in 2006, where a female student reported she was raped during a sorority party. The prosecutor declined to pursue the case for insufficient evidence, although the school found the male guilty of sexual misconduct in disciplinary proceedings. 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.” As a response to student feminists’ call to wear red in support of sexual abuse survivors, flyers were posted urging male students to wear blue in support of “truth.” Finally, a student publication sided with the male, posting online “important public facts,” including the woman’s identity, and putting up flyers announcing “Rape Case Blown Open.” See Andrew Petkofsky, At W&M, Some Say Too Much Detail Constant Information About Sexual Assault Case Creates Unease, RICHMOND TIMES-DISPATCH, Feb. 19, 2006, at B1. See also Richard Faithful, Assault Gets Even Uglier, CAMPUSPROGRESS.ORG, Oct. 10, 2006, available at http://www.campusprogress.org/features/1210/assault-gets-even-uglier/index.php; Letters to the Editor, THE FLAT HAT ONLINE (February 24, 2006), available at http://flathat.wm.edu/2006-02-24/story.php?type=2&aid=15.

184 See Angela Onwachi-Willig, Book Review, Girl, Fight!, 22 BERKELEY J. GENDER L. & JUST. 254, 257 (2007) (observing that today’s young women “easily blind themselves to the barriers generally faced by women” and see their choices as free despite 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 34, at 864 (asserting that women’s rejection affirmative consent is explained by “women’s weaknesses” in wanting male pursers and fact that women “for 10,000 years . . . have enjoyed men begging for sex”).

185 Pillsbury, supra note 39, at 918 (“A real man will not be put off by minor obstacles such as female reluctance . . . .”). 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”).

186 See Sexy Dressing, supra note 72, at 1332 (observing that “men and women eroticize the relationship of [male] domination so that it is sustained by (socially constructed) desire”).
Similarly, both men and women tend to embrace the romanticized notion of the reluctant or silent female partner. Chastity ideals persist even in our highly sexualized Girls Gone Wild society. Many people prefer sexual aggressors to be men and continue to look down on “liberated” women who welcome sexuality and open sexual communication. Moreover, “liberated” women seem to defy their gender roles in other ways. The “Sex and the City” type woman is financially stable and in theory socially independent of men. She can exercise sexual agency because she can afford not to be “marriage material.” In this sense, the liberated woman is still an unsuitable and unattainable ideal for many real American women – women who do not live in NYC and cannot buy Manolo Blahniks. In addition, even girls who have gone wild feel the need to cover for exercises of sexual agency. Co-eds still widely “blame” open sexual communication or activity on overconsumption of alcohol that induced them to act in a manner inconsistent with gender paradigms. Moreover, the Girls Gone Wild culture is not one of sexual agency, but rather a phenomenon of women reinforcing the sex object caricature in exchange for the fleeting benefits of momentary fame, attention, and popularity. In sum, countering the sexual roles both young women and men so readily play is no easy feat, and it certainly could not be done simply by tinkering with the actus reus of rape.

188 See Pillsbury, supra note 39, at 890 (maintaining that males are seen as “most interested” in sex and “less capable of sexual restraint”).
190 See Pettinato, supra note 187, at 112 (attributing women’s inequality in marriage to continued economic subordination).
191 See Dowd, supra note 189 (asserting that “women have moved from fighting objectification to seeking it”).
192 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.” A 21-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.” Hoffman, supra note 16.
**B. Society Gone Tough-on-crime**

Another reason for the failure of realist reform is that the American criminal system is affixed to a larger social narrative about victims and criminals, ultimately inhospitable to date rape criminalization. One might initially think any reform increasing the chances and likelihood of prosecution would flourish in tough-on-crime America. During the last several decades, so-called retributive, but in fact pro-vengeance, ideologies flourished. Since the Nixon Administration, the United States waged several “wars” on crime, sentences uniformly increased, and being tough on crime became a sure-win platform on both sides of the political aisle. Today, the victim’s rights movement is a powerful lobby with a critical voice in the justice system, and victims play a large part in every part of the prosecution. One would think, therefore, any law that puts more criminals in jail and “protects” victims would thrive. How come tougher date rape laws never engendered widespread public support like tough drug laws and anti-pedophile measures?

The answer is that reforms about countering racial and gender stereotypes within the criminal system have very little purchase among those who advocate retribution and victim’s

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

194 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 Regan’s other enemy, welfare mothers). See infra notes 195-196 and accompanying text.


197 See generally *Victim Wrongs*, supra note 134.
In fact, tough-on-crime ideology exploits socially-ingrained racist and sexist beliefs in order to allow “ordinary” members of society to distance themselves from criminals. Politicians and media have constructed the criminal as an inhuman boogie-man, or autonomous young minority male, who feels no remorse and has no “excuse” for the crimes he commits. The complement to the criminal caricature is the image of the pristine innocent victim, preferably a young female subjected to violent murder or rape. In victim’s rights ideology, victims are necessarily passive objects upon whom criminal acts were imposed. A proper victim has absolutely no responsibility for the crime, abides by every social more, and necessarily seeks closure through harsh punishment of the offender.

Some “feminist” reforms fit well within the victims’ rights paradigm. After OJ Simpson, society had no problem putting batterers in the category of irredeemable, evil criminal. Although there is certainly a distinct caricature of a minority abuser (think “wife-beater”)

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198 See Feminist War, supra note 2, 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”).


200 See, e.g., 148 CONG. REC. H916 (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”).

201 See Lynne Henderson, Co-opting Compassion: The Federal Victim’s Rights Amendment, 10 ST. THOMAS L. REV. 579, 586-87 (1998) (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”).

202 See id. at 584 (observing that “[v]ictims are ‘blameless,’ innocent, usually attractive, middle class, and white” persons subjected to “particularly brutal homicides”).


204 See Feminist War, supra note 2, 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).

205 See Feminist War, supra note 2, at 777 (noting view that that victims must exhibit “righteous anger at every turn”).

through movies like “The Burning Bed,” society could see white men as repulsive
batterers, so long as they committed atrocious crimes against their innocent white wives. Concurrent with the image of the horrible batterer was the helpless, infantile, emotionally fragile
wife in desperate need of government intervention. Domestic violence reforms incorporating
these bipolar images, such as forced separation and mandatory prosecution, enjoy wide-spread
popularity. Even the highest officials in the conservative government have characterized
abusers as horrific criminals at whom the state needs to “throw the book.” But if abusers and
battered wives could fit in the tough-on-crime framework then why not rapists and their victims?

Here, once again, it is important to distinguish between paradigmatic and
nonparadigmatic rapes. 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. Society has absolutely no problem asking for the highest and
most brutal forms of punishment for paradigmatic rapists. Over the past several years,

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207 See Rashmi Goel, Can I Call Kimura Crazy? Ethical Tensions in the Cultural Defense, 3 SEATTLE J. FOR
SOC. JUST. 443, 454 (2004) (noting “strong stereotype[] that Latino males are macho and hot tempered”).
208 See Martha R. Mahoney, Legal Images of Battered Women: Redefining the Issue of Separation, 90 MICH. L.
REV. 1, 2–3 (1991) (asserting that movie The Burning Bed helped build cultural image of weak battered women
subjected to terrorism-like violence); Coker, supra note 3, at 1028–29 (2000) (observing battered women’s
movement’s primary focus on white women).
209 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); Micchio, supra note 206, at 242 (maintaining that mandatory policies “reify[] the
cultural stereotypes of the incapacitated and irrational woman”) See generally Feminist War, supra note 2, Part IV
B (criticizing domestic violence criminalization for objectifying women).
210 See infra note 218 and accompanying text (discussing tough-on-abuse attitudes).
211 See, e.g., President George W. Bush, President Proclaims October Domestic Violence Awareness Month,
Remarks by the President on Domestic Violence Prevention (Oct. 8, 2003) (declaring “fight against domestic
violence” and prescribing “faith based programs” as solution), available at http://www.whitehouse.gov/news/
releases/2003/10/20031008-5.html.
212 See supra note 200. Experts note that characterizing rapists as abnormal has historical roots. See Christina
E. Wells & Erin Elliott Motley, Reinforcing the Myth of the Crazed Rapist: A Feminist Critique of Recent Rape
as mental deviants with little ability to control their behavior”).
213 See Nora Demleitner, First Peoples, First Principles: The Sentencing Commission’s Obligation to Reject
False Images of Criminal Offenders, 87 IOWA L. REV. 563, 568 (2002) (observing how publicity of such cases
elevated crime against women and children to “national crises”). See also Jonathan Simon, Megan’s Law: Crime
politicians bolstered by victim’s rights allies have proposed newer and better ways of making sex offenders suffer, testing the very limits of constitutionality. Prosecutors have defended such policies all the way up to Supreme Court, which has been more than willing to put the stamp of approval on public registration and indefinite detention of sex offenders. Far from being archaic constructions from days past, images of paradigmatic rapists as unscrupulous minorities or predatory sickos hanging out in the shadows are popular as ever.

Although throwing the book at sexual predators is a fabulous rhetorical ace for the savvy politician, few find it politically expedient to be “tough” on date rape. Despite an embarrassing history of sex offenses on American university campuses, the date rape issue,
with its descriptive nuance, has little political appeal. 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. 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. Society does not view a date rapist as a deviant, and he is likely not a deviant. A date rapist is often no more than a young man who takes very seriously the “goal” of sex and his role as aggressor. To many, this is normal, not criminal, behavior.

Today, hatred of criminals is dependent on the criminal being wholly unlike average persons and therefore disentitled to empathy, sympathy, compassion, and humane treatment. The language used by politicians and victim’s rights advocates describing sex offenders as monsters and predators had much to do with dehumanizing criminals in the eyes of the public.


\footnote{See No Bad Men, supra note 39, at 678 (observing American cultural paradigm that “‘nice’ (well educated, white, middle class, employed) men do not rape”) (footnote omitted).}

\footnote{See Wells & Motley, supra note 212, at 164 (noting that society “may tolerate the questionable aspects of registration and notification laws as long as the defendant appears monstrous” but not when offender is “college student convicted of raping a young woman at a fraternity party”). Conservative columnist Kathleen Parker reacts to the forced registration of a college student date rapist, stating, “In our justifiable repulsion in the face of monsters . . . we have used too broad a brush.” Kathleen Parker, When date rape is a life sentence, TOWNHALL.COM, May 10, 2006, available at http://www.townhall.com/columnists/KathleenParker/2006/05/10/when_date_rape_is_a_life_sentence.}

\footnote{See Estrich, supra note 81, 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”).}

\footnote{See Judith Lewis Herman, Considering Sex Offenders: A Model of Addiction, in RAPE & SOCIETY 74, 77 (Patricia Searles & Ronald J. Berger, eds., 1995) (observing that “[y]oung rapists in college-student surveys are demonstrably sexist, but not demonstrably ‘sick’”).}

\footnote{See Sex, Rape, and Shame, supra note 150, at 684-85 (citing studies finding that men often believe sexually coercive behavior is normal successful seduction).}

\footnote{See Trouble with Trials, supra note 116, at 852 (observing tough-on-crime “view of the criminal offender [as] someone hostile to civilized values, devoid of human sensibilities, utterly ‘other’”).}

To the extent that rape reformers supported the victim’s rights movement and its construction of rapists as inhuman and abnormal, they planted the seeds of realist reform’s demise.228 How can a clean-cut college boy who did no more than assume when the girl said “no” she was playing coy be considered a horrible monster?229

In addition, a date rape victim is often not an idealized victim like the innocent child subject to a brutal violent attack.230 Date rape victims do not always readily appear weak or perpetually damaged, and the circumstance of being on a date itself conveys a certain level of sexual agency.231 As a result, in the minds of jurors and the public, college date rape complainants are not “real” victims,232 the preferred victim often being the “unjustly accused” defendant.233 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, although three years later as a sexy co-ed, she has absolutely no ability to refuse. The fact that college date rape victims are not


229 One juror explained an acquittal, stating that because 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* 100 (1989) (quoting rape juror). *See also No Bad Men, supra note 39, at 678* (noting that jurors expect rapist to be “a sex-crazed, deviant sociopath” and/or “‘loser’ who has no girlfriend”).

230 *See Feminist War, supra* note 2, at 775 (noting victims’ rights movement’s characterization of victims as “weak, innocent, and helpless”).

231 *See No Bad Men, supra* note 39, at 681 (asserting jurors disbelieve “women who push the limits of their sex roles”).

232 *See supra* notes 230-231 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 94, at 249-50.

233 *See supra* note 34 and accompanying text.
passive, child-like objects is clear to both public and juries, even where rape laws and other legal reforms enjoy success.\textsuperscript{234}

Date rape is such an important issue and so wildly unpopular because it forces society to confront the bias inherent, not only in male-female sexual relationships, but also in the criminal system in general. Taking date rape “seriously” requires society to believe that a wrong can occur in the absence of social, racial, or psychological divergence. The jury must be willing to treat the boy-next-door like a criminal and the girl who has “gone wild” like an innocent victim. Moreover, asking the jury to convict for lack of affirmative consent requires jurors 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 that the affirmative consent “invites jury nullification.”\textsuperscript{235}

\textbf{PART IV: WAR ON RAPE REFORM?}

Much like the elderly woman at Wendy’s wondered, “Where’s the beef?” one might at this point ask, “Where’s the critique?” Thus far, the article has asserted that realist rape reforms were valiant but doomed efforts to make rape trials humane and redirect social attitudes toward sexual violence. It has also rejected the common set of civil libertarian objections that automatically prioritize defendants’ procedural rights over gender equality. However, this Article parts ways with most feminist commentary in asserting that less, not more, criminal law is needed. It contends the feminist investment in criminal sanctions, well-intentioned as it may be, has helped stilt the progression of women’s sexual autonomy.

\textbf{A. Micro-level Harms of Feminist Criminal Reform}

\textsuperscript{234} See supra notes 231-232 and accompanying text.
\textsuperscript{235} Dressler, supra note 111, at 423. See also After Rape Law, supra note 103, at 958 (asserting jurors will not punish what “elite opinion regards as a serious crime” but “popular opinion regards as nature taking its course”).
It is useful to distinguish at the outset between the effects of criminal law reform on the micro-level (on individual victims) and macro-level (on structural subordination). Feminist War criticizes mandatory domestic violence policies for presuming that the purported micro-level benefit of jailing abusers is more important than all other victim interests, including autonomy. Feminist War exposes a host of micro-level harms mandatory arrest and prosecution cause to individual victims. Because of mandatory policies, women victims are arrested as a result of police backlash, jailed as material witnesses, and otherwise prosecuted by the very system to which they turned for relief. Moreover, mandatory prosecution causes victims to suffer loss of economic support, immigration problems, denial of public benefits, broken family, and emotional trauma. Finally, some experts assert that mandatory arrest and prosecution create more not less danger for victims.

236 Feminist War, supra note 2, at 761.
237 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 12-fold increase in arrests of women compared to two-fold increase for men). See also James O. Clifford, Domestic Case Arrests of Women Rise, AP WIRE, Nov. 24, 1999 (observing that after California mandatory arrest law was instituted total domestic violence arrests decreased but percentage of women domestic arrestees rose from 5 to 16%); 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, 289 (1999) (asserting that police “inevitably become resentful and may end up ‘retaliating’ by arresting a battered woman who returns to her batterer”).
238 See Coker, supra note 3, at 1044-45 (discussing arrests of battered women for child abuse and neglect).
239 See id. 1017–18 (examining economic burdens of separation).
240 See Feminist War, supra note 2, at (“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).
Unlike domestic violence policies, realist rape reforms favor a carrot over stick approach to encourage reluctant victims to come forward. Rather than simply forcing rape victims into an invasive trial, which would result in less reporting, feminists sought to lessen trial trauma through shields and linguistic legal standards. Thus, unlike their domestic violence counterparts, realist rape reforms have very few micro-level downsides. Because the reforms do not prescribe mandatory prosecution, rape victims are not in danger of being jailed for refusing to testify.

Moreover, the generally non-familial nature of rape removes many other harms of involvement with the criminal system. Rape victims are not normally dependent on rapists for economic support, love, child rearing, or other effects, and accordingly are not disadvantaged their incarceration. If there is such a dependent relationship, a rape victim has the option to decline to prosecute, unless the rape is considered domestic violence and mandatory policies apply. Furthermore, police involvement in a rape victim’s life does not generally put her in jeopardy of being prosecuted for other crimes like child abuse or neglect. As for backlash, there is no evidence that realist reforms have led to women being arrested and prosecuted more often for date rape. Compare this with domestic violence reform, where mandatory arrest has resulted in substantially higher increases in arrests of women than men.

Moreover, domestic violence and rape victims seem to have divergent interests in state intervention. At the risk of over-generalization and with the caveat that each victim has innumerable individual interests, one can make some general observations. When a domestic violence victim engages the state, one of her concerns is stopping the abuse and perhaps seeing the abuser jailed. However, there are so many other issues that she may wish to see addressed – issues involving family, children, money, housing, employment, and/or immigration status.\footnote{247 See Coker, \textit{supra} note 3 and accompanying text.} The inherent conflict is that resort to police intervention may temporarily satisfy her deterrence and vengeance-based desires at the cost of her longer term socio-economic interests.\footnote{248 See Ann E. Freedman, \textit{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).} Thus, a criticism is that the state intervenes criminally without providing practical resources to ensure the victim’s post-prosecution well-being.\footnote{249 One could argue that rape reform harms women by forcing them to stop having the “unfree” sex necessary for socio-economic survival. \textit{See infra} Part II.B. However, women who have constrained sex retain the ability not to prosecute, and most prosecutors do not go around actively seeking to intervene in such relationships.} By contrast, for many date rape victims, the only state intervention desired is prosecution,\footnote{250 Admittedly, homeless or prostitute rape victims have related socio-economic needs. \textit{See} Lise Gotell, \textit{Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women}, 41 AKRON L. REV. 865, 863-64 (2008) (noting how neoliberal philosophy obscures social realities of “risky” rape victims). Nevertheless, the average co-ed victim is only disadvantaged by her subordinated gender status, which she believes can be elevated through prosecution.} which will not likely compromise other interests.\footnote{251 The argument could be made that victims are harmed by seeking retribution at the expense of other interests. \textit{See}, e.g., Lea VanderVelde, \textit{The Legal Ways of Seduction}, 48 STAN. L. REV. 817, 842-45 (1996) (criticizing legal regimes that “provide rape victims only with vengeance . . . rather than compensation that would improve their lives”); Martin, \textit{supra} note 228, at 156 (1998) (criticizing “ubiquitous” concept that “the criminal trial, and the punishment that it justifies, [is] an occasion of healing and closure”).} As a consequence, it is hard to argue that prosecution of the rapist runs contrary to the victim’s interests, when, on the micro-level, it is the only thing she wants.\footnote{252 Although on a macro-level, feeding the prosecutorial machine is bad for women, a given rape victim is unlikely to see her desire for retribution trumped by philosophical objections to neoliberalism.}

One problem for rape reformers is that appeal to the criminal law is not likely to satisfy the rape victim’s interest in retribution. As noted in the last section, date rape prosecutions
continue to prove ultimately traumatic and unsatisfying to victims. Nonetheless, the reformer can reply that shield laws may not work very well, but they work sometimes, and in any case they help more than harm victims. Given the lack of micro-level harms of realist reform, the feminist critique of rape reform must occur on the macro-level.

B. Macro-level Harms of Feminist Criminal Reform

The principal argument of this paper is that criminal law reform should not be part of the feminist agenda given how criminalization impacts gender equality generally. Although, as demonstrated in the last subsection, it is understandable why feminists would seek to make the system more hospitable to victims, the potential micro-level benefits must be understood in the context of larger messages criminalization sends and political institutions it supports. Continued involvement with the American criminal system as it is currently constituted is inconsistent with feminist philosophy and ultimately undermines feminism’s potential to secure socio-economic arrangements that benefit all women.

1. Criminalization Supports Neoliberalism

A principle macro-level objection to feminist involvement with criminal law is that it makes feminism complicit in entrenching a neoliberal paradigm of rampant individualism,

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253 See supra note 3 and accompanying text.
254 Some argue that prosecution compromises victims’ interest in privacy. See Jeffrey J. Pokorak, Rape Victims and Prosecutors: The Inevitable Ethical Conflict of De Facto Client/Attorney Relationships, 48 S. TEX. L. REV. 695, 713-15 (2007) [hereinafter Rape Victims and Prosecutors], but this seems like an argument in favor of rape shields.
255 See Deborah L. Rhode, Feminism and the State, 107 HARV. L. REV. 1181, 1184 (1994) (maintaining that feminists “share with [Marxists] a commitment to a more egalitarian distributive structure and a greater sense of collective responsibility”).
256 I use “neoliberalism” to signify the constructivist project of imbuing market values with a normative quality that prescribes specific modes of individual action: [N]eo-liberalism . . . relieves the discrepancy between economic and moral behavior by configuring 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.
minimization of government services, and unconstrained capitalism.\textsuperscript{257} The tough-on-crime philosophy that overtook America was not a singular phenomenon, divorced from a larger political and economic program. Rather, the re-orientation of criminal law has been a distinct part of an overarching anti-distributive political program that began as a response to the New Deal, hit a fever pitch during Reagan’s presidency, and continues to reign supreme today.\textsuperscript{258} Over the last several decades, the political rhetoric of crime and punishment has gone hand in hand with the trenchant argument against welfarism.\textsuperscript{259} Horrendous criminals became the perfect straw men, invaluable as examples of why there should be “no tolerance” for people’s “poor excuses.”\textsuperscript{260} The image of the irredeemable fully-responsible criminal allowed society to feel comfortable with ever harsher punishments while denying any responsibility for the root of these trends.

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\item See Feminist War, supra note 2, at 749 (examining relationship between tough-on-crime ideology and conservative economic and social agenda); Angela P. Harris, \textit{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 attacks “that citizen’s purported enemies-reliably, queers, liberals, feminists, and blacks”).
\item Reagan stated:

\begin{quote}
 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.
\end{quote}

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\item See Brown, supra note 257, at 6 (observing that under neoliberalism “a ‘mismanged 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 and rape while out on a 48 hour furlough in Governor Michael Dukakis’s state. Horton took center stage during Dukakis’s bid for presidency and played no small part in his decisive defeat. See David Lauter, \textit{Crime Issue Becoming Election Battleground}, \textit{L.A. TIMES}, June 13, 1988, at 1.
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causes of crime.\footnote{Markus Dirk Dubber, \textit{The Victim in American Penal Law: A Systematic Overview}, 3 \textit{BUFF. CRIM. L. REV.} 3, 9 (1999–2000) (noting how sentimental identification with victim allows society to avoid ethical question of punishment); \textit{Feminist War, supra} note 2, 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”).}

The victim was also in a pawn in the tough-on-crime paradigm. For this reason, victim’s rights reformers disfavor victims who advocate mercy,\footnote{Elizabeth E. Joh, \textit{Narrating Pain: The Problem with Victim Impact Statements}, 10 \textit{S. CAL. INTERDISC. L.J.} 17, 17 (2000) (noting that victims’ rights movement cannot tolerate “narratives in which victims’ families can exercise mercy, kindness, or forgiveness”).} cannot tolerate victims who are criminals,\footnote{See \textit{Kanwar, supra} note 203, 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)”)} and support policies, like the death penalty, despite their discrimination against certain victims.\footnote{See \textit{supra} note 118 (bias against black victims in death penalty cases). Diane Clements, president of victim’s 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, \textit{Ruling May Spur New Death Penalty Challenges}, 3 NO. 9 \textit{A.B.A. J. E-REP.} 1 (Mar. 4, 2005).}

In addition to being anti-progressive, the neoliberal ideology is distinctly anti-feminist.\footnote{See, e.g., Lawrence H. Summers, \textit{Remarks at NBER Conference on Diversifying the Science & Engineering Workforce} (Jan. 14, 2005) (attributing lack of top women scientists to “taste differences between little girls and little boys”), available at http://www.president.harvard.edu/speeches/2005/nber.html.} It is the very philosophy that discounts women’s failure to break glass ceilings as “preferences choices”\footnote{See \textit{Lisa Philipps, Taxing the Market Citizen: Fiscal Policy and Inequality in an Age of Privatization, 63 \textit{LAW & 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”).} see supra note 2} and sees claims of sexism as lame excuses for lack of merits (i.e. market worth).\footnote{See, e.g., James C. Dobson, \textit{Understanding and Accepting Your Mates Differences}, Family.org, http://www.family.org/marriage/A000000990.cfm (“[G]ender roles may have become blurred in the age of feminism and liberation, yet . . . [r]ecognizing these respective roles is vital not only for a proper understanding of God’s design for human life, but also for the survival of the family and of society as a whole.”).}

In addition, believing that criminals are inherently worse that ordinary folk is strikingly similar to the idea that women are inherently weaker than men and consequently incapable of high status occupation.\footnote{Margaret Thornton and Joanne Bagust observe how neoliberalism is hostile to feminism on another front, stating that “neo-liberalism and the corporatization of universities has induced a turning away from feminism and diversity” toward “subjects that facilitate the market.” \textit{The Gender Trap: Flexible Work in Corporate Legal Practice}, 45 \textit{OSGOODE HALL L.J.} 773, 811 (2007).} Domestic violence reform, like paradigmatic rape condemnation, with its message of zero tolerance, deviance, and objectification, found perfect symmetry with the
neoliberal crime governance state.\textsuperscript{269} By treating battering and rape as products of individual criminality and not social conditions, criminalization policies had the effect of obscuring the gender equality aims of the anti-violence movement.\textsuperscript{270}

Rape reformers could counter that realist rape reforms were, in fact, efforts to rid criminal law of its neoliberal bent. Rape shield laws contradicted ideology treating rape as a matter of the victim’s individual responsibility for loose, risky, or contributory behavior.\textsuperscript{271} Affirmative consent laws attempted to reform gender norms by prohibiting behavior widely considered “normal.”\textsuperscript{272} While worthy goals, the unfortunate reality is that the criminal trial proves to be a very poor vehicle for social change and nuanced thinking.\textsuperscript{273} Philosophically and structurally, the criminal system is hostile to postmodern influence.\textsuperscript{274}

The American penal system is the very embodiment of “the Western philosophical notion of hierarchical rule and coercive authority,” which, according to bell hooks, serves as the “foundation” of male domination of women.\textsuperscript{275} While it is theoretically possible that feminists could bestow the concept of sexual crime victimhood with appropriate nuance to recognize

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\textsuperscript{269} Feminist War, supra note 2, at 793-800 (discussing conservative appropriation of domestic violence issue); Micchio, supra note 206, at 238 (observing political appeal of domestic violence criminalization after OJ Simpson). I say “crime governance state” because, as Jonathan Simon notes, crime control was one of the few government actions Bush and Reagan found politically. From a Tight Place: Crime, Punishment, and American Liberalism, 17 YALE L. & POL’Y REV. 853, 854 (1999).

\textsuperscript{270} See Feminist War, supra note 2, at 808-09 (“Accepting such binary characterizations of abusers and victims dispels the government and society’s responsibility for creating the conditions precedent to domestic abuse.”). See also Elizabeth Schneider, Battered Women Symposium, supra note 283, at 359 (asserting that criminalization delinks abuse from gender inequality).

\textsuperscript{271} See Gotell, supra note 250, at 863-64 (observing that neoliberalism constructs “violence enacted on the bodies of vulnerable women [as] personalized and individualized”).

\textsuperscript{272} Similarly, domestic violence reform has racially equalized criminal enforcement. See Feminist War, supra note 2.

\textsuperscript{273} 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. Trouble with Trials, supra note 116, at 853-54. Of course, “[t]he unworthy, such as ‘bad’ mothers, ‘bad’ girls, and unruly youth, are never real victims.” Martin, supra note 228, at 158.

\textsuperscript{274} See Martin, supra note 228, at 155 (observing that given its individualistic retributive ethic, 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”).

\textsuperscript{275} bell hooks, FEMINIST THEORY: FROM MARGIN TO CENTER 118(1984).
constrained agency, this is practically impossible given the current culturally-cemented view of crime. Prosecutorial actors and jurors continue to invest concepts of criminality and victimhood with meanings informed by gender norms, regardless of legal definitions. Indeed, the anti-date rape message has largely been interpreted by media and public as simply a tough-on-rape message involving prototypical rapists and victims, rather than a caution against gender stereotypes. Domestic violence reforms were far more successful at convincing society that battering is deviant because society can imagine “beating a woman” as something only a monster or loser does. Nonparadigmatic rape, however, is something which, like more subtle forms of domestic control, society cannot condemn without a re-evaluation of entrenched gender norms. Consequently, because date rape could not be unmoored from its social origins, the tactic of criminalization and punishment - the quintessential unmooring move - was doomed to fail.

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277 See supra notes 230-233 and accompanying text (examining victimhood constructions).
278 See supra note 170-172 and accompanying text (observing institutional actors’ internalization of rape myths); note 137 and accompanying text (discussing juror perceptions).
279 See Monstrous Offenders, supra note 213, 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).
280 Mahoney, supra note 208, at 12 (noting popular view of batterers as “aberrant”); Joan Erskine, Note, If it Quacks Like a Duck: Recharacterizing Domestic Violence as Criminal Coercion, 65 BROOK. L. REV. 1207, 1216–20 (1999) (observing that “batterers have become the perfect bad guys”).
281 Respondents on Yahoo called abusers “Not real men. Pathetic,” “not men at all,” and “just pathetic/weak/cowardly [sic] and can only find power in abusing women.” Yahoo Abuse Answers, supra note 33. One post on UK Yahoo stated that men hit women, “because if they hit another man, they would be beat down like the piece[s] of **** they are.” Yahoo Answers (UK), available at http://uk.answers.yahoo.com/question/index?qid=20060910051356AAavmvy.
282 Men tend to despise abusers, see Yahoo Abuse Answers, supra note 33, but have little objection to other forms of domestic control. See Men and Women Define Domestic Violence Differently, PLANETPSYCH.COM, http://www.planetpsych.com/zPsychology_101/domestic_violence.htm (reporting that majority of male respondents did not find nonviolent domestic control to be abuse).
283 See Feminist War, supra note 2, at 811(maintaining that criminalization runs counter to feminist goals of “fighting patriarchy and vindicating women’s autonomy”). See also Schneider, supra note 270, at 322–23 (observing that “violence has become unmoored from . . . issues of gender”).
Moreover, even if realist reforms somewhat equalize the system, it is still problematic to make criminal law the most active and visible face of feminist efforts against sexual violence. The very process of utilizing penal law runs counter to feminist philosophy because the criminal system cannot be separated from the neoliberal ideology animating it.\textsuperscript{284} To be sure, the very dialectic of criminality leads people to believe that events like date rape are problems of individual pathology and not social hierarchy.\textsuperscript{285} In turn, government and society are relieved of the responsibility for the economic and sociological conditions of date rape.\textsuperscript{286} Seeking to solve the date rape problem by jailing a few “bad” rapists moreover deflects attention away from the fact that date rape’s cultural and socioeconomic predicates are widespread and seemingly normal.\textsuperscript{287}

2. Criminalization Entrenches Existing Gender Norms

Much of Feminist War is dedicated to critiquing domestic violence policies for continuing the unfortunate American legal tradition of objectifying women. Not only did abuse reformers routinely objectify anti-prosecutorial victims as wholly controlled by threatening partners,\textsuperscript{288} some feminists went so far as to characterize certain victims as perpetual objects of a

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\textsuperscript{284} See Martin, supra note 228, at 153 (maintaining that criminal law’s purpose is to “control the ‘dangerous classes’ and to perpetuate and replicate existing power” and expressing concern that “feminist ideas and credibility are being appropriated to strengthen an apparatus that . . . should be dismantled”). See also Edmonds, supra note 118 (arguing it is theoretically unsound for feminist to support system infested with racial injustice).

\textsuperscript{285} See Sexy Dressing, supra note 72, at 1321 (asserting that it is easy to support tough rape laws when “the only losers are a pathological subclass of men”).


\textsuperscript{287} See Sexy Dressing, supra note 72, 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 Robin West, Rape Panel, supra note 145, at 152 (noting that focus on criminal law obscures that feminism’s goal is “an end to sexual violence and not maximum incarceration”).

\textsuperscript{288} See, e.g., Machaela M. Hoctor, Comment, Domestic Violence as a Crime Against the State: The Need for Mandatory Arrest in California, 85 CAL. L. REV. 643, 687 (1997) (arguing that allowing “victims to control the

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pathological psychology whose primary manifestation seemed to be reluctance to prosecute.289 Moreover, by objectifying women who refuse to prosecute as scared or sick, mandatory policies obscured the myriad of real factors that would influence any reasonable person not to prosecute.290 By contrast, realist rape laws do not appear to assume rape victims are damaged and unable to make legal decisions.291

Nonetheless, realist rape reform incorporates prevailing gender norms in other ways that should give pause to pro-criminalization feminists. Turning to rape shield first, one articulated feminist critique is that such laws reflect and reinforce the belief that a woman’s sexuality should be hidden.292 To be fair, an examination of the rape shield’s history reveals two very different justifications, one more sexist than the other. Initially, some politicians lobbied for reform as the sexual analog to evidentiary bans on prior bad acts evidence. They argued that defense attorneys would capitalize on victims’ past promiscuous (wrongful) behavior to prejudice juries and embarrass victims.293 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

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289 See Feminist War, supra note 2, at 809-17 (objectification critique) & 783-91 (examining women’s historical objectification). See, e.g., Ruth Jones, Guardianship for Coercively Controlled Battered Women: Breaking the Control of the Abuser, 88 Geo. L. J. 605 (2000) (advocating guardianship for abuse victims); Wills, supra note 288, at 173 (arguing that prosecutors know best how to ensure victim’s safety).

290 Feminist War, supra note 2, at 761-62. See also Coker, supra note 3, at 1017-18 (asserting that state intervention is “cruel trap” because it presumes “that women who are ‘serious’ about ending domestic violence will leave their partner while, at the same time, reducing dramatically the availability of public assistance that makes leaving somewhat possible”).

291 Some contend that affirmative consent limits women’s sexual agency by forcing them to say “yes.” See, e.g., KATIE ROEPHE, THE MORNING AFTER: SEX, FEAR & FEMINISM ON CAMPUS 22 (1993) (arguing that affirmative consent “proposes that women, like children, have trouble communicating what they want”); Subotnik, supra note 34, at 847 (critiquing affirmative consent as “fueled by the notion that contemporary women can’t say ‘no’”). However, a woman who likes ambiguous sex always retains the option not to report rape and otherwise encourage aggression. See infra PART V.B (addressing erotic interest in aggressive sex).


293 See, e.g., Privacy Protection for Rape Victims Act, 124 Cong. Rec. 36,256 (1978) (Statement of Sen. Biden) (“The enactment of this legislation will eliminate the defense strategy . . . of placing the victim and her reputation on trial . . . .”).
Obviously, such a justification supports rather than counters the view that female sexuality be kept secret (and even condemned).

There is also, however, a more feminist, “lesser-of-two evils” justification of rape shield. It recognizes that it would be best for society to understand that women can have sex when they want, with whom they want, how they want, and retain the ability to refuse. The unfortunate reality is that most of society, while perhaps giving lip service to female sexual agency, have not abandoned the chaste woman/sex object dichotomy and will not soon do so. Shields therefore preserve sexual autonomy by ensuring women that having even a very kinky sexual history will not disqualify them from claiming rape. However, then the Hobson’s choice is either advocate broad shield laws, which can reify that female sexuality is shameful, or abandon shields and allow individual victims to be sacrificial lambs on the altar of unattainable equality. Most feminists chose the former and support this choice by asserting that the little rape shield might contribute to patriarchy is far outweighed by lessening trial trauma and jailing rapists.

In response, reformers’ calculation only makes sense if one takes for granted that feminist change ought to come through the criminal law. Women victims are put in danger of second

294 See Id. at 34,913 (stating that purpose of Bill, later codified as Fed. R. Evid. 412 (1994), was to limit “humiliating cross-examination of [victims’] past sexual experiences and intimate personal histories”).

295 See Chastity Requirement, supra note 44, at 94 (“Instead of championing women’s sexual autonomy, drafters concentrated on how degrading and embarrassing it was for a women to have to discuss publicly their private sexual affairs”).

296 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 . . . .”).

297 See supra notes 188-192 and accompanying text (noting persistent chastity ideals).

298 See, e.g., Chastity Requirement, supra note 44, at 141 (proposing that broader shield laws protect woman’s prerogative to be promiscuous); 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 (1991) (observing that rape shield laws protect “a woman’s choice of sexual lifestyle”).

299 Perhaps this is why there are few feminist critiques of rape shield laws. Although I discovered one article entitled “A Feminist Repudiation of the Rape Shield Laws,” see supra note 292, the article mainly consists of proving jurors are not prejudiced by sexual evidence and recounting civil libertarian objections.

300 Anne Coughlin contends that rape law was always part of the state’s larger effort to constrain sexual autonomy. Because adultery and fornication were crimes, rape law existed as a quasi defense for women who had engaged in unwanted prohibited sex. See generally Anne M. Coughlin, Sex and Guilt, 84 VA. L. REV. 1 (1998).
trauma precisely because they seek relief through the criminal system, a system which is structurally, socially, and perhaps inherently adverse to them.\textsuperscript{301} If date rape victims sought other ways to heal and feminists explored other avenues for preventing rapes, there would simply be no invasive criminal trial requiring shields.\textsuperscript{302} Moreover, reformers may underestimate the extent to which rape shield laws incorporate rather than undermine gender norms.\textsuperscript{303} While reformers contend shield laws are about sexual agency, most “ordinary folk” would probably disagree. When one speaks of rape shield, the conversation often centers on victims’ all-important privacy.\textsuperscript{304} The idea is that a woman’s very sense of well-being is intimately intertwined with her ability to hide her sexuality.\textsuperscript{305} One could scarcely imagine an ordinary person believing that a man’s fundamental happiness is dependent on hiding information about his sexual prowess. Consequently, while not denying that victims value sexual secrecy in a world that impugns female sexuality, on a macro-level, the dialectic of privacy proves a very real obstacle to women’s sexual freedom.\textsuperscript{306} As Martha Nussbaum cautions, “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.”\textsuperscript{307}

\textsuperscript{301} See supra note (discussing criminal trial’s structural aversion to postmodernism); Naomi Cahn, \textit{Policing Women: Moral Arguments and the Dilemmas of Criminalization}, 49 DEPAUL L. REV. 817, 821 (2000) (observing that criminal system unsupportive of women’s issue and rests on “nonneutral” assumptions).

\textsuperscript{302} See supra notes 148-149 and accompanying text. Sharon Marcus observes that “an almost exclusive insistence on equitable reparation and vindication in the courts has limited effectiveness for a politics of rape intervention.” Sharon Marcus, \textit{Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention}, in \textit{GENDER STRUGGLES: PRACTICAL APPROACHES TO CONTEMPORARY FEMINISM} 169 (Mui & Murphy, eds. 2002).

\textsuperscript{303} Cf. Abrams, supra note 276, 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”).

\textsuperscript{304} See, e.g., \textit{Rape Victims and Prosecutors}, supra note 254, at 713 (“The first need of rape victims, both personal and legal, is privacy”).


\textsuperscript{306} See Harris, supra note 257, at 1577-78 (warning that dialectic of “privacy rights” has tendency to turn focus away from larger transformations of socio-economic structures).

\textsuperscript{307} Martha C. Nussbaum, \textit{Is Privacy Bad for Women?}, \textit{BOSTON REV.}, Apr./May 2000, available at http://www.bostonreview.net/BR25.2/nussbaum.html. See also Larry Cata Bucker, \textit{Exposing the Perversions of
Furthermore, affirmative consent may have the effect of making irrelevant some “trauma” evidence, but it also runs the risk of reinforcing gendered communication norms that predicate date rape. In a utopian world, men and women would approach sex with consideration and open communication, rendering affirmative consent laws wholly unnecessary. Feminists argue, however, that we live in the real world where women are not able to openly express opinions about sex, and men exert subtle pressures and selectively read signals. Given this reality, the only way to prevent rape is to put the burden of communication on the man – the party who not only seeks sex but who is in theory able to communicate openly about it.

Nevertheless, inserting affirmative consent into the botched sex equation does little to forward a feminist agenda. Let us assume for a moment a scenario equally as fantastical as the utopian view of sexual communications – that affirmative consent actually affects social practice and makes men procure “yes” before sex. Likely not much would change. Women would continue to believe they must play coy, and men would still be goal-oriented toward sex, just with “getting to yes” inserted into effort. Men would continue to pressure women toward the “goal,” and women would say “yes,” out of fear or confrontation-aversion. Moreover, by making pursuers responsible for procuring permission, affirmative consent reinforces that men should take the lead in sexual relations and women should be passive, equivocal, and reluctant to give unsolicited consent while still obliged to concede when asked. Far from being


308 See supra notes 304-305 and accompanying text.
309 See supra notes 149-150 and accompanying text.
310 See id.
311 See Barrie Bondurant & Patricia L. N. Donat, Perceptions of Women’s Sexual Interest and Acquaintance Rape, Psychology of Women Q. 23 (4), 691–705 (1999) (finding that pre-existing rape-supportive attitudes lead to date rape).
312 See supra notes 154-156 and accompanying text.
313 See No Bad Men, supra note 157 and accompanying text.
transformative, the affirmative consent standard takes for granted and even strengthens prevailing gender norms, with the fix being an ineffective insertion of language into a highly psychologically and culturally ordered scenario. Consequently, despite all the efforts to create shields and language protocols, on the macro-level, realist rape reforms have done little to counter, and may have reinforced, patriarchal paradigms that lead to date rape and doom rape prosecutions.

PART V: WAR ON FEMINIST WAR

For a feminist, it is truly a struggle to critique realist reforms’ obvious efforts to civilize the criminal system’s treatment of rape victims. Nonetheless, as valiant and understandable as realist efforts were, the feminist obsession with prosecutorial reformation has ultimately deflected attention away from the real problems – the neoliberal order and cultural norms that keep all women subordinate, including “normal” views of female sexual agency. In this Part, I would like to respond to some of the criticisms both previously articulated based on Feminist War and those anticipated. I divide these objections into feminist and post-feminist critiques, with most objections coming from feminists.

A. Feminist Objections

1. Decriminalizing Domestic Violence and Rape is Bad

Let me be clear that this project does not address the question of decriminalization. Although there are many good reasons to believe that domestic violence is best addressed solely through mechanisms outside of criminal law, Feminist War’s only suggestion is that feminists re-

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direct efforts away from advocating better ways of putting people in jail.\textsuperscript{315} The article is careful to point out that mandatory policies would continue to exist and be improved by crime control enthusiasts.\textsuperscript{316} \textit{Feminist War} calls for redirection of feminist political and intellectual capital away from criminal law but stops short of encouraging feminists to actively oppose mandatory policies.\textsuperscript{317} Of course, the clear implication is that they should,\textsuperscript{318} but even this position is only about abandoning mandatory schemes and not about decriminalization.

When it comes to realist rape reform, there is little doubt that if feminists stop pushing for reforms that “take date rape seriously,” prosecutors and conservative politicians will not step to the forefront of that issue.\textsuperscript{319} In fact, without feminist efforts, defense attorneys would probably succeed in peeling back rape shield laws and reversing affirmative consent standards in the name of due process.\textsuperscript{320} As a consequence, reorienting feminist efforts outside criminal law would likely have a real impact on the state of rape prosecutions. The question is whether I am prepared to support this reorientation even though it will eliminate laws geared toward making rape trials less traumatic and biased.

Answering this question with a guarded “yes,” I am persuaded that the combination of ineffectiveness of reform,\textsuperscript{321} sluggish evolution of female sexuality norms,\textsuperscript{322} and ubiquitousness

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315 See Feminist War, supra note 2, at 824 (“Feminists should not be channeling their efforts into helping the government find new, better, and easier ways to incarcerate people.”) (footnote omitted).
316 Id. at 762-63.
317 Id. at 830.
318 See MaGuigan, supra note 22, at (stating feminists should oppose new mandatory programs).
319 See supra notes 65-68 and accompanying text (discussing police and prosecutor attitudes toward date rape); supra notes 194-196 and accompanying text (observing political positions on date rape).
320 This could easily be achieved through expansive reading of the catch-all provisions in shield provisions. See supra notes and accompanying text. See generally Chastity Requirement, supra note 298.
321 See supra Part III.
322 Today, gender roles are more restrictive, see Dowd, supra note 189, and feminism is seen as dangerous. See Ann Bartow, Some Dumb Girl Syndrome: Challenging and Subverting Destructive Stereotypes of Female Attorneys, 11 WM. & MARY J. WOMEN & L. 221, 222 (2005) (“Feminism as a social construct has been blamed for promulagating terrorism, ruining sexual relationships, causing road rage and traffic congestion, and undermining healthy families.”).
\end{footnotes}
of the neoliberal criminal system, warrant the redirection of feminist rape efforts outside criminal law. However, even the assertion that feminists should discontinue advocating for stronger criminal laws is not the same as supporting decriminalization. In no way does this Article seek to single out date rape for decriminalization, which has already been done by others with little relationship to the arguments herein. Further, I would not support decriminalizing date rape without articulating a larger program of decriminalization based on a global view of American criminal justice, a project I decidedly leave for another day. For now, I simply contend that an anti-subordination movement like feminism should not continue to invest resources in rape criminalization, understanding that our criminal system enables a philosophy that dismisses the manifestation of widespread social inequality as individual deviance. No longer should “a punitive, retribution-driven agenda” constitute “the most publicly accessible face of the women’s movement.”

2. What Should Feminists Do?

One common response to Feminist War is that working within the criminal law is the best feminists can do given the mammoth effort it would take to economically empower women and

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323 See supra notes 250-260 and accompanying text.
324 See, e.g., Subotnik, supra note 314. Others argue that certain forms of date rape should be only minor crimes.
326 See Katharine T. Bartlett, Feminist Legal Methods, 103 HARV. L. REV. 829, 848-49 (1990) (contending that feminists should be concerned about larger issue of subordination).
327 See West, Rape Panel, supra note 287, 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”).
328 Martin, supra note 228, at 158. See also Judith Butler, Against Proper Objects, in FEMINISM MEETS QUEER THEORY (Weed & Schor, eds. 1997) (observing that “feminism has become identified with state-allied regulatory power over sexuality”).
reorient gender norms. In our current political and cultural climate, there is simply no possibility that battered women will become economically secure and attitudes toward female sexual agency will progress, so the very best feminist can do is secure the micro-level satisfaction victims get from jailing criminals. Because the pros and cons of criminalization were already addressed exhaustively, I will just add a few comments here. First, engaging the criminal system is not simply a neutral choice that is “better than doing nothing.” It supports a specific political paradigm and creates a myriad of collateral harms to subordinated groups.

Second, feminists should recognize that criminalization has received popular support, at least in the abuse and paradigmatic rape contexts, precisely because it reinforces the distributive and social realities that keep women subordinated. Feminists must ever be wary that “to allow what now appears politically palatable to establish [feminist] agenda is to doom it from the outset.”

As a consequence, I actually do think it is better to “do nothing” than to continue the trend toward criminal “governance feminism.” However, feminists should not just sit back and remain silent on domestic violence and rape. Although abandoning criminal law is an important step in removing deviance blinders and exposing structural and social predicates of

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329 Dan Kahan proposes using police power to “gently nudge” rather than “shove” through new norms. See Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem, 67 U. CHI. L. REV. 607, 623-25 (2000). The problem is that the American criminal system has a whole bunch of norms sticking to it that become more deeply entrenched every time it is engaged. Moreover, the language of deviance may have the effect of changing surface norms, but it also conceals deeper distributional disparities. See supra notes 285-287 and accompanying text.

330 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”).

331 See Feminist War, supra note 2, at 758 (arguing that criminal system is “infested with racial, socioeconomic, and gender biases that manifest[] every time criminal enforcement [i]s increased”).

332 Rhode, supra note 255.

333 See Two Globalizations, supra note 325 (discussing disengagement from law).

334 Janet Halley coined this phrase to describe the “installation of feminists and feminist ideas in actual legal-institutional power.” 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). “Governance feminism” also describes the substantive move in American feminism toward absolutist prohibition and criminal law. See id. at 341-42.
abuse and date rape, feminists can engage other interventions.\textsuperscript{335} In the domestic violence arena, reformers can advocate economic, child care, and social services models that provide to all women, not just physically battered women, the ability to exercise agency in relationships.\textsuperscript{336} In the rape context, one intervention that has often been advocated is educating criminal justice officials about rape myths.\textsuperscript{337} Unfortunately, intervention with criminal law actors, however well intended, could end up creating more problems then it solves.\textsuperscript{338} There are still other ways in which feminists can influence prevailing views of sexual agency.

Feminists could attempt to articulate the reformation of gender norms in terms of men’s erotic interests. They could argue, for example, that the chaste women/sex object binary harms men by imposing a tariff on female sexual agency, thereby discouraging women from being sexy and having sex.\textsuperscript{339} Now, whether this is actually a compelling argument to men is another question. There are already a multitude of social pressures that keep women from adopting chaste personas,\textsuperscript{340} not the least of which is that the chaste lady ideal is unattainable and unmitigatingly not fun. The small tax of potential unconsensual sex likely will not keep women from “sexy dressing” or sexy acting.\textsuperscript{341}

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\item See, e.g., Seidman & Vickers, \textit{supra} note 18, at 471-484 (advocating providing services to rape victims and addressing socio-economic predicates of rape).
\item See, e.g., Coker, \textit{supra} note 3, at 1050 (proposing to frame domestic violence policy through “material resource” test focusing on poor minority women).
\item See, e.g., Curcio, \textit{supra} note 122, at 595-96 (advocating such education of judges, prosecutors, and police).
\item It is wholly possible that prosecutors might conclude that “taking date rape seriously” entails pushing forward prosecutions at all costs, without considering nuances of individual case. Cf. Mary Becker, Keynote Address, Symposium, \textit{Domestic Violence and Victimizing the Victim: Relief, Results, Reform}, 23 N. Ill. U. L. REV. 477, 487–88 (2003) (noting that employer-sponsored diversity and harassment training “can reinforce stereotypes and actually do harm”); \textit{Feminist War, supra} note 2, at 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”).
\item See \textit{Sexy Dressing, supra} note 72, at 1341 (noting argument that sex abuse is bad for men because it produces “women who don’t want sex with them, or want sex only because men want them to want it”).
\item See \textit{supra} note 192.
\item See \textit{Sexy Dressing, supra} note 72, at (noting possibility that social construction of self-esteem compel women to dress sexy).
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Moreover, there is a huge psychological benefit to the “ordinary” guy from the sex object as opposed to sex agent system. Post-feminists, who defend pornography, hope that men will view girls who have gone wild as individuals fully able to exercise sexual choice. This requires men to understand that a woman who has chosen to be sexy on videotape retains the ability not have sex. What is likely titillating to the “ordinary guy,” however, is not the thought that a sexy woman will have sex with some sexy guy, but that she must have sex with him. Of course, a feminist could aver that removing the tax of potential rape and stigma will lead to all women having more sex more often, which is generally good for men. But this is only persuasive if men believe that they will in fact enjoy more erotic pleasure in a sex agent than sex object regime. In addition, a sex agent regime deprives men of relatively chaste women available for marriage.

Thus, feminists likely have to find ways to help reorient male sexual interests. They must formulate strategies for convincing men that that being chosen as a sex partner is better than forcing sex and marrying a chaste lady is not an ideal. Feminist can also expose how the goal-oriented attitude toward sex hurts men. Studies show that much of the sex-goal mindset is attributable to peer pressure among young males. This pressure is undoubtedly an endless source of pain and insecurity to many individual men. Feminists can find ways to intercede in this peer norm formation that do not involve using police power against a random prosecutorial

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342 See Abrams, supra note 276, at 314 (observing that sex positivists supported pornography believing women could be “partial authors of their sexual fantasies, and initiators in identifying and satisfying their sexual desires”). But see, e.g., Catharine A. MacKinnon, Not a Moral Issue, 2 YALE L. & POL’Y REV. 321, 323-24 (1984) (objecting to pornography on grounds that it causes violence and discrimination).
343 See Sexy Dressing, supra note 72, at 1341 (positing that men may prefer system of sex-abuse because it produces chaste wives and sex-object prostitutes).
345 See Levit, supra note 70, at 1057 (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).
selection of boys who accede to peer pressure. Although finding appropriate methodologies for dismantling the chastity/sex object paradigm and creating interest conversion against goal-oriented sex is no easy task, it is clear that the criminal law is a poor vehicle for achieving this change.

In order to intervene in male attitude formation, feminists must talk to men as people, not just seek to jail them as criminals. Indeed, criminalization does not seem to change men’s opinions on sex, and backlash against punishment of “ordinary guys” may lead men to dig in their heels and embrace patriarchal beliefs more vehemently.

Alternatively or simultaneously, feminists can try to create conditions in which women feel comfortable openly communicating about sex. Feminists should address why women go through with sex rather than expressing ambivalence or feign reluctance despite desire. The sexual mores by which women abide are distinctly tied to subordinate socio-economic status, and it is this status about which feminists ought to be most concerned. 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. Moreover, in the enterprise of obtaining men, women are told they are buyers in a seller’s market and their main currency is sexual

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346 See, e.g., Gill, Dismantling Gender and Race Stereotypes: Using Education to Prevent Date Rape, 7 UCLA WOMEN’S L.J. 27, 40 (1996) (proposing rape education programs for teenagers). One must, however, be exceeding careful given that in our conservative school system, rape awareness may just mean teaching children to abstain.

347 See Levit, supra note 70 (urging feminists to abandon “retribution” against men and suggesting consciousness-raising methodologies for dismantling patriarchy).

348 See Kahan, supra note; UNWANTED SEX, supra note 105, at 57-58 (quoting KATIE ROIPHE, THE MORNING AFTER (1993) (observing that policies that apparently conflate rape and ordinary sex produce “a potent cultural backlash”) (quoting KATIE ROIPHE, THE MORNING AFTER (1993)).


351 See Dowd, supra note 189 (“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’”).
mystique. In turn, catching a man depends on behaving and communicating in a way that is optimally geared toward male appreciation. Since mystique is the touchstone, of course, open and free sexual communication is suboptimal behavior. It is “unromantic” to be frank, and the woman runs the risk of being thought of as oversexed if she exhibits sexual desire or a tease or prude if she is communicates reluctance. Feminists should put efforts into countering women’s assumption that “catching a man” is life’s primary pursuit. This would of course start with economic empowerment and status elevation.

Let me add a caveat here – I recognize both sexes feel enormous pressure to find significant others and adopt various behavioral methodologies for securing relationships. It would be a mistake, however, to understand the construction of dating “winners” and “losers” as divorced from inequality. Economic status, beauty standards, and other factors effecting “dateability” are deeply social in nature and entrench and reflect various hierarchies. For example, the construction of female attractiveness in modern America is extremely disempowering to women. Women suffer astonishing amounts of psychological pain and anxiety, put themselves in uncomfortable bindings, forego basic sustenance, and even undergo painful body mutilation with foreign objects under the skin to achieve the cartoonish look of a

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

353 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)).

354 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 39, at 947 (quoting LEORA TANENBAUM, SLUT! GROWING UP FEMALE WITH A BAD REPUTATION 165-66 (1999) (quoting high school student)).


356 Some criticize affirmative consent for regulating status quo “sexual bargaining.” See, e.g., Subotnik (SCAL), supra note 34. However, the social conditions in which these bargains occur is infested with patriarchal and down-right misogynistic norms. Moreover, emphasizing a woman’s sexuality over all her other possible contributions continues the sad practice of biologically objectifying women as creatures that essentially have sex and reproduce. See, e.g., Preston, supra note 353.

357 Many men are also dating “losers” because of patriarchal norms. See supra notes 150-154 and accompanying test.
stick figure with exaggerated sexual attributes. It is true that even dismantling the predicate conditions for women’s sexual silence would not remove all the gendered rules of the dating game. However, women’s approach to sexual communication has identifiable ties to economic and social subordination, an issue ripe for feminist intervention.

More than just the need to land a man, there are specific messages, largely emphasized by women themselves, regarding “proper” sexual behavior. For many decades, feminists have theorized female sexuality with great complexity. For now, I will just suggest that feminists seek ways to help instill in women (and men) a belief that every person can and should have as much or as little sex as they wish. This is no small task given that the chastity paradigm can be used as a sword by women who resent girl gone wilds’ apparent promiscuity-related status elevation. But the weapons of chastity and sexiness are only necessary when women are warring over highly desired, scarce resources. If women believe men are not the ultimate spoils of war, they will have less incentive to embrace sex object personas or alternatively disparage sexy women by lodging chastity attacks.

3. We’re Not There Yet / Neoconservative Appropriation

358 See MEGAN SEELY, FIGHT LIKE A GIRL: HOW TO BE A FEARLESS FEMINIST 124 (2007) (attributing this to powerful cultural message that authentic women “are not good enough”).

359 See Cheryl B. Preston, Significant Bits and Pieces: Learning from Fashion Magazines about Violence against Women, 9 UCLA WOMEN’S L.J. 1, 7 (1998) (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”).


361 For example, the debate over feminism and pornography is well addressed in feminist literature. See generally Susan Etta Keller, Viewing and Doing: Complicating Pornography’s Meaning, 81 GEO. L.J. 2195, 2218 (1993); Jeffrey G. Sherman, Love Speech: The Social Utility of Pornography, 47 STAN. L. REV. 661 (1995); Abrams, supra note 276.

362 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 dating war.
One criticism often directed against *Feminist War* is that it overstates the extent to which society takes domestic violence seriously. Feminists from foreign countries and certain U.S. states assert that domestic violence is still under-criminalized and question whether *Feminist War*’s concern over hyper-criminalization is misplaced. This criticism is even starker in the date rape context, as many continue to believe unconsensual or uncommunicative sex is not a crime. Assuming that gendered crimes remain relatively underpunished, the question is whether there is nonetheless a place for criticizing criminalization. I believe there is a definite place for such critique even when formal equality in the criminal law has not been achieved.

*Feminist War* argues that mandatory prosecution causes harm to individual women and stultifies feminism’s progression, and this is the case whether or not domestic violence is currently underpunished. Even where people do not yet “take domestic violence seriously,” one can still counsel that mandatory policies should not be part of the effort to do so. *Feminist War* also asserts that getting society to view domestic abuse as criminal is not an end in itself to be achieved at all costs. Rather, feminists should marshal efforts toward changing structures of subordination and improving individual battered women’s lives. Consequently, *Feminist War*’s message is that feminists in pre-formal equality domestic violence systems should consider foregoing mandatory prosecution.

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363 See, e.g., Sack, *supra* note 243, at 1559-60 (suggesting that in absence of mandatory policies, police and prosecutors will not make “right” choices).
364 I gained some extremely useful insight on this point from my discussions with Professor Paola Bergallo of the Universidad de Buenos Aires. In Argentina, where the reform effort is still in relative infancy, there is apparently a philosophical divide between feminists and conservative domestic violence reformers, with most feminists favoring non-criminal programs and conservative tough-on-crime women supporting criminalization.
365 See, e.g., Erickson, *supra* note 108.
366 See *Feminist War*, *supra* note 2, at 783.
367 See *Feminist War*, *supra* note 2, at 809 (arguing that “reformers’ contention that mandatory policies . . . ‘send a message’ should be viewed with a jaundiced eye”). *See also supra* notes 363-366 and accompanying text (observing individualist message sent by criminalization).
As for rape, this Article has been very straightforward in that its critique takes place within the context of a society that does not take date rape seriously. The Article is very sympathetic to the argument that "we are not there yet," and thus a substantial portion of the paper is dedicated to demonstrating why the date rape issue is integral to feminism.\(^{368}\) However, it is apparent women will not get "there" through rape shields and affirmative consent.\(^{369}\) Criminalization 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."\(^{370}\) Feminists should engage in a concerted effort to raise consciousness about date rape, but criminal law has little potential to do anything other than diminish consciousness.\(^{371}\)

A related powerful critique, that cuts me to the core, points out the dangerous potential for neo-conservative cooption of this type of scholarship.\(^{372}\) Indeed, academic post-modernity can appear to well-intentioned liberals as dangerously close to anti-rights pre-modernity.\(^{373}\) I, myself, have been disturbed to see bits and pieces of \textit{Feminist War} placed prominently on uber-conservative and so-called men’s rights websites and blogs as prima facie evidence that the

\(^{368}\) \textit{See supra} notes 302-306 and accompanying text.
\(^{369}\) \textit{See} Marcus, \textit{supra} note 302. Orly Lobel sets forth a slightly different critique of "exits" from the law, stating that "legal scholarship oriented toward the exploration of extralegal paths reinforces the exact narrative that it originally resisted--that the state cannot and should not be accountable for sustaining and improving the lifeworld of individuals." Orly Lobel, \textit{The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics}, 120 HARV. L. REV. 937 (2007). Although I do not advocate abandoning other laws geared toward sexual equality, it is difficult to see any transformative potential of current American criminal law.
\(^{370}\) Preston, \textit{supra} note 359, at 73.
\(^{371}\) \textit{See supra} note 369 and accompanying text.
\(^{373}\) \textit{See} Martha T. McCluskey, \textit{Thinking with Wolves: Left Legal Theory after the Right’s Rise}, 54 BUFF. L. REV. 1191, 1205 (2007) (noting concern that post-modern theorists’ "attacks on liberal legalism" “ultimately will do more to advance right-wing anti-liberal legalism and less to advance progressive alternatives”).
feminazis have gone wild. However, any internal critique of a progressive movement runs the risk of appropriation by those on the right. For example, progressives who criticize certain African American groups for ignoring the interests of black women or gays could be accused of fueling racists’ claim that black men are sexist and homophobic. However, bigots will always find ways to gather “evidence” for their beliefs, and the risk that internal critique may supply ammunition is outweighed by gains to the anti-subordination agenda more generally.

Moreover, failure to continually assess and reassess feminist theory out of fear of neo-con exploitation would in essence allow conservatives to control the destiny of feminist scholarship. To be sure, any scholarship can be misappropriated by those who do not actually read or understand it. The neo-cons exploiting Feminist War quote out-of-context snippets or broadly recount the anti-reform message without analysis. Were these bloggers to actually read and understand the article, they would find the world therein advocated much more repugnant to their conception of a comfortable status quo than a world with mere domestic violence

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374 See, e.g., Carey Roberts, Harsh domestic violence laws recall Jim Crow abuses, RENEW AMERICA (March 10, 2008), available at http://www.renewamerica.us/columns/roberts/080310; Stupid feminist Domestic Violence Laws Recall Jim Crow Abuses, POLITICAL CORRECTNESS WATCH, http://pcwatch.blogspot.com/2008_03_01_archive.html. Apparently, Mr. Robert’s article is reprinted on a number of conservative and men’s rights sites. See also, e.g., Feminists: would you defend VAWA if it were VAMA instead?, YAHOO ANSWERS, http://answers.yahoo.com/question/index?qid=20080607184301AAfKz1b (“The domestic violence laws are prejudiced against men because they were promoted by feminists (see Prof 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.


376 See id. at 197 (asserting that risks of internal critique are outweighed by potential for “confronting complex subordination”).

377 We must be mindful that “[feminist] strategies and demands should continually be re-examined in the light of experience of law and legal practices.” C. Smart & J. Brophy, Locating Law: A Discussion of the Place of Law in Feminist Politics, in, WOMEN-IN-LAW: EXPLORATIONS IN LAW, FAMILY AND SEXUALITY (J. Brophy & C. Smart, eds. 1985) 18.
criminalization. In sum, to allow fear of conservative exploitation to silence diverse voices from within feminism is to foreclose multiple avenues of exploration and opportunities for growth.\textsuperscript{378}

**B. The Post-Feminist Objection**

In contrast to feminist critique that this Article is not appropriately anti-rape, post-feminists might object that it is actually too anti-sex. The vision of gentle natured men, displaying every ounce of sensitivity, without any aggression, proceeding with sex as part of the larger valuation of human relations, and women openly and without diffidence communicating their wants and insecurities, may look to post-feminists less like utopia and more like purgatory. A post-feminist is certain to critique this Article’s apparent underestimation of female erotic interest in male sexual aggression and female passivity.\textsuperscript{379} In truth, women and men are constantly fed these sexual customs, and many women idealize the image of a relentless sexual pursuer singularly attuned to her secret driving passion for sex, despite her ardent protestations.\textsuperscript{380} While this Article in no way advances a moralistic argument against eroticizing apparently forcible or unconsensual sex, it does advocate dismantling the prevailing male goal-orientation and female-passivity norms governing initial sexual encounters.\textsuperscript{381}

Admittedly, caution is necessary when proposing utopian ideals to avoid imposing normative judgments on women who, because of practical constraints or personal preference, cannot achieve the ideal. As Catherine P. Wells notes, utopian visions “can provide hope and

\footnotesize{\textsuperscript{378} See Deborah L. Rhode, \textit{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”).}

\footnotesize{\textsuperscript{379} See Abrams, supra note 276, at 304 (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”).}

\footnotesize{\textsuperscript{380} See Camille Paglia, \textit{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”).}

\footnotesize{\textsuperscript{381} See Pillsbury, supra note 39, at 953 (“However beautiful the ideal, magical romance provides a dangerous guide to real life.”).}
inspiration for self-empowerment, but when they are transplanted into the context of good womenhood, they may become just one more set of oppressive expectations.” To be clear, the argument for open sexual communication in no way intends to place additional burdens on those who for economic, social, or purely personal reasons must engage in constrained sex. Nor does it assert that there is anything more intrinsically valuable about communicative sexual relations than aggressive uncommunicative sex both parties desire and implicitly or explicitly endorse.

There is a salient distinction to be made here. The erotic interest in apparently forcible sex is unproblematic in relationships of trust. When people engage in aggressive or violent sex, in order for it to be something “good” rather than harmful there must be some level at which the force is part of an understanding. As a consequence, couples with established force guidelines, consent proxies, or those in sufficiently trusting relationships can always choose to bypass the communication ideals presupposed herein. In an established relationship, any person can be as sexual or nonsexual, as open or silent, as aggressive or passive as he or she wants. Feminists need only counter the norms that produce male aggression and female passivity during initial sexual encounters, not ordered by previous sexual understandings. To be clear, my suggestion that feminists help change gender norms does not invite feminists to lobby for strict

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382 Catherine Pierce Wells, Date Rape and the Law: Another Feminist View, in DATE RAPE supra note 147, at 49.
383 See Amber Hollibaugh, Desire for the Future: Radical Hope in Passion and Pleasure, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY (Carole S. Vance ed., 2d ed. 1992), at 401, 403 (noting that women may abandon feminism if they “don’t feel our desires fit a model of proper feminist sex”).
384 See Katherine M. Franke, Theorizing Yes: An Essay on Feminism, Law, and Desire, 101 COLUM. L. REV. 181 (2001) (cautioning that feminists must 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”).
385 See infra note 387 and accompanying text (discussing the normative choice made by this Article).
386 See Robin West, Desperately Seeking a Moralist, 29 Harv. J. L. & Gender 1, 3 (2006) (observing difference between moral condemnation of S&M and objecting to undesired sex).
obscenity laws or condemn sado-masochism and other forms of “non-conventional” sex.\footnote{This introduces a larger debate about the appropriate feminist stance on S&M. Compare Franke, supra note 384, at 206-07 (observing potential of unconventional sex to counter stereotypes of female sexuality as “dangerous” or “warm and fuzzy”) with Cheryl Hanna, Sex is Not a Sport: Consent and Violence in Criminal Law, 42 B.C. L. REV. 239, 286 (2001) (advocating close scrutiny and heavy regulation of S&M because of potential for abuse and its “symbolic message”). I would venture, however, that there are likely more women submissives in societies where women are empowered and male submissives in highly sexist societies. Without a clear tie to subordination, the objection to consensual female masochism appears mainly moralistic.} Mainly, I hope that rape reform efforts will be redirected towards women’s socio-economic empowerment and changing the paradigms of “conventional” sex.

However, the post-feminist might not be satisfied, despite the qualification that the communication ideals implicitly endorsed herein only apply to new sexual relations or sexual relations otherwise lacking trust. She might assert that first-time sex is precisely when a woman needs to be coy and finds aggression sexy. By the time there is trust, feminine mystique is not required and male aggression just seems artificial and uninteresting.\footnote{See Lois Pineau, Date Rape: A Feminist Analysis, 8 LAW & PHIL. 217, 228 (1989) (noting argument that prevailing norms allow women to enjoy “the sexual enjoyment they really want, at the same time that it relieves them of the responsibility for admitting to and acting upon what they want”).} Remember, however, the proposal here is not to engage in norm enforcement but to intercede in norm creation. Rather than forcing women to be sexually open and men to be sexually passive, feminists should help create the conditions under which both men and women want to employ the type of courtship behavior that does not predicate date rape.

Now, there may be some women who, even after norms change, desire first-time male-aggressive and female-resistant sex. Depriving such women of their erotic preference is obviously a cost of changing prevailing sexual practices. Nonetheless, it seems beyond question that this is a small cost compared to the benefits of changing the sexual relationship paradigms that cause date rape. A sex positivist might also argue consensual aggressive sex is pleasurable precisely because the couple is feigning something that actually occurs. When the practice no longer exists, the erotic interest is diminished. In response, even with a feminist effort to
dismantle date rape predicates, there will be incidents of unwanted and forced sex. Moreover, such sex will be a greater taboo, arguably making it more dangerously delicious.

Let me be clear that this article forthrightly assumes that widespread unsatisfying sex (specifically, the type that leads women to feel raped) is not a preferred state of affairs. While this first principle is not itself beyond question or post-modern objection, it is the starting point of this normative project. Even so, a “bad” act like rape may simultaneously be a source of erotic pleasure, which is fine. However, the value of the pleasure one gets from pretending “bad” acts cannot substitute for moral justification, given the normative grounding of most feminist theory. By placing the satisfaction received from acting out misogynistic practices on the same level as the value all women receive from dismantling misogyny, sex positivists run risk of adapting distinctly anti-woman positions. Moreover, as much as post-feminists rightly warn dominance feminists 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.

389 Of course, consent can also reify 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). So let me add the caveat that what I mean by encouraging “consensual” sexual relations is encouraging interactions that reflect women’s equal rather than subordinate status. Because this paper is “feminist,” its principle normative project is to counter women’s subordination. One could posit, however, a separate normative anti-rape project that, in polar opposition to hedonists and sex-positivists, views civilized progression as moving toward asexual de-gendered Schopenhauerian asceticism, much like penal theorists claim that advancement 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 CRIMINAL LAW REVIEW 85 (2004).

390 Pleasure, pain, guilt, and exhilaration are feelings not easily disentangled.

391 See Ian Halley, Queer Theory by Men, 11 DUKE J. GENDER L. & POL’Y 7, 17 (2004) (asserting that “in the eroticization of domination we experience the unspeakable thrill of encountering our own metaphysical and experiential dissolution”).

392 See West, supra note 386, 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 Review, Split Decisions, 30 HARV. J. L. & GENDER 257, 263 (2007) (criticizing Halley for being “unwilling to articulate harm in any other way other than a lost or missed opportunity for pleasure”).

393 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 20.
of women’s desire for sex.\textsuperscript{394} Even if it were possible to divorce sex from the various social inequities animating it, like all human experiences, sex can produced the highest ecstasy, the lowest forms of self- and other-hatred, mild pleasure, mild pain, contentment, resentment, or nothing at all.\textsuperscript{395}

The difficulty here is that women must constantly navigate the space between idealized autonomous liberality and the oppressive conditions of subordination.\textsuperscript{396} The existence of constrained agency requires feminists to walk a delicate line, putting pressure on structures of subordination while simultaneously preserving ways for women to enjoy sexual pleasure in the world as it exists. This Article does not purport to have found the perfect balance between fighting hierarchy and recognizing the impossibility of atomistic liberal subjectivity. Nonetheless, the turn away from criminal law allows feminists to explore these tensions and develop strategies without involving an external male-dominated neo-liberal structure hostile to both fair distribution and women’s autonomy. Outside of the criminal law, liberal feminists can develop strategies to encourage genuine sexual autonomy while post-feminists can examine which transformations adequately respect female sexual desire.

\textbf{EPILOGUE}

After deliberating for days, the jury was still hung, and the judge declared a mistrial. The prosecution immediately stated its intention to retry the case. Two months later, I am in the

\begin{footnotes}
\item[394] See Franks, supra note 392, at 257 (asserting that Halley “presume[s] [the] good of undifferentiated, decontextualized, and dehistoricized bodily pleasures”).
\item[395] Compare Dressler, supra note 111, at (“[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.”).
\item[396] 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”).
\end{footnotes}
neighboring courtroom, feeling a sense of eerie déjà vu as I look around at the chiped particle board rails and worn industrial carpets. Tammy again takes the stand, but this time she looks very different. The new prosecutor has done his job well, I think to myself. Tammy wears a modest knee-length tweed skirt and a long-sleeve shirt buttoned all the way up. Her luxurious hair is back in a pony tail, and she wears not a stitch of makeup. Even her demeanor has changed. She sits demurely and meekly recounts her recollection of the fateful night. During cross-examination, Tammy takes several pauses to “collect herself,” a stunning transformation from the defiant woman of the last trial.

Eventually, the jury retires to deliberate the case, and José goes back to his holding cell. They reach a consensus in less than two hours, and José reappears at counsel table, surrounded by inscrutable marshals. A large smile breaks out on his sober, silent face, as the judge reads the not-guilty verdict on first degree sexual assault. But that is not the end. The judge trains his focus on José and, with a cold look, states, “as to the charge of assault with a dangerous weapon, the jury finds you guilty as charged.” José visibly crumbles. Slowly, he raises his eyes toward the ceiling and clasps his hands in supplication, “Madre de dio!” Later in the week, the judge, after calling the crime “despicable and unforgivable,” sentences José to 7 years in jail. During his incarceration, he is happy to receive occasional visits from his wife and three children, but that will all end soon. Deportation proceedings are already well under way.

The conviction is little consolation to Tammy. She has already received so much negative attention for the first mistrial, and she is quite sure word will get around about the rape acquittal. Returning to her apartment, Tammy wonders how things could get any worse. Her boyfriend broke up with her anyway. Her friends barely talk to her. Any guy who knows about the rape will not date her. In fact, she saw a copy of an email between some of her classmates
saying, “I wouldn’t date that slut – she’d probably accuse me of rape, too.” Lately, Tammy has been hanging out with a “party-girl” named Felicia. Her sole moments of joy these days consist of getting dress-up, going to bars with Felicia, and getting “hammered” on Jagermeister shots.

One night, while Tammy is wasted at a local college bar, she notices some “hot” guys with cameras, surrounded by groups of women. “I wonder if that’s Girls Gone Wild,” she thinks. One of the men, an all-American beach boy type, approaches her and says, “Man, you are the finest thing in here - do you want to pose? I’ll give you a T-shirt and a trucker cap.” Tammy says she is not sure, but Felicia counsels, “come on, you are sooo lucky,” to the nodding approval of several of the surrounding women. “Do you really think I’m pretty enough?” Tammy shyly asks the cameraman. “Sure, you’re the hottest I’ve seen in a long time.” Tammy does two more shots, and poses.\footnote{The actual case on which this narrative is based did result in an initial mistrial, retrial, and conviction for assault with a deadly weapon. Moreover, the complainant did change her appearance and demeanor in the second trial, as described. The depictions of José’s reaction and his sentence are also for the most accurate. Of course, only having the public defender’s side of the story, I cannot possibly know what happened to Tammy after the case. Thus, the last couple of paragraphs are a fictional narrative consisting of what could occur, intended to provoke the reader into further reflection on the ideas contained in the Article.}