

Article

Why Rape Should Not (Always) Be a Crime

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Shouldn't rape, an act of bodily invasion that can traumatize, endanger, and dehumanize its victims, be punished as crime? For centuries, lawmakers, philosophers, legal theorists, and women's rights advocates have converged upon the criminal law as the appropriate vehicle to reflect society's opprobrium and inculcate norms against rape. This may be changing. In response to a broad and comprehensive enforcement effort by the Department of Education (DOE), many universities are re-drafting their campus sexual assault policies.¹ DOE has made clear that it believes that Title IX of the 1964 Civil Rights Act requires schools to "address sexual violence and other forms of sex *discrimination*."² "[S]exual violence refers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent . . ."³ In other words, notwithstand-

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1. On May 1, 2014, the Department of Education (DOE) released the names of fifty-five colleges and universities that it was investigating for potentially discriminatory practices relating to sexual assault on campus. Jennifer Steinhauer & David S. Joachim, *55 Colleges Named in Federal Inquiry into Handling of Sexual Assault Cases*, N.Y. TIMES, May 2, 2014, at A15. That list has now grown to sixty-four and includes some of the country's most prestigious universities. Tyler Kingkade, *64 Colleges Are Now Under Investigation for Their Handling of Sexual Assaults*, HUFFINGTON POST (June 30, 2014, 12:59 PM), http://www.huffingtonpost.com/2014/06/30/colleges-under-investigation-sex-assault_n_5543694.html.

2. Press Release, U.S. Dep't Educ., U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations (May 1, 2014) (emphasis added), <http://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations>.

3. *Id.*

ing twenty centuries of treating rape as a criminal injury, DOE has recast rape as a civil wrong—a discriminatory act. This Article argues that by invoking a civil process, DOE is likely to meet with more success in reducing the amount of nonconsensual sex. Once it does so, the norm of male entitlement that gives rise to so much criminal conduct may be destabilized enough to enable the criminal law as reformed to be enforced.

The story of criminal rape law's undoing begins with the rape reform movement of the 1970's and 80's, which attempted to have the criminal law take rape more seriously. The individual goals of different state rape reform movements were many and tactics varied, but one overriding goal, shared by virtually all reformers, was to expand the amount of criminally proscribed activity. Traditional rape law reflected a social norm that validated men's entitlement to sex⁴ and allowed men to consistently ignore and override women's will. By refusing to criminalize sexual activity coerced without force, and often perpetrated by men that women knew, the law sanctioned men's routine appropriation of sex from women. The goal of rape reform was to make women's willingness to have sex, her consent, the centerpiece of the rape inquiry; men would no longer feel so entitled to disregard a woman's will in their attempt to get as much sex as they wanted.⁵ It is because that norm has not shifted sufficiently that DOE must now use a civil cause of action to combat what had been seen as a criminal problem.

This Article advances three overlapping but different reasons why the criminal law has not been more successful in

4. A "culture of sexual entitlement" is how an independent commission recently described the norms that enabled, if not caused, two different sexual assaults allegedly perpetrated by Boston University's men's ice hockey team. One of these incidents resulted in the accused player pleading guilty to assault and battery. See Boston University Office of the President, *Report of the Men's Ice Hockey Task Force*, BOS. UNIV. (Aug. 28, 2012) <http://www.bu.edu/president/reports/hockey-task-force>. Diana Russell helped explain this sense of entitlement forty years ago, when she asked one of her subjects about her impressions of what motivated the man who raped her. "I think what was going on in his head was 'Me, Graham, horny. You, woman!'" DIANA E. H. RUSSELL, *THE POLITICS OF RAPE: THE VICTIM'S PERSPECTIVE* 93 (1975).

5. Rape scholar Cassia Spohn writes that many rape reformers viewed the law's traditional approach to rape as "designed [not] to protect women from sexual assault, but to preserve male rights to possess and subjugate women as sexual objects." Cassia C. Spohn, *The Rape Reform Movement: The Traditional Common Law and Rape Law Reforms*, 39 *JURIMETRICS J.* 119, 121 (1999).

changing the social norms with regard to male entitlement to sex. First, the criminal burden of proof makes norm transformation exceedingly difficult. Making consent the determinative factor in rape does little good if proving the absence thereof—beyond a reasonable doubt, no less—is all but impossible. A law that defines rape as nonconsensual sex may get the theory of rape right, but it ignores the overwhelming practical difficulty of proving non-consent to an act for which there are no witnesses, no extrinsic evidence, and often no particular reason to think that the act was not consensual. This problem applies to a huge amount of sexual misconduct, whether secured through force or not. If behavior is not punished criminally because it cannot be proved, then the public's understanding of criminal behavior will not change.

Second, competing constructions of “the rapist” undermined feminist attempts to denormalize male predatory behavior. Shortly after most of the original rape reform measures were implemented, a new wave of changes to rape law emerged, much of it generated at the federal level. Tough-on-rapists measures enacted in the 1990s reflect an understanding of rapists as profoundly deviant and distinctly criminal. This pathological view of rape rejects the feminist insight at the core of much rape reform, which was that male appropriation of sex is commonplace and completely understandable given heterosexual scripts and norms of sexual pursuit.

Third, rape reformers failed to appreciate the delicate relationship between rape's injury, victims' agency, and the criminal law. In an effort to combat social norms that divested women of sexual agency, rape reform efforts asked all parties—victim, potential perpetrator, and jurors—to assume women lack agency; but women often resist being viewed this way. Moreover, when rape is a crime against the state, enforcement of it necessarily inhibits a victim's agency because the enforcement power and decision-making is vested in someone other than the victim. While this is true of all personal injury crimes, it is a particular problem with rape law if the essence of the injury is an affront to a victim's autonomy and agency. Enforcing the crime thus tends to accentuate rather than alleviate the injury to agency, and women consistently refuse to label their own experiences as rape, even if the criminal law would seem to.

The Article proceeds as follows. Part I explores the primary legal frameworks for understanding rape law over time. It traces the origins of rape as a sometimes civil, sometimes criminal, wrong—through the patriarchal view of rape as a property crime, to the feminist (and liberal) remake of rape into an individual criminal injury to autonomy. It then briefly discusses recent rejections of the liberal/feminist position.⁶ Parts II–IV explore the three major impediments to effective norm change in more detail.

Part V, after explaining why the recent proposed revisions to the Model Penal Code are not likely to overcome the problems previously discussed, demonstrates why DOE's initiative to use Title IX to curb sexual assaults on campuses may be more effective. If the new campus policies are effective in reducing the amount of nonconsensual sex, the norms of male entitlement that rape reformers originally tried to dislodge may be eroded sufficiently for the criminal law to effectively combat nonconsensual sex. The key to initially dislodging the norm, however, will be distancing the university procedures from the criminal law.

Resistance to the new policies to date has come mostly from those unwilling to see university procedures as distinct from the criminal law. Thus, critics either insist that the problem be addressed in the criminal system,⁷ or they insist that universities provide criminal law safeguards for those accused.⁸ But these new policies do not involve charging men on college campuses with rape. The accused are being charged with perpetrating discriminatory conduct. If found responsible for such conduct, the men should not be considered rapists. Indeed, be-

6. See Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372 (2013).

7. See, e.g., Jed Rubenfeld, *Mishandling Rape*, N.Y. TIMES, Nov. 16, 2014, at SR1 (“[S]exual assault on campus should mean what it means in . . . courts of law.”); Caroline Kitchens, *Overreaching on Campus Rape*, NAT’L REV. (May 13, 2014), <http://www.nationalreview.com/article/377878/overreaching-campus-rape-caroline-kitchens> (“If President Obama really wants to take rape seriously, he will take the power away from campus kangaroo courts and place such criminal investigations where they belong: in the hands of trained law enforcement.”).

8. Numerous Harvard Law School faculty members signed a petition criticizing Harvard's proposed rules, in part because those rules did not provide adequate opportunity to investigate facts and confront witnesses. See Elizabeth Bartholet, *Rethink Harvard's Sexual Harassment Policy*, BOS. GLOBE, Oct. 15, 2014, at A11.

cause most people are still not ready to call most men who secure sex without consent “rapists,” DOE and universities must be careful not to allow people to conflate what DOE is prohibiting with rape.

DOE’s policies do not necessarily represent a codification of the feminist theory that all nonconsensual sex is rape. One can believe that the rape reform movement went “too far” in criminalizing nonconsensual sex and still believe that nonconsensual sex is wrong, that its prevalence is rooted in male entitlement to sex, and that male entitlement to sex has a serious, negative, and discriminatory impact on college women. The goal of DOE’s policies is to reduce that discriminatory male conduct by dislodging the norms that reproduce it.

I. THE THEORIES OF RAPE

This Part provides a brief history of rape law, with an emphasis on the relatively recent debate over if and how the law should implement a standard that protects women’s autonomy by criminalizing nonconsensual sex.

A. THE TRADITIONAL AND MOSTLY OLD VIEW

The first known prohibition on rape appears in Hammurabi’s Code and dates from 1900 B.C.⁹ Hebrew law punished rape of a married woman with death, but rape of an unmarried woman with a fine of fifty shekels and the rapist had to marry his victim. Under early Roman law, *raptus* was a private, not a public wrong, and involved carrying a woman off by force, with or without intercourse. “The specific malice of the offense consisted not in the sexual ravishment of the woman, but in stealing her away from her parents, guardian or husband.”¹⁰

Monetary compensation for rape follows logically when women are viewed as property because rape causes economic injury to the men who own women.¹¹ The criminalization of

9. See KEITH BURGESS-JACKSON, *RAPE: A PHILOSOPHICAL INVESTIGATION* 68 (1996).

10. JAMES A. BRUNDAGE, *Rape and Marriage in the Medieval Canon Law*, in *SEX, LAW, AND MARRIAGE IN THE MIDDLE AGES* 63 (1993).

11. Consider this report from a Justice of the Peace in England in 1745:

Granted a warrant against John Newman of the tithing of Marston, yeoman, at the complaint of Jane Biggs, wife of John Biggs of same, for his assaulting her with intent to have carnal knowledge of her body. Upon his appearance, the fact was so clearly proved upon him, upon the oath of the complainant, that I adjudged him to pay unto

rape under this view makes sense for the same reason that criminalizing larceny makes sense. The state has a legitimate interest in making sure property interests are secure and stable. This usually means protecting the status quo. Protection of that status quo includes protection of the family relationships in which patriarchal control is respected by all.¹²

Thus, under the conservative patriarchal world view, there is no need to get mired in questions of whether the rapist intended to hurt the woman, or was recklessly indifferent to her consent, or was just trying to have consensual sex but read her body language wrong. By having sex with another man's property, a perpetrator was injuring another man. This system seems inapposite today not just because it placed such a high value on women's chastity, but because it was protecting men from *their* women's defilement.

Discomfort with viewing rape as a property crime emerged as early as the 12th century. At that time, canonical scholars began to distinguish rape from other property crimes.¹³ The law started placing responsibility on the victim to "cry out in protest" though there was little consensus on how much force was necessary to secure prosecution.¹⁴ As that early debate presaged, once the law rejects the idea of women as property of another, it needs another way of conceptualizing rape and women's role in it.

B. THE LIBERAL, FEMINIST AND MOSTLY CODIFIED VIEW

1. Theory

In her influential 1975 historical study of rape, Susan Brownmiller argued that not much changed with regard to rape

John Biggs for damages 5 guineas
Roy Porter, *Rape—Does It Have a Historical Meaning?* in RAPE 217 (Sylvana Tomaselli & Roy Porter eds., 1986).

12. See BURGESS-JACKSON, *supra* note 9, at 48 ("To the conservative, the rapist sets back not just a particular man's interest in the exclusive possession and control of his property, but the interest of society as a whole in having strong patriarchal marriages and families."); David Dyzenhaus, *John Stuart Mill and the Harm of Pornography*, 102 ETHICS 534, 550 (1992) ("Conservatives think that the use of state coercion is justified when there is a threat to what they hold to be the core values of a legitimate status quo.").

13. BRUNDAGE, *supra* note 10, at 66.

14. *Id.* at 68–69 ("[I]t is not surprising to find that the medieval canonists—like modern lawyers, one may add—were far from unanimous in defining just what degree of force must be demonstrated to prove rape.").

law between the 13th and 20th centuries.¹⁵ The 12th century debate about weeping and wailing and hue and cry was a debate about how much force and how much resistance were necessary before the law could classify a man's sexual aggression as rape. It was Brownmiller and other feminist writers in the 1970s, writing about the ubiquity of men overriding women's will, with force or without it, that spurred the rape reform movement.¹⁶

The predominant definition of rape at that time—"carnal knowledge, of a woman, not the man's wife, forcibly and against her will"—not only contained vestiges of a patriarchal world in which women were the property of their husbands (if not their fathers), it made force and resistance necessary elements of the crime.¹⁷ It was clear, though, that rape was no longer considered a property crime. In a polity in which the individual, not the family, is the basic unit for governance, rape cannot be a crime against a family whose property is damaged. It has to be a crime against an individual who is unlawfully touched. Rape thus seems to be some form of battery. If it is a battery, though, there would be no reason for a legal requirement to resist; other victims of battery do not have to resist unwanted physical touching in order for the law to view the touching as unlawful.

Reformers offered a different view of rape, arguably one much more in line with a polity that was increasingly willing to view women as legitimate, autonomous agents of their own economic, social, and sexual destiny.¹⁸ Rape became a crime involving the nonconsensual touching of a particular part of the body. What makes rape different from other batteries is the part of the body that is touched or invaded. Nonconsensual

15. SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 30 (1975) ("From the thirteenth to the twentieth century, little changed.").

16. See Spohn, *supra* note 5 (giving credit to these feminist chroniclers of rape for starting the rape reform movement); see also SUSAN GRIFFIN, *RAPE: THE ALL AMERICAN CRIME* (1971) (criticizing the patriarchal culture that encourages rape); RUSSELL, *supra* note 4 (relating rape victims' stories).

17. WAYNE R. LAFAVE, *CRIMINAL LAW* 891–94 (5th ed. 2010).

18. At a theoretical level, the feminist effort to redefine rape was not that controversial because by making consent, or lack thereof, the defining component of rape, the reformers were reifying a liberal construction of the individual. Women were people whose will mattered. To the extent there was controversy over making women's will matter, it centered on how the law could tell what women's will was. Critics of rape reform argued that women often said no when they meant yes and that any judicial scrutiny of what was verbally expressed during sex would inevitably ruin the spontaneity and thrill of sexual experience for both parties. See *infra* text accompanying notes 100–02.

sexual activity is an unwanted intrusion onto and into a part of the body that for physiological or cultural reasons, or both, is understood as deeply infused with emotion and bonding and pleasure and privacy. Nonconsensual intercourse or touching of this part of the body may cause emotional, relational, hedonic, and dignitary injuries.

What makes rape injurious under this view is the uniqueness of the sexual parts of the body. Nonconsensual interference with one's arm—perhaps when someone grabs you on a crowded subway—is not as injurious as rape, because rape involves that part of the body that is special. And, of course, what makes the definitional issue even more problematic is that consensual touching of that part of the body is commonplace, enjoyable, and fine. So it is not just the touching, and it is not just the part of the body that is touched. What makes rape rape is that the touching of that part of the body is *nonconsensual*.¹⁹ Force and resistance have nothing to do with it. Overriding the victim's will that she not be touched in that particular area by that particular person constitutes the gravamen of rape. It is that act of disregarding her will that violates women's sexual autonomy.²⁰

2. Rape Reform

This liberal construction of rape law undergirds all of the 1970s and 1980s rape reform efforts. In order to effectuate a change toward a focus on consent, reformers concentrated on three areas.²¹ First, they enacted statutes that criminalized nonconsensual sex secured without any use of force and eliminated the resistance requirement. The law of aggravated battery polices force;²² the law of rape was supposed to police something else. While the resistance requirement had often helped the state prove force (because perpetrators used force to overcome victim resistance), there was no justifiable reason to re-

19. RICHARD A. POSNER, *SEX AND REASON* 388 (1992) (“[A]ll that distinguishes [rape] from ordinary sexual intercourse is lack of consent . . .”).

20. For a comprehensive account of rape as a violation of women's sexual autonomy, see STEPHEN J. SCHULHOFER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* (1998) (concluding chapter entitled “Taking Sexual Autonomy Seriously”).

21. Spohn, *supra* note 5, at 122 (reformers concentrated on three areas: eliminating force, enacting rape shield laws, and introducing gradations of sexual offenses).

22. See LAFAVE, *supra* note 17, at 860.

quire women to physically resist an illegal act. One is not required to resist assault or robbery or any other battery. Most state statutes and state Supreme Courts now articulate at least some definitions of rape or sexual assault that do not include force.²³ Thus, technically, it is a crime in most states to knowingly disregard a woman's will when securing sex.

Second, and relatedly, reformers offered gradations of sexual assault. With the encouragement of prosecutors, who knew that nonviolent sexual attacks would be viewed with some skepticism, the vast majority of states have adopted a variety of sexually aggressive offenses: rape, aggravated rape, sexual assault, sexual abuse, etc. It is not just traditional carnal knowledge secured by force, but a variety of potentially offensive sexual contact, secured with or without force, that is criminalized.²⁴

Third, reformers enacted evidentiary shield laws that barred evidence of women's prior sexual behavior.²⁵ This was necessary in order to focus the trial on what actually happened during the event in question, not on whether a woman might have consented before.

These changes attempted to recognize (i) the legitimacy of an alleged victim's voice—force and physical resistance should not be necessary if the victim expressed her desire not to proceed—and (ii) respect for women's decision-making capacity—

23. MODEL PENAL CODE § 213.4 cmt. (AM. LAW INST., Tentative Draft No.1 2014) [hereinafter ALI Draft] (explaining that only twelve states maintain the traditional force requirement). *But see* John F. Decker & Peter G. Baroni, "No" Still Means "Yes": *The Failure of the "Non-Consent" Reform Movement in American Rape and Sexual Assault Law*, 101 J. CRIM. & CRIMINOLOGY 1081, 1084–86 (2012) (indicating that twenty-eight states allow the prosecution to convict by showing the victim did not consent; nine states appear to allow for conviction with only nonconsent, but to establish lack of consent, the prosecution must prove force or inability to consent; sixteen states do not have non-consent offenses—though fifteen of these sixteen allow "incapacity to consent" to substitute for force).

24. Professor Patricia Falk lists seven different "nonviolent" categories of behavior that are often criminalized: (i) abuse of trust; (ii) abuse of authority; (iii) nonconsensual sex without force; (iv) sex accomplished through coercion or extortion; (v) sex with a drunk or drugged victim who is not capable of knowingly consenting; (vi) sex with a mentally incapacitated person who is not capable of knowingly consenting; and (vii) sex secured through fraud. *See* Patricia J. Falk, *Not Logic, but Experience: Drawing on Lessons from the Real World in Thinking About the Riddle of Rape-by-Fraud*, 123 YALE L.J. ONLINE 353, 357–58 (2013).

25. *See, e.g.*, FED. R. EVID. 412 (prohibiting admission of evidence offered as proof of a victim's sexual predisposition or prior sexual history).

that a woman had consented to sex before did not mean she consented this time.²⁶ Still, it did not take long for commentators to recognize that many of the most common ways for men to routinely extract sex from women not only did not involve force, they did not even involve obvious rejection of a woman's voice. Sexual scripts and norms with regard to sexual activity dictated that men were active and women were passive.²⁷ Women were supposed to say no when they meant yes or to not say anything at all.²⁸ Men were supposed to—or at least allowed to—proceed in the face of ambiguity because ambiguity is what made sex exciting.

Given the strength of those scripts and norms, it was not surprising to see studies showing that men often confused women's abject fear for passive acquiescence.²⁹ One widely-respected comprehensive study found that 22% of women reported having been forced to do something sexual by a man while only 3% of men reported having forced a woman to do something sexual.³⁰ Men tend to interpret women's nonverbal actions as indicia of desire to consent, when women do not

26. That these changes were necessary at all shows the unique position of rape in the criminal law and our culture. Embedded in the traditional approach to rape was a deep distrust of women—a distrust reflected in the formal definition, which required force, and a distrust that manifested itself in relatively commonplace jury acquittals. It was not the “law” but juries who had previously concluded that a woman who had consented once, must have consented again or was disreputable enough that the jury simply did not care whether she consented. Katharine K. Baker, *Once A Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 586–88 (1997) (arguing that it was jury disregard for women who seemed “loose” as much as jury disbelief that led juries to acquit in cases with victims who had a sexual past).

27. Robin Warshaw & Andrea Parrot, *The Contribution of Sex-Role Socialization to Acquaintance Rape*, in *ACQUAINTANCE RAPE: THE HIDDEN CRIME* 75 (Andrea Parrot & Laurie Bechhofer eds., 1991) (“From their socialization in childhood and adolescence, [men and women] develop[] different goals related to sexuality [M]en are supposed to singlemindedly go after sexual intercourse with a female, regardless of how they do it. . . . [W]omen should passively acquiesce or use any strategy to try to avoid sexual intercourse.”).

28. *Id.* at 75–76.

29. See, e.g., Eugene J. Kanin, *Date Rape: Unofficial Criminals and Victims*, 9 VICTIMOLOGY 95, 97 (1984) (noting that some perpetrators in the study had mistaken their victims' fear for acquiescence).

30. ROBERT T. MICHAEL ET AL., *SEX IN AMERICA: A DEFINITIVE SURVEY* 221–28 (1994) (suggesting that there is a “gender chasm” when it comes to perceptions on whether sex was forced).

mean for those actions to be interpreted even as sexual interest, much less consent.³¹

Accordingly, many feminist writers encouraged courts to move toward an affirmative consent standard, what a co-author and I have labeled “a baseline of no,”³² and others have called the “Yes Model.”³³ Not only should no mean no, silence should mean no. Unless she says yes, the answer should be no. Several states adopted statutes that seemed to require affirmative assent to sex.³⁴ California recently adopted an affirmative consent standard to be applied at all colleges and universities receiving state funding.³⁵ Other states have simply proved more willing to convict men who proceed in the face of ambiguity.³⁶ Some states have also adjusted the mens rea for rape so that negligence in determining whether a woman consented is sufficient to secure a rape conviction.³⁷ The proposed revisions to the Model Penal Code, discussed in Part V.A. below, explicitly adopt an affirmative consent requirement.³⁸

Notwithstanding these changes, the number of rape reports that lead to arrest has declined significantly since 1970.³⁹

31. Michelle J. Anderson, *Negotiating Sex*, 78 S. CAL. L. REV. 1401, 1417 (2005) (citing studies).

32. Katharine K. Baker & Michelle Oberman, *Women's Sexual Agency and the Law of Rape in the 21st Century*, STUD. L. POL. & SOC'Y (forthcoming) (manuscript at 3) (on file with author).

33. Anderson, *supra* note 31, at 1405.

34. Six states define consent as positive cooperation. ALI Draft, *supra* note 23, at 41. In Wisconsin, the crime is defined as sexual intercourse with a person without the consent of that person, with consent being defined as “words or overt actions by a person who is competent to give informed consent indicating a freely given agreement” WIS. STAT. § 940.225 (4) (2013). Florida defines rape as sex without “intelligent, knowing and voluntary consent” FLA. STAT. § 794.011(1)(a) (2014). In Washington, consent is defined to mean “that at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact.” WASH. REV. CODE § 9A.44.010(7) (2008).

35. See CAL. EDUC. CODE § 67386(a) (West 2015). California did not adopt an affirmative consent standard into its criminal code generally.

36. See, e.g., *State v. Reid*, 479 A.2d 1291, 1293 (Me. 1984); *Commonwealth v. Lopez*, 745 N.E.2d 961, 962 (Mass. 2001); *State ex rel. M.T.S.*, 609 A.2d 1266, 1267 (N.J. 1992).

37. Stephen Schulhofer, *Rape-Law Reform Circa 2002: Has the Pendulum Swung Too Far?*, 989 ANNALS N.Y. ACAD. SCI. 276, 282 (2003).

38. See *infra* Part V.A.

39. See Corey Rayburn Yung, *Rape Law Fundamentals* 43 (Feb. 2, 2014) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2337621.

Conviction rates have not increased.⁴⁰ The Department of Justice reports that 20% of women on college campuses have been victims of sexual assault, but very few of them bring charges.⁴¹ Despite all the reform, the criminal law does not appear to be actively punishing vast amounts of nonconsensual sex.

C. THE RE-EMERGENCE OF FORCE

Recently, in a much critiqued article, Professor Jed Rubenfeld rejected the feminist/liberal construction of rape's injury.⁴² Using the law's reticence to treat sex secured by deception as rape,⁴³ Rubenfeld argues that it cannot be overriding the victim's will with regard to how the sexual parts of her body are touched that constitutes the gravamen of rape. If the law really saw that as injury, it would punish sex secured by deception because everywhere else in the law, fraud vitiates consent.⁴⁴ Instead, Rubenfeld argues, the injury of rape results from a combination of force and sex that takes away the victim's self-control. Sex that is secured through force violates a victim's right to "self-possession,"⁴⁵ as do slavery and torture. Sex se-

40. *Id.* at 43–44; see Spohn, *supra* note 5, at 129.

41. CHRISTOPHER P. KREBS ET AL., NAT'L CRIMINAL JUSTICE REFERENCE SERV. THE CAMPUS SEXUAL ASSAULT STUDY: FINAL REPORT XIII (Oct. 2007), <http://www.ncjrs.gov/pdffiles1/grants/221153.pdf>. This figure is controversial, but it is "not out of line with what is reported by other studies." See Marc Perry, *Behind the Statistics on Campus Rape: Research Is More Nuanced than Easy Numbers Imply*, CHRON. HIGHER EDUC. (Jan. 9, 2015), <http://chronicle.com/article/Behind-the-Statistics-on/151089> (quoting rape researcher Mary P. Koss).

42. See Rubenfeld, *supra* note 6. *Yale Law Journal Online* published a forum after Rubenfeld's article came out, in which Professors Tom Dougherty, Patricia Falk, Gowri Ramachandran, and Deborah Tuerkheimer all took issue with Rubenfeld's insistence on force. See YALE L.J., <http://www.yalelawjournal.org/forum/> (follow "volume 123" hyperlink; then scroll down to collection of articles responding to Jed Rubenfeld) (last visited Oct. 17, 2015); see also Kiel Brennan-Marquez, *A Quite Principled Conceit*, 80 U. CHI. L. REV. 81, 83 (2013) (arguing that all criminal statutes involve imperfect line-drawing and Rubenfeld's line, which he draws with the concept of self-possession, is no better at capturing our intuitions than is the line drawn by invoking the concept of sexual autonomy); Sherry Colb, *The Role of Consent in Defining Rape*, DORF ON LAW (May 1, 2013), <http://www.dorfonlaw.org/2013/05/the-role-of-consent-in-definingrape.html> (saying no should be enough, because once someone has said no and the other person does not stop, there is an implicit threat in place); Yung, *supra* note 39.

43. Rape-by-deception usually involves a man impersonating another man or claiming to be someone that he is not. See Rubenfeld, *supra* note 6, at 1375–76.

44. *Id.* at 1376.

45. *Id.* at 1434.

cured without force does not result in a comparable injury. For Rubinfeld, rape is forcible rape.⁴⁶ Everything else—sex with an intoxicated person, sex with an unconscious or underage person, sex with someone who just lies there—if it should be criminalized at all, is something other than rape.⁴⁷

By (re)making force an essential part of rape, Rubinfeld solves two of the biggest practical problems to confront criminal enforcement of contemporary rape law. First, force is exceedingly useful in establishing lack of consent. Just as the resistance requirement helped establish force, so the force requirement helped establish lack of consent. In the absence of writings or witnesses or videotape,⁴⁸ jurors have very little way of determining that someone did not consent to an act.⁴⁹ Force makes that clear. Second, force helps establish that the alleged rapist knew that the victim was not consenting. In a context in which ambiguity and wordlessness are celebrated as passion, a potential defendant can have a very difficult time discerning consent. But he almost certainly knows whether he used force.

46. This is an obvious, if implicit rejection of Professor Susan Estrich's argument of 30 years ago. See SUSAN ESTRICH, REAL RAPE 5–7 (1987) (arguing that “simple rape” by a man who does not expressly use or threaten force with a woman whom he knows is “real rape”). Professor Rubinfeld's position also aligns him with a hapless bunch of Tea Party candidates who ran into trouble trying to explain what they thought “real rape” was. See Gowri Ramachandran, *Delineating the Heinous: Rape, Sex, and Self-Possession*, 123 YALE L.J. ONLINE 371, 372 (2013), <http://yalelawjournal.org/2013/12/1/ramachandran.html>.

47. Rubinfeld, *supra* note 6, at 1435–42 (discussing why sex with unconscious, drunk, and underage “partners” should not be considered rape). Rubinfeld appears sometimes to argue that these acts should be treated as batteries, *id.* at 1440 (“[S]exual penetration of an unconscious stranger (or mere acquaintance) . . . is a crime under traditional assault-and-battery law.”), but at other times suggest that criminal prohibitions on this sort of activity are inevitably too broad. See *infra* note 50.

48. The existence of videotape can even fail to establish the consent question definitively. See *infra* text accompanying notes 82–87.

49. Lack of consent is difficult whether the law uses a subjective or objective standard. If courts interpret the question of consent to be only about the alleged victim's state of mind, whatever her outward manifestations, it is particularly difficult to prove. But even if courts instruct juries, or juries believe, that lack of consent must be established objectively, such that it is clear that consent was absent or ambiguous, establishing those facts beyond a reasonable doubt is very difficult. See Schulhofer, *supra* note 37, at 284–85 (discussing the objective and subjective standards and noting that neither party is likely telling the complete truth); *infra* Part II (discussing the difficulties in securing a sexual assault conviction).

Rubinfeld does not ground his conceptualization of rape law in arguments about enforceability or culpability, though.⁵⁰ He grounds his argument in the nature of the injury.⁵¹ Applying his theory to the problem of sexual assault on college campuses, he argues that attempts like DOE's to enforce broader understandings of assault using lesser standards of proof will exacerbate what he sees as the fundamental problem: "that almost no college rapists are criminally punished," because victims go through a college process, not the criminal law.⁵² He suggests that the college process should be integrated with law enforcement, not distinct from it, so that those who actually commit rape (that is, in Rubinfeld's view, those who use force) will be criminally punished.

The analysis that follows explains why Professor Rubinfeld and other DOE critics' faith in the criminal process to adjudi-

50. His argument against criminalizing some forms of nonconsensual sex may be grounded in culpability. He argues that attempts to prohibit non-forceful nonconsensual sex are so overbroad that they criminalize behavior that is commonplace, like drunk people having sex or touching another's sexual organs while sleeping. See Rubinfeld, *supra* note 6, at 1442 (discussing sexual contact involving intoxication); *id.* at 1440 (discussing sexual contact during sleep).

51. Most of the criticism of Rubinfeld has come from those who cannot accept his argument that the harm from unconsented to sex is insufficiently grave to warrant punishment as a rapist. Critics argue that the harm from coerced sex in which no force was used can be just as devastating as the harm from a typical forced rape. See Brennan-Marquez, *supra* note 42, at 82 (arguing that in the end Rubinfeld's framework relies on intuitions about what should be criminalized (sex by deception should not), but to get there Rubinfeld excludes other acts that many people's intuitions suggest should be considered rape, i.e., when the victim is unconscious, asleep, or very intoxicated); Falk, *supra* note 24, at 360–62 (detailing the many instances in which behavior that Rubinfeld would not term rape harms victims). Others argue that knotty questions of consent cannot be avoided under Rubinfeld's definition, because even if we frame the issue in terms of self-possession, there is the question of whether one consented to the loss of possession. Tom Dougherty, *No Way Around Consent: A Reply to Rubinfeld on "Rape-by-Deception,"* 123 YALE L.J. ONLINE 321, 325–26 (2013), <http://www.yalelawjournal.org/forum/no-way-around-consent-a-reply-to-rubinfeld-on-rape-by-deception>. Moreover, it is arguably not rape but sex itself that leads one to lose a sense of being self-possessed. This may be particularly true for women, for whom a great deal of consensual sexual activity inevitably involves an invasion of the self. Women are quite used to "no longer [being] their own person," see Rubinfeld, *supra* note 6, at 1430, whether during sex or during pregnancy. See Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 34–35 (1988) (suggesting that for most women, in pregnancy and in intercourse, the sense of being invaded, possessed by another, is commonplace—for men, it is very rare).

52. See Rubinfeld, *supra* note 6.

cate and punish sexual assault is misplaced. But the mere presence of Rubinfeld's article, and the uproar around it, indicate that rape reformers were not as successful as hoped in changing norms with regard to what is criminal behavior. The law changed, but many people, including prominent criminal law scholars, still reject the notion that nonconsensual sex is rape. It is hardly surprising, then, that a tremendous amount of nonconsensual sex goes unpunished.

II. THE (ALMOST IMPOSSIBLE) ROAD TO CONVICTION

The first major impediment for the rape reform movement had to do with problems of proof. For a while now, commentators have recognized how hard it can be to prove nonconsensual sex between acquaintances.⁵³ Stranger rape, in which the operative question is not usually whether consensual sexual activity occurred but who perpetrated an obviously nonconsensual act, is now exceedingly easy to prove. Thanks to DNA evidence, these cases are virtually never tried anymore.⁵⁴ Assuming appropriately followed police procedure, a rape kit tells us with certainty that a particular man's semen was found in a particular victim's body. That man pleads guilty to something because there is no way he can overcome the scientific proof linking him to a crime. His only potential defense is consent—but that is too implausible in the paradigmatic stranger rape scenario.

Once there is a plausible story of consent, though, the problems of proof become paramount. In an age when hook-ups are the norm for college students,⁵⁵ when sex on first dates is com-

53. See, e.g., David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 CRIM. L. & CRIMINOLOGY 1194, 1316–17 (1997) (discussing prosecutorial difficulty in proving non-consent beyond a reasonable doubt); see also Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 690 (1999) (explaining that the circumstances surrounding date rape often make it difficult to prove non-consent beyond a reasonable doubt).

54. See Brandon Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 74–75 nn.73–75, 75 (2008) (analyzing and citing studies showing that the plea bargain rate for felony rape convictions is 90%, as compared with a 51% plea bargain rate for felony murder); see also D. Michael Risnger, *Innocents Convicted: An Empirically Justified Factual Wrongful Conviction Rate*, 97 J. CRIM. L. & CRIMINOLOGY 761, 786 (2007) (discussing how DNA technology has reduced the prevalence of false identifications, which are likely to be challenged in court, in rape cases).

55. Between 60–80% of North American college students report having some hook-up experience. See Justin R. Garcia et al., *Sexual Hookup Culture: A Review*, 16 REV. GEN. PSYCHOL. 161, 163 (2012).

mon, and when many people celebrate the liberating opportunities of sex without relationship,⁵⁶ there are many reasons to believe an alleged victim might have consented. Often, alleged rapes start with consensual touching.⁵⁷ Sometimes there has been consensual intercourse before. In a surprising number of cases there is consensual intercourse afterwards, even if the victim perceived the earlier incident as rape.⁵⁸ Sexual activity, whether coerced or not, usually takes place in private. There is usually no tangible evidence of non-consent. Everyone concedes that intercourse took place.

The victim's story is all the prosecution has. The defendant, if well-represented, does not have to take the stand. Therefore, whether he remembers everything perfectly, whether he has ever lied before, whether he is the "type" of person who might have done the opposite of what he claims, does not have to be at issue. Meanwhile, because the victim usually must take the stand, her memory, her credibility, and her character are inevitably at issue; she is the only proof.⁵⁹

The circumstances in which rapes occur and the sexual nature of the crime make it *likely* that she will be a bad witness. The vast majority of acquaintance rapes involve people who have been drinking alcohol,⁶⁰ thus their memories are likely to

56. HANNA ROSIN, *THE END OF MEN* 25–40 (2012) (arguing that contemporary women are liberated from oppressive relationships when given the freedom to hook-up); Laura A. Rosenbury & Jennifer E. Rothman, *Sex in and out of Intimacy*, 59 EMORY L.J. 809, 853 (2010) (arguing that sex without intimacy or relationship affords women freedom that has been denied to them in relationships).

57. See *In re John Z.*, 60 P.3d 183, 184–85 (Cal. 2003) (describing a case where a victim initially consented to some sexual contact but then withdrew consent); R. Lance Shotland, *A Theory of Courtship Rape: Part 2*, 48 J. SOC. ISSUES 127, 129 (1992) (describing initially consensual behavior that turns into rape).

58. See Melissa J. Layman et al., *Unacknowledged Versus Acknowledged Rape Victims: Situational Factors and Posttraumatic Stress*, 105 J. ABNORMAL PSYCHOL. 124, 127 (reporting that 10% of victims who acknowledged being raped had sex with the perpetrator afterwards; 32% of victims who did not acknowledge what happened to them as rape had sex with the perpetrator afterwards).

59. Evidence rules allow any witness' credibility to be impeached. See FED. R. EVID. 607, 608. If a defendant never testifies, his credibility is not openly questioned.

60. See Bryden & Lengnick, *supra* note 53, at 1350 (citing earlier studies showing between 75–90% of sexual assaults on college campuses involve alcohol); Meichun Mohler-Kuo et al., *Correlates of Rape While Intoxicated in a National Sample of College Women*, 65 J. STUD. ON ALCOHOL 37, 40 (2004) (stating that 72% of college rape victims reported being intoxicated during the

be fuzzy. Even without alcohol, rape victims “tend to have less clear and vivid memories than people with other types of traumatic or unpleasant experiences.”⁶¹ Indeed, blocking out the event from one’s memory has been found to be a healthy psychological response. It helps diminish the ongoing trauma that rape victims suffer.⁶² In other words, the healthier the victim, the worse she is as a witness.⁶³

Even if victims can recall what happened, even if they did not just close their eyes and cry,⁶⁴ it can be very difficult to describe what happened. Most people are not used to describing their sex lives in detail, if at all. To be asked to do so, under oath, with one’s description subject to vigorous scrutiny not only by defense counsel but by a group of twelve strangers, can be daunting.⁶⁵

There is only so much that rape shield laws can place off-limits in a trial.⁶⁶ No court is going to exclude the victim’s past

rape).

61. Arthur Garrison, *Rape Trauma Syndrome: A Review of a Behavioral Science Theory and Its Admissibility in Criminal Trials*, 23 AM. J. TRIAL ADVOC. 591, 625 (2000).

62. *Id.*

63. For those familiar with this data, there was a telltale sign that the infamous *Rolling Stone* article, which was later retracted because the victim’s story appears to have been highly inaccurate, was wrong. The reporter wrote that the victim “remember[ed] every moment of the three hours of agony.” Sabrina Rubin Erdely, *A Rape on Campus: A Brutal Assault and Struggle for Justice at UVA*, ROLLING STONE (Nov. 19, 2014), <http://web.archive.org/web/20141123012328/http://www.rollingstone.com/culture/features/a-rape-on-campus-20141119>. Those who work with rape victims know that it is very unlikely that a victim would remember every moment. See Garrison, *supra* note 61.

64. Professor Estrich described her own rape and how difficult it can be to recollect the incident for the police when they ask. She reflected that “no one [tells you] that if you’re raped, you should not shut your eyes and cry for fear that this really is happening.” ESTRICH, *supra* note 46, at 2.

65. See, e.g., Walt Bogdanich, *Reporting Rape, and Wishing She Hadn’t: Inside One College’s Response When a Student Came Forward*, N.Y. TIMES, July 13, 2014, at 15 (“It was one of the hardest things I have ever gone through . . . I felt like I was talking to someone who knew nothing [about] any sort of social interaction; what happens at parties; what happens in sex.”); Richard Pérez-Peña & Kate Taylor, *Fight Against Sex Assaults Holds Colleges to Account*, N.Y. TIMES, May 4, 2014, at 1 (reporting that one Columbia University student commented that when she had to testify about how she was raped anally, she “had to tell an embarrassing story and then teach [the university panel] an embarrassing subject . . . [which] felt really gross”).

66. Bryden & Lengnick, *supra* note 53, at 1287 (“[S]ome sorts of evidence about the complainant’s character and habits will inevitably be available to the jury.”).

sexual behavior with the alleged perpetrator.⁶⁷ No court will exclude incidents about which she may have lied in the past.⁶⁸ No court can make it easy for her to talk about her own embarrassment, possible fear, and sense of powerlessness during a sexual encounter.⁶⁹ Her comfort with her own sexuality, her experience and familiarity with certain acts and sensations will be on display whether she wants them to be or not.

Consider the well-publicized recent case of Army Brigadier General Jeffrey A. Sinclair. General Sinclair had what everyone acknowledged was a three-year affair with a female captain under his command. The woman's complaint alleged that during the affair, the general forced her to have oral sex. Her story was that "[w]ith the relationship becoming increasingly stormy, General Sinclair one day walked into her office in Afghanistan, unbuttoned his pants, grabbed her by the neck and forced her to fellate him."⁷⁰ She testified that "I know I didn't pull away from him, but I didn't want to do it."⁷¹ The Army's case against the general collapsed.

Even if the woman had no history of lying and no previous testimony that was subject to impeachment, this would be an exceedingly difficult case to prove beyond a reasonable doubt. Indeed, General Sinclair could have been much more violent. He could have started to choke her;⁷² he could have pinned her; he could have pulled her arm across her back and threatened to break it and then demanded that she perform sexual acts on him. None of these hypothetical acts would leave proof of rape but no one—not even Professor Rubinfeld⁷³—would suggest

67. See FED. R. EVID. 412(b)(1)(B) (providing a specific exception for consensual sex with the accused).

68. See FED. R. EVID. 608.

69. And what if she has felt all of those sensations during consensual sex? Is it her responsibility to still articulate the difference? If she has difficulty doing so, does that mean she has not been injured? See *infra* Part IV.A.

70. Alan Blinder & Richard Oppel Jr., *How a Military Sexual Assault Case Foundered*, N.Y. TIMES, Mar. 13, 2014, at A19.

71. *Id.*

72. Choking and strangulation tend to leave minimal signs of injury and are risk factors for later violence. Maureen Funk & Julie Schuppel, *Strangulation Injuries*, 102 WIS. MED. J. 41, 43 (2003); Kathryn Laughon et al., *Revision of the Abuse Assessment Screen to Address Nonlethal Strangulation*, 37 J. OBSTETRIC GYNECOLOGIC & NEONATAL NURSING 502, 502–05 (2008). The victim in the Sinclair case also alleged that the accused threatened to kill her if she told his wife about their affair. See Blinder & Oppel, *supra* note 70.

73. See *supra* Part I.C.

that they were not rape. Yet the law would likely not have been able to punish General Sinclair for any of it.

The defense's attacks on her credibility would be the same no matter how bad her allegations: she was a jealous lover who wanted to hurt "the wife"; she wanted to retaliate against him for ending the relationship; she was accusing him of rape to protect herself from a charge of adultery (which can be illegal in the military); she had loved him.⁷⁴ Like many victims of rape, she had consensual sex with him again.⁷⁵ All of that makes her a bad witness. Unless there was demonstrable evidence of force or witnesses that heard him threaten, the prosecution had nothing but her word on which to rely.

The reason this case fell so completely apart was not because it became clear that what she alleged happened did not happen. What became clear is that the prosecution could not prove it. The biggest blow to the Army was not a piece of evidence suggesting that her account of the rape was untrue, but that she had previously lied about the existence of a cell phone containing (redundant) proof that the affair had been consensual. The cell phone was a smoking gun with regard to the witness's overall credibility, not a smoking gun with regard to the facts of what was alleged.

For better or worse, evidence rules allow fact finders to make overall credibility determinations about witnesses based on what those witnesses have said in the past.⁷⁶ The trial judge sanctioned the Army officials for letting politics blind them to what any experienced prosecutor should have known—and the original prosecutor who resigned from the case appears to have known—that the case could not be won with a witness who had a credibility problem.⁷⁷ Victim credibility is all there is in a case like this.

74. All of these arguments were made by the defense in the Sinclair case. See Blinder & Opper, *supra* note 70.

75. See Garrison, *supra* note 61, at 616.

76. See generally FED. R. EVID. 608 (allowing character evidence for truthfulness even though the rules disallow character evidence for other traits).

77. The military judge stopped the court-martial and ordered parties to work out a settlement indicating that the Army's decision to prosecute the General had been motivated too much by politics and not enough by the realities of the case. The original chief prosecutor for the Army resigned from the case under protest because his superiors continued to press for the most serious charges against his will. Blinder & Opper, *supra* note 70, at A1, A19.

This problem of having to rely so completely on the victim's credibility has nothing to do with police or prosecutors not believing in the harms of acquaintance rape. It has nothing to do with the law trying to push juries to effectuate social change too abruptly.⁷⁸ It has little to do with women as a class not being believed. Throughout the General Sinclair saga, the Army maintained that it believed the woman. The problem is that rape is a crime that by its nature has no witnesses, produces no demonstrable evidence, and inevitably brings with it a perfectly plausible theory of legality, i.e., consent. The crime also involves, indeed the essence of the injury stems from, an act that most people find very difficult to talk about.

Consider also the case of a Columbia University student profiled in the *New York Times*.⁷⁹ She alleged that a friend, with whom she had had consensual sex twice, raped her. She recounted to the university tribunal that one evening she willingly let the accused man accompany her back to her room from a party but shortly after getting there:

[He] grabbed her wrists and pinned her arms behind her head. He pushed her legs against her chest and forcefully penetrated her anus. They had never had anal sex before. They had never discussed it. It was painful. S[he] began to struggle, screaming at him to stop, yelling at him to get off of her. He didn't stop.

Afterwards, he lay next to her for a few seconds. They didn't speak. He abruptly got out of bed, gathered his clothes, and walked out the door, leaving a handle of vodka behind him.⁸⁰

This is a perfectly plausible story. There is nothing about her narrative that suggests that she is lying or misremembering anything—even though she acknowledged that she was, understandably, nervous and uncomfortable—when reciting the facts to university officials. The problem is that it is incredibly easy for the alleged perpetrator or his defense team to tell a comparably plausible story, an almost-comparably-plausible story, or a story that even if unlikely, might be true. As long as he, or his defense team, tell any of those competing stories in a

78. Professor Dan Kahan has written about the dangers of trying to change social norms—particularly entrenched social norms—too quickly. See Dan Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 623–25 (2000) (suggesting societal norms contributed to the ineffectiveness of rape law reforms).

79. Pérez-Peña & Taylor, *supra* note 65.

80. Anna Bahr, *Accessible, Prompt, and Equitable?: An Examination of Sexual Assault at Columbia*, BLUE & WHITE, Feb. 2014, at 17, <http://static1.squarespace.com/static/545d1072e4b043f3abfcc09/t/549efd16e4b0be677c08d3a1/1419705622273/February+2014+Issue.pdf>.

remotely credible manner, the criminal burden of proof entitles him to a finding of not guilty.⁸¹

Even when there is corroborating evidence, proof problems abound. In 2006, an Illinois high school student accused Adrian Missbrenner and several other men of rape after she learned there was a videotape of them having sex with her while she was very intoxicated.⁸² In this case, the victim did not have to take the stand. She let the tape testify for her. The tape showed three older boys having sex with her and scribbling obscenities on her body. There was undisputed evidence that the victim had been drinking, and by the end of the video, she was clearly unconscious. Prosecutors argued that the tape was proof that the victim was too intoxicated to consent to intercourse. The jury acquitted Missbrenner.

The tape was in three segments.⁸³ In the first, the girl is heard making sounds and (possibly) talking while having sex with the first man. In the second part, the one in which Missbrenner appears penetrating her, prosecutors argued that the girl's eyes were closed and she was listless. In the third segment, the victim is unconscious. It is in the third segment that the men wrote sexual slurs and spit on her body.⁸⁴ To the jurors, it was unclear how soon after Missbrenner's intercourse the last segment was taped.⁸⁵

Notably, one juror said, "I think they should still go for the civil trial. There's a different set of standards there."⁸⁶ "Clearly we knew what those young men did was wrong. Clearly, they took advantage of her. But there was reasonable doubt."⁸⁷ Rape jurors take reasonable doubt seriously. After an acquittal in an

81. Universities are not bound to use the criminal burden, *see infra* Part V.B.1.b, but the Columbia tribunal still found the evidence of assault too indeterminate to hold the defendant responsible. *See* Pérez-Peña & Taylor, *supra* note 65, at 1, 22.

82. *Burr Ridge Man Acquitted in Rape Case*, ASSOCIATED PRESS, Mar. 4, 2006.

83. No one except the prosecutors, the defense, the judge, and the jurors saw the videotape, but it was described sufficiently for reporters to learn about the segments and what was in them. *See* Christy Gutowski, *Juror Says Case "Insult Not Assault" Tape Shows Naperville Girl Was a "Willing Participant," Woman Says*, CHIC. DAILY HERALD, Mar. 18, 2005.

84. *Id.*

85. *Id.*

86. John Bisognano, *Juror: Tape Key to Verdict; Foreman in Rape Case Says There Was Doubt*, CHI. TRIB., Mar. 9, 2006, at 2C.1.

87. *Id.*

Army sexual misconduct trial several years before the Missbrenner case, a juror explained, “it’s not that we didn’t believe the women; it’s that we had reasonable doubt.”⁸⁸

A California judge who tried *California v. John Z.*,⁸⁹ a textbook case of complicated consent,⁹⁰ voiced comparable concerns. *John Z.* is notable for the California Supreme Court’s willingness to affirm the trial court’s finding of rape even though the victim testified that she said yes before she said no. The case was tried by a judge without a jury, and the judge made a finding of force, presumably because the defendant pushed the girl onto the bed.⁹¹ In a subsequent interview, the judge opined that a jury probably would not have found the defendant guilty as he did, and he was not sure that he himself would convict again on identical facts.⁹² The prosecution’s appellate lawyer assigned to defend the verdict on appeal expressed comparable doubts.⁹³ Several experienced sex crimes prosecutors, when asked their opinion about this case, expressed shock that the prosecution had gone forward. They thought it was too hard to win.⁹⁴

88. *All Things Considered: McKinney Juror Speaks*, NPR (Mar. 19, 1998) (Interview by Robert Siegel & Noah Adams with Martha Raddatz), <http://www.npr.org/programs/all-thingsconsidered/1998/03/19/12966073/?showDate=1998-03-19>.

89. *In re John Z.*, 60 P.3d 183 (Cal. 2003). This case is reproduced in many casebooks also because the woman acknowledged saying yes before she said no.

90. *John Z.* involved two boys having sex with a seventeen year-old girl. The boys had been drinking. The girl had not. It was not videotaped. See Michelle Oberman, *Two Truths and a Lie: In re John Z. and Other Stories at the Juncture of Teen Sex and the Law*, 38 L. & SOC. INQUIRY 364 (2013) (providing an in-depth description of the case and the lawyers and judges involved in it). *John Z.* used to be featured in the most popularly used Criminal Law casebook, the fifth edition of Joshua Dressler’s *Cases and Materials on Criminal Law*. Though it was removed in the most recent edition, the authors continue to contemplate putting it back in and continue to reference the case and Professor Oberman’s article. E-mail from Joshua Dressler, Distinguished Univ. Professor, Ohio State Univ. Moritz Coll. of Law, to Katharine Baker, Professor of Law, Chi.-Kent Coll. of Law (June 10, 2015, 1:31 PM) (on file with author).

91. See Oberman, *supra* note 90, at 386.

92. See *id.* at 386–87 (describing an interview with the trial judge).

93. *Id.* at 389 (“I don’t lose any sleep over ninety-nine percent of [the cases being prosecuted]. . . . This case is in the one percent of uncertainty for me.”).

94. *Id.* at 375–76 (describing experienced prosecutors wondering how the case ever made it through the prosecutor’s screening process with “so many proof problems”).

John Z. and the recent convictions in the videotaped case from Steubenville, Ohio,⁹⁵ show that occasionally the law can do what reformers wanted. It can criminalize nonconsensual sex qua nonconsensual sex.⁹⁶ But these cases also show how extraordinarily difficult it is to convict. The high school girl on the videotape in Steubenville was unconscious the entire time.⁹⁷ Both cases were tried in juvenile court to a judge, not a jury. That's one finder of fact to convince, not twelve. Judges are also trained to apply the law as written. They should be much less likely than lay jurors to let preconceived notions of "what rape is" affect their judgment.

The standard feminist critique of why rape reform has not resulted in more convictions is that police and prosecutors fail to prosecute the law as written.⁹⁸ But police and prosecutors should not be blamed for failure to prosecute that which they cannot prove. Indeed, the Army prosecutors in the Sinclair case were sanctioned for proceeding with a case that they should have known they could not adequately prove.⁹⁹

The feminist defense of rape reform has focused on the normative propriety of making consent the defining line between rape and sex, but feminists have arguably paid too little attention to the practical difficulty of making consent the central issue. The problem is not, as the normative debate suggests, that by requiring evidence of consent the law is killing the spontaneity, ruining the romance, and demanding cold

95. For a description of the case, see Juliet Macur & Nate Schweber, *Rape Case Unfolds on Web and Splits City*, N.Y. TIMES, Dec. 17, 2012, at D1. The incident was also covered extensively on cable news. See, e.g., Erik Wemple, *CNN Is Getting Hammered for Steubenville Coverage*, WASH. POST (Mar. 18, 2013), <http://www.washingtonpost.com/blogs/erik-wemple/wp/2013/03/18/cnn-is-getting-hammered-for-steubenville-coverage>.

96. There was a finding of force in *John Z.*, but it was minimal (pushing the victim back down on a bed). See Oberman, *supra* note 90, at 386.

97. Macur & Schweber, *supra* note 95.

98. See generally ROSE CORRIGAN, UP AGAINST A WALL: RAPE REFORM AND THE FAILURE OF SUCCESS 80–100 (2013) (ebook) (finding that police and prosecutors often do not take rape claims seriously); Lynn Hecht Schafran, *Writing and Reading About Rape: A Primer*, 66 ST. JOHN'S L. REV. 979, 1010–11 (1993) (articulating that the police and prosecutors "unfound" cases that did not fit into the stranger rape paradigm); Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U. CAL. DAVIS L. REV. 1013 (1991) (detailing the ways in which police, prosecutors, and jurors refuse to believe women).

99. The court-martial judge reprimanded Army officials for letting the political pressure to enforce sexual assault rules cloud their judgment of whether this was an appropriate case to press. See Blinder & Opiel, *supra* note 70.

hard contracts for sex.¹⁰⁰ Those claims are readily dismissed because (1) talking about sex does not necessarily ruin it,¹⁰¹ and (2) women's safety is far more important than men's dreams of romance.¹⁰² The problem is that it does limited good to change the law to require communication of consent if no one can prove what is required. It may even be damaging to ask the law to do something that in the vast majority of appropriate cases, it cannot do.

The result is that cases either are not pursued¹⁰³ or they are pursued but do not result in convictions. What kind of message does the result in the Missbrenner case send to young men who have the opportunity to take advantage of a not completely unconscious woman? What kind of message does the collapse of the Army's case in Sinclair send to women who might come forward with allegations of rape by a superior officer? Would anyone, should anyone, tell the Columbia student to pursue criminal charges given how extraordinarily unlikely it would be for the prosecution to be able to secure a conviction? Without more convictions based on the new understanding of what rape is, people will not come to understand the underlying behavior as criminal. The criminal law is not punishing a vast amount of nonconsensual sex because the law cannot prove that it happened.¹⁰⁴

100. See Neil Gilbert, *The Phantom Epidemic of Sexual Assault*, 103 PUB. INT. 54, 60 (1991); George F. Will, *Sex Amidst the Semicolons*, NEWSWEEK, Oct. 4, 1992, at 92.

101. Jason Vest, *The School that Put Sex to the Test: At Antioch, a Passionate Reaction to Consent Code*, WASH. POST, Dec. 3, 1993, at G1 (reporting that sex continues to be a regular part of life at Antioch College despite the mandatory communication-before-sex requirement); see also Jane Gross, *Combating Rape on Campus in a Class on Sexual Consent*, N.Y. TIMES, Sept. 25, 1993, at A1.

102. See Baker, *supra* note 53 (“[T]here is a mystery and spontaneity to non-verbal communication . . . but it can also be very dangerous.”); Lynne Henderson, *Rape and Responsibility*, 11 LAW & PHIL. 127, 162 (1992) (finding that much of women's “fear, shame, and anger” at being assaulted could be “easily avoided” with communication); see also ALI Draft, *supra* note 23 (assuming consent when there is none or giving a “false positive[]” presents a far greater danger than assuming no consent or giving a “false negative[]”).

103. Oberman, *supra* note 90 (explaining that experienced prosecutors would not have pursued the *John Z.* case because of victim hardship and the small chance of success); see also William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 570 (2001) (discussing prosecutor disincentives for cases that are difficult to prove).

104. People may believe, beyond a reasonable doubt, that these men are doing something *wrong*. Rape reformers can take some comfort in that what had once been seen as inevitable or justifiable is now seen as unjustifiable.

III. THE COMPETING CONSTRUCTIONS OF THE RAPIST

The second major impediment for the rape reform movement derives from competing constructions of rapists. As suggested earlier, one of the primary goals of rape reform was to expand the amount of legally-proscribed sexual activity by encouraging the law and those who enforce it to see “sex” that was coerced, often by an acquaintance, without the use of a weapon or the infliction of other external injury, as “rape.”¹⁰⁵ As Susan Estrich argued with the title of her book, the goal was to treat all kinds of rape as “Real Rape,”¹⁰⁶ though many people realized that securing convictions for this new kind of rape would be difficult.¹⁰⁷ The problem stemmed from just how commonplace acquaintance rapist behavior is. Significant numbers of men admit to having committed rape.¹⁰⁸ Even more men admit to having coerced sex, when coercion is defined along a spectrum of ignoring women’s protests, to using physical force.¹⁰⁹ Studies document that men rape without even realizing

Rape reform may have shifted attitudes away from blaming women toward acknowledging the fault of the rapist. *See* Macur & Schweber, *supra* note 95 (noting that people sympathetic to the football players in Steubenville even acknowledged that they were not being decent human beings). *Compare* Baker, *supra* note 26, at 587–88 (discussing prominent cases in which jurors or the public refused to blame the accused men because, although they acknowledged the accused men used force to secure sex, they thought the women deserved it), *with* Chuck Goudie, *Outcome of Video Rape Case Is No Cause for Celebration*, CHI. DAILY HERALD, Mar. 3, 2006 (articulating that Missbrenner’s own mother said that what her son did was not “nice”), and Gutowski, *supra* note 83 (explaining that jurors saw the behavior as wrong). *But see* Oberman, *supra* note 90, at 399 (explaining that no one whom Professor Oberman spoke to in her in-depth study of the *John Z.* case defended *John Z.*’s actions).

105. *See supra* Part I.B.

106. ESTRICH, *supra* note 46.

107. *See infra* text accompanying notes 117–19.

108. ROBIN WARSHAW, I NEVER CALLED IT RAPE: THE MS. REPORT ON RECOGNIZING, FIGHTING, AND SURVIVING DATE AND ACQUAINTANCE RAPE 21 (1994); *see also* Mary P. Koss, *Hidden Rape: Sexual Aggression and Victimization in a National Sample of Students in Higher Education*, in RAPE & SEXUAL ASSAULT II 3, 11 (Ann Wolbert Burgess ed., 1988) (finding that one in twelve men admitted to committing rape). This is a dated study, but given the number of sexual assaults that occur on college campuses today, a reduced finding would be surprising. *E.g.*, Lauren Sieben, *Education Dept. Issues New Guidance for Sexual-Assault Violations*, CHRON. HIGHER EDUC. (Apr. 4, 2011), <http://chronicle.com/article/Education-Dept-Issues-New/127004> (estimating that one in five women on college campuses are victims of sexual assault).

109. *See* Karen R. Rapaport & C. Dale Posey, *Sexually Coercive College Males*, in ACQUAINTANCE RAPE, *supra* note 27, at 217, 219–20.

that they have.¹¹⁰ Men, *understandably*, confuse women's passivity for consent because many men know that women can be passive even when they want to consent to sex.¹¹¹ Men believe that women say no when they mean yes.¹¹² And some women do say no when they mean yes.¹¹³

In addition, men are expected to treat sex as a given in their lives, an obvious goal with a prize that enhances their masculinity in their own eyes and the eyes of others.¹¹⁴ Men are encouraged to compete with other men with regard to sexual conquests.¹¹⁵ It is thus all too obvious why men proceed with sex even if a woman does not expressly consent. Men are not taught to think of nonconsensual sex as an oxymoron, much less rape, so it is not surprising that men rape when the definition of rape is nonconsensual sex.¹¹⁶

Rape reformers knew this. They knew that they were trying to dismantle entrenched norms in gendered scripts that all too easily explained why acquaintance rape was so prevalent. They knew that they were indicting the status quo and trying to make it criminal. Professor Catharine MacKinnon opined,

110. Kanin, *supra* note 29.

111. See, e.g., Anderson, *supra* note 31, at 1416 (discussing women's passivity); see also Baker, *supra* note 53, at 674 (recounting literature on how women are socialized to be passive); Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN'S STUD. 387, 440 (1996) ("Th[e] overriding theme of female silence as the mark of a good woman expresses itself in numerous variations in our general sexual culture She may speak if her voice soothes, entertains, informs, or otherwise helps to serve male needs. What she may not do is express her own needs or views").

112. Henderson, *supra* note 102, at 141–42 (discussing the "no means yes" assumption); see also Oberman, *supra* note 90, at 394 (noting that in an *honest* conversation with the trial judge in the *John Z.* case, the judge acknowledged that as a kid he never would have taken the first "no" seriously).

113. One 1988 survey found that thirty-nine percent of women at a Texas university indicated that they did not want to have sex even though they did. Charlene L. Muehlenhard & Lisa C. Hollabaugh, *Do Women Sometimes Say No When They Mean Yes? The Prevalence and Correlates of Women's Token Resistance to Sex*, 54 J. PERSONALITY & SOC. PSYCHOL. 872, 872 (1988).

114. Baker, *supra* note 53, at 675–79 (discussing the link between sexual performance and idealized masculinity).

115. E.g., Baker, *supra* note 26, at 606 (examining instances where men used sexual conquests as a kind of competition with other men).

116. The rape reform movement included attempts to educate men about the harms of acquaintance rape, but studies conducted of college populations suggest that these training programs often fall short in transforming the way men think about potential hook-up partners. See Katharine K. Baker, *Sex and Equality*, 93 B.U. L. REV. ANNEX 663 (2013) (citing hook-up culture studies and how disregarding women's desires is commonplace).

“when so many rapes involve honest men and violated women . . . is the woman raped but not by a rapist?”¹¹⁷ Susan Estrich advised, “[i]t is easier to condemn date rape than it is to punish date rapists.”¹¹⁸ Professor Lynne Henderson saw this as a retribution/deterrence tradeoff. To really conflate acquaintance and stranger rapists was to say all rapists were deserving of the same severe penalty, but making the penalty that severe for a crime that was being perpetrated by so many peoples’ brothers and sons would inevitably lead to under-enforcement:

Feminists *are* caught in a bind between the arguments for retributive punishment and deterrence of the crime of rape. Because all rape is a form of soul-murder, a life-threatening, and life-damaging experience, proportionality would seem to demand heavy penalties. . . . Practically, however, a patriarchal society will not tolerate imposition of heavy penalties on large numbers of men for raping women, at least in the short term.¹¹⁹

Even as these reformers were analyzing the likely problems with making the commonplace criminal, there was a competing, though superficially sympathetic, movement which sought to re-invigorate the notion that rapists—real rapists—were particularly dangerous. The result was a series of tough-on-rapists initiatives that undermined the reformist goal of expanding the amount of legally proscribed activity.

In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program.¹²⁰ This program predicated the receipt of federal money for law enforcement on states developing registration systems for people convicted of certain sexual offenses. In 1997, Congress amended the Act to include a notification system, so not only did states have to develop systems for tracking those who had committed sexual offenses, they had to inform the public if someone who had committed such offenses was in its midst.¹²¹

117. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 183 (1989).

118. Susan Estrich, *Palm Beach Stories*, 11 LAW & PHIL. 5, 32–33 (1992).

119. Henderson, *supra* note 102, at 175–76.

120. 42 U.S.C. § 14071(a)(1) (West 2000) (repealed 2006). This Act and the state statutes it engendered are often named after victims. The most famous one may be New Jersey’s “Megan’s Law.” See Jenny A. Montana, Note, *An Ineffective Weapon in the Fight Against Child Sexual Abuse: New Jersey’s Megan’s Law*, 3 J. L. & POL’Y 569, 569–71 (1995) (describing the New Jersey legislation).

121. 42 U.S.C. § 14071(e)(2).

In enacting these registration and notification systems, state legislatures routinely relied on scientifically unsupported, but generally accepted, notions that rapists are uniquely recidivistic and sexually perverse. Rapists are different, it was implicitly argued, so they need special rules.¹²²

In reality, there is no evidence that rapists recidivate at a rate any higher than other criminals.¹²³ Nor is there any supporting evidence that most rapists are psychologically impaired.¹²⁴ Registration and notification programs are rooted in an unsupported belief that rapists are “other”; that they are uniquely deviant. The rapid passage of registration and notification laws¹²⁵ demonstrates how easy it is to reify and exacerbate an understanding of rapists as psychopaths.

Notification rules are especially pernicious in this regard. Being branded by the government and having one’s presence in a community announced because of that branding, obviously stigmatizes those who are branded. One study in Wisconsin found that notification routinely resulted in ostracization, harassment, and negative impacts on family and friends of the offenders.¹²⁶ No one denies this stigmatizing effect; it was just thought appropriate to the offense of rape and necessary in order to protect the public from rapists.¹²⁷

122. Compare N.J. STAT. ANN. § 2C:7-1(a) (West 1994) (“The danger of recidivism posed by sex offenders and . . . the dangers posed by persons who prey on others as a result of mental illness . . .”), with N.Y. CORRECT. LAW § 168 (McKinney 1998) (connecting the legislative findings and intent to the “danger of recidivism”).

123. See generally Christina E. Wells & Erin Elliott Motley, *Reinforcing the Myth of the Crazy Rapist: A Feminist Critique of Recent Rape Legislation*, 81 B.U. L. REV. 127, 158 n.135 (2001) (citing a number of studies that found rapists did not have higher recidivism rates than other types of offenders).

124. See Gene G. Abel, Judith V. Becker & Linda J. Skinner, *Aggressive Behavior and Sex*, 3 PSYCHIATRIC CLINICS N. AM. 133, 140 (1980) (asserting that less than five percent of rapists were psychotic at the time of the commission of rape); James V. P. Check & Neil Malamuth, *An Empirical Assessment of Some Feminist Hypotheses About Rape*, 8 INT’L J. WOMEN’S STUD. 414, 415 (1985) (psychologists consistently fail to find evidence of abnormality among rapist populations); Paul Schewe & William O’Donohue, *Rape Prevention: Methodological Problems and New Directions*, 13 CLINICAL PSYCHIATRY REV. 667, 668–72 (1993) (finding no significant psychological differences between rapist and nonrapist populations).

125. See Wells & Motley, *supra* note 123, at 132 n.22 (demonstrating that nearly all states now have very similar registration laws).

126. Richard G. Zevitz & Mary Ann Farkas, *Sex Offender Community Notification: Managing High Risk Criminals or Exacting Further Vengeance*, 18 BEHAV. SCI. & L. 375, 381–84 (2000).

127. *E.g.*, N.J. STAT. ANN. § 2C:7-1(a); N.Y. CORRECT. LAW § 168.

Yet many people do not feel the need to be protected from all the brothers and sons who expropriate sex from women without consent, nor do they likely see the need to stigmatize men who are conforming to social norms. When notification and registration laws validate the idea that rapists are uniquely dangerous it becomes much harder for everyone, from judge to juror to prosecutor to victim, to see the boy next door as a rapist.¹²⁸

There are other parts of the conservative campaign that single rapists out as uniquely dangerous and thereby undermine the feminist attempts to indict the status quo. In the 1990s, many states adopted special civil commitment procedures for sexual predators,¹²⁹ even though most of those states already had mechanisms in place that provided for civil commitment of the mentally ill.¹³⁰ This suggests (again, without any medical justification) that rapists are somehow uniquely mentally ill or, for some reason, worthy of civil commitment even in the absence of mental illness.¹³¹

Comparably, in passing Federal Rules of Evidence 413–415, which allow prior sexual offenses to be introduced in order to establish that the defendant has a sexual assaulter’s character, Congress relied on the demonstrably false proposition that rapists constitute a “small class of depraved criminals.”¹³² Not only is there no evidence that rapists are rare or depraved, the rape reform movement that preceded the tough-on-rapists

128. Consider the response of the CNN reporters discussing the verdict in the Stuebenville rape case immediately after it came down, “the most severe thing with these young men is being labeled as sex offenders.” Wemple, *supra* note 95.

129. See Wells & Motley, *supra* note 123, at 135–37.

130. See Stephen Schulhofer, *Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, with Particular Reference to Sexually Violent Predator Laws*, 7 J. CONTEMP. LEGAL ISSUES 69, 94–96 (1996).

131. In upholding sexual predator statutes, the Supreme Court indicated that states could set their own criteria for determining who should be confined civilly. *Kansas v. Hendricks*, 521 U.S. 346, 359–60 (1997).

132. See David J. Karp, *Evidence of Propensity and Probability in Sex Offense Cases and Other Cases*, 70 CHI-KENT L. REV. 15, 19–26 (1994). Mr. Karp’s views, originally expressed in a speech to the Association of American Law Schools, were referenced by the sponsors of FED. R. EVID. 413–15, Representative Susan Molinari and Senator Bob Dole. See 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari); *id.* at S24,799 (daily ed. Sept. 20, 1994) (statement of Sen. Dole). Mr. Karp served as Senior Counsel at the Office of Policy Development, U.S. Department of Justice.

campaign was premised on the notion that rape was commonplace. Many men did it; that was the problem.

What is surprising about the tough-on-rapists movement is not necessarily its success. Much of the push was initiated at the federal level, with federal funds attached, at a time when both houses of Congress were growing increasingly conservative and a Democratic president had no desire to appear soft on crime, particularly sexual crime.¹³³ What is surprising is how little resistance the tough-on-rapists movement encountered from feminists. There was minimal public opposition to these measures even though just a bit of reflection shows how much they reject the feminist insights at the core of the rape reform movement.¹³⁴ It took less than twenty years for most state legislatures to, first, override the traditional approach to rape in order to greatly expand the class of offenses that might be criminalized as sexual assault,¹³⁵ and then, second, institute unique forms of punishment that inevitably restricted the number of men whom the criminal justice system would be willing to classify as rapists. No one commented on the whiplash.

IV. AGENCY AND THE CRIMINAL LAW

The third major impediment for rape reform grew out of the delicate relationship between victim injury, victim agency and the criminal law. This Part demonstrates how rape's injury is exceedingly difficult to predict, as it more often dependent on a victim's psychological and cultural understanding of sex, than on an objective understanding of force or threat. Moreover, many victims appear to have both the power and desire to try to minimize their injury. Their desire to do this is magnified by

133. Democratic President Bill Clinton had a notorious reputation as a "womanizer," and was almost impeached for lying about the sexual affair he had with a White House intern. *See generally* RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 1 (1999) (discussing the conduct and subsequent impeachment of President Clinton).

134. Kristin Bumiller later wrote about the uncomfortable alliance between some mainstream feminists and conservative crime-control advocates, *see* KRISTIN BUMILLER, IN AN ABUSIVE STATE: HOW NEOLIBERALISM APPROPRIATED THE FEMINIST MOVEMENT AGAINST SEXUAL VIOLENCE (2008), but there was little public outcry and virtually no mobilization of the political forces that pushed the initial rape reforms. For a discussion of the tensions between the tough-on-rapists movement and feminism insights, *see generally* Baker, *supra* note 26, and Wells & Motley, *supra* note 123.

135. *See supra* text accompanying notes 21–23.

a criminal law process that requires them to abdicate their own agency and subject themselves to relentless critiques of their sexual experience. Finally, the criminal law requires victims to label their friends, acquaintances and friends of acquaintances as rapists and indict the status quo in which they all live. It appears to be much easier for many victims to just not bother.

A. VICTIM INJURY AND AGENCY

The history of the law's treatment of rape, discussed in Part I, suggests that there still may not be consensus on how, why and when rape victims are injured. In certain situations, most obviously in paradigmatic violent stranger rape scenarios, everyone agrees that there is victim injury. Professor Rubinfeld suggests that injury comes from the invasion of the victim's right to self-possession;¹³⁶ the liberal view suggests that it comes from the interference with the victim's autonomy because it involves a nonconsensual touching of a physiologically and emotionally meaningful part of the body;¹³⁷ the Model Penal Code, though not clear on what the injury from rape is, at least makes clear that rape's injury is unique.¹³⁸ "Offensive Touching" under the Code is treated as its own crime, completely distinct from battery, which must involve "physical injury."¹³⁹ Other contemporary commentators have argued that the best legal framework for conceptualizing rape is larceny; rape is kind of theft, though not—as it was for the Romans—from the husband or father, but from the woman herself.¹⁴⁰

Because so much of rape's injury stems from the sexual nature of the act, not the physical harm with which most of the

136. See *supra* text accompanying notes 42–47.

137. See SCHULHOFER, *supra* note 20.

138. See LAFAVE, *supra* note 17, at 860.

139. See *id.* ("The modern approach, as reflected in the Model Penal Code, is to limit battery to instances of physical injury and cover unwanted sexual advances by other statutes."); ALI Draft, *supra* note 23 (adopting the approach to distinguish sexual offenses from other batteries).

140. Richard Posner at one time championed the commodification framework as the best way to think about rape. See RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 202 (3d ed. 1986); see also Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1805 (1992) (suggesting that "we once again think about rape as an offense against property"); Yung, *supra* note 39 (manuscript at 34) (interpreting and endorsing various other commentators whom he says have argued that "rape is essentially the theft of sex").

law of battery is concerned,¹⁴¹ rape's injury is exceedingly difficult to measure. This hardly makes it trivial or unworthy of criminal protection, but it does mean that rape's injury is likely to be highly subjective. It explains why so little of rape's injury can be predicted by the nature of the act and so much depends on the belief structures of the victim and those around her.¹⁴² As Professor Gowri Ramachandran argued in response to Professor Rubinfeld, much of rape's injury is related to the "cultural valence" of sex.¹⁴³ That cultural valence is necessarily contingent on individual psychological factors and social norms.

Most feminists writing about the injury of rape have emphasized the relationship between rape and fear. Lynne Henderson, bravely describing her own rape, explains that rape involves the "phenomenological harm of thinking you are experiencing your own death."¹⁴⁴ Michelle Anderson introduces one of her articles with a vivid account of a thirteen-year-old girl, frozen with fear, being "non-violently" raped by a sixteen-year-old neighbor.¹⁴⁵ Robin West argues that "[t]he experience of rape . . . [involves] fear for one's own imminent death, and the pain of nonconsensual physical touching."¹⁴⁶

West and Henderson both also suggest that rape's injury involves a kind of psychological harm that is distinct from fear. West uses the phrase "spiritual murder."¹⁴⁷ Henderson uses the

141. See LAFAVE, *supra* note 17, at 860.

142. In rejecting Professor Rubinfeld's self-possession theory, Professor Gowri Ramachandran argues that "Rubinfeld's self-possession concept ignores that sex is particularly meaningful in both good and bad ways, for reasons beyond the possession of one partner's body by the other. The reasons sex is special range from its unique long-term physical risks (pregnancy and disease) to its cultural valence." Ramachandran, *supra* note 46, at 375; see Amy L. Brown & Maria Testa, *Social Influences on Judgments of Rape Victims: The Role of the Negative and Positive Social Reactions of Others*, 58 SEX ROLES 490, 496-97 (2008) (reporting on the variety of factors, including sex-role socialization, acceptance of rape myths (in both the victim and the victim's community), as well as the availability of primary and secondary social support networks as having a significant effect on victim injury).

143. Ramachandran, *supra* note 46, at 375.

144. Lynne N. Henderson, *What Makes Rape a Crime?*, 3 BERKELEY WOMEN'S L.J. 193, 227 (1987).

145. Anderson, *supra* note 31, at 1401-02.

146. Robin West, *Sex, Law, and Consent*, in THE ETHICS OF CONSENT: THEORY AND PRACTICE 221, 232 (Franklin G. Miller & Alan Wertheimer eds., 2010).

147. Robin L. West, *Legitimizing the Illegitimate: A Comment on Beyond Rape*, 93 COLUM. L. REV. 1442, 1447 (1993).

phrase “soul murder.”¹⁴⁸ Janet Halley understands this depiction of rape’s harm as involving a “breakdown of selfhood.”¹⁴⁹

Social science data confirms that rape can be incredibly injurious psychologically. “[R]ape is one of the most severe of all traumas, causing multiple, long-term negative outcomes.”¹⁵⁰ Between 17% and 65% of female rape victims with a lifetime history of sexual assault develop post-traumatic stress disorder (PTSD); between 13% and 51% of rape victims are clinically depressed; between 12% to 40% suffer from anxiety.¹⁵¹ Many rape survivors develop dependencies on alcohol or other illicit substances.¹⁵²

The severity of these injuries does not depend on whether the perpetrator was a stranger.¹⁵³ Some studies suggest that victims of stranger rapes recover sooner and have lower levels of psychological distress than victims of acquaintance rape.¹⁵⁴ Other studies find that stranger rapes and partner rapes (as opposed to acquaintance rapes) may produce the most severe PTSD,¹⁵⁵ while acquaintance rapes produce higher levels of self-blame.¹⁵⁶

The amount of force used is not necessarily predictive of injury either. Some studies have found a correlation between force used in rape and post-assault distress,¹⁵⁷ but others have not.¹⁵⁸ The relationship between violence and trauma may be curvilinear, with victims of very high levels and very low levels

148. Henderson, *supra* note 144, at 225.

149. JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 63 (2006).

150. Rebecca Campbell et al., *An Ecological Model of the Impact of Sexual Assault on Women’s Mental Health*, 10 TRAUMA VIOLENCE & ABUSE 225, 225 (2009).

151. *Id.* at 225–26 (citing multiple studies).

152. *Id.*

153. *Id.* at 232 (citing studies).

154. B. Katz, *The Psychological Impact of Stranger vs. Nonstranger Rape on Victim’s Recovery*, in ACQUAINTANCE RAPE, *supra* note 27, at 267.

155. See Campbell et al., *supra* note 150, at 232 (citing studies).

156. Bonnie L. Katz & Martha R. Burt, *Self-Blame in Recovery from Rape*, in RAPE AND SEXUAL ASSAULT II 151, 162 (Ann Wolbert Burgess ed., 1988).

157. Sarah E. Ullman & Judith M. Siegal, *Victim-Offender Relationship and Sexual Assault*, 8 VIOLENCE & VICTIMS 121, 129 (1993); I. T. Bownes et al., *Assault Characteristics and Posttraumatic Stress Disorder in Rape Victims*, 83 ACTA PSYCHIATRICA SCANDINAVIA 27, 27 (1991).

158. See Dean G. Kilpatrick et al., *Factors Predicting Psychological Distress Among Rape Victims*, in TRAUMA AND ITS WAKE 113, 131 (Charles R. Figley, ed., 1984); Beverly M. Atkeson et al., *Victims of Rape: Repeated Assessment of Depressive Symptoms*, 50 J. CONSULTING & CLINICAL PSYCHOL. 96, 101 (1982).

the most traumatized.¹⁵⁹ Given these divergent findings, it is not particularly surprising that a literature review concludes that the “mental health consequences of rape are caused by multiple factors beyond characteristics of . . . the assault.”¹⁶⁰ In other words, there may be no correlation between the kind of rape or the perceived culpability of the defendant, and the harm inflicted on the victim.¹⁶¹

One factor that has been found to decrease both the risk of injury and the likelihood of rape is resistance. Michelle Anderson reports that contrary to what some reformers argued about the futility of resistance, resistance is effective in reducing rape, while not increasing the chance of injury.¹⁶² Passive, non-resisting victims are especially likely to blame themselves,¹⁶³ and self-blame is a significant factor in the extent of a rape victim’s injury.¹⁶⁴ Studies indicate that self-blame decreases the rate of a victim’s recovery, increases the chance of PTSD, and lessens the likelihood that the victim will report the crime or seek help for her injuries.¹⁶⁵ One study of the effectiveness of rape resistance found that, during the attack, women who avoided rape were thinking about avoiding rape, while most rape victims were thinking about avoiding death.¹⁶⁶

Professor Anderson does not argue for the reinstatement of the resistance requirement, only for the recognition that wom-

159. See Garrison, *supra* note 61, at 624 (citing studies).

160. Campbell et al., *supra* note 150, at 238.

161. The criminal law is accustomed to situations in which the culpability of the perpetrator is directly proportional to the harm done the victim.

162. Michelle Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 983, 985 (1998).

163. *Id.* at 988.

164. See Katz & Burt, *supra* note 156, at 160 (asserting that self-blame is a significant component of injury). It is important to note that self-blame is often dependent on a host of factors that have absolutely nothing to do with the incident itself. Traditional gender attitudes and rape myth acceptance are strongly correlated with how much individuals blame the victim and the more others blame the victim, the more likely she is to blame herself. See Brown & Testa, *supra* note 142, at 496.

165. Anderson, *supra* note 162, at 989.

166. PAULINE B. BART & PATRICIA H. O'BRIEN, STOPPING RAPE: SUCCESSFUL SURVIVAL STRATEGIES 110–11 (1985). This finding begs questions about the injury of rape, though it also might reflect the wisdom of victims. Victims who believe their lives to be at stake would rather be raped than killed, so they do not resist. For further discussion of Professor Henderson’s explanation of rape’s injury, see Henderson, *supra* note 102 (stating that victims fear murder). For other victims who do not sense that their life is at stake, it is worth resisting rape.

en should—for their own sake—be taught to resist. They are less likely to feel injured if they do.¹⁶⁷ One way to resist being a rape victim—the way Anderson describes—is to fight the man off with fists and knees and teeth and screams. Another way is to resist the definition of rape. “Research has consistently found that a large percentage of women—typically over 50%—who have experienced vaginal, oral or anal intercourse against their will label their experience as something other than rape.”¹⁶⁸

Mary Koss interviewed victims of stranger rape: 55% of them considered it rape, 15% thought it was a crime different than rape and 8% did not believe they were victimized.¹⁶⁹ In her study of twenty-seven young women who had sexual experience that involved force or coercion, Lynn Phillips found that the vast majority did not label their experience as abuse or victimization.¹⁷⁰ Regardless of what they were told the legal definition of rape is, subject participants let their own understanding of rape dictate what they were willing to label as rape.¹⁷¹ When asked whether they have ever experienced a given situation, and that situation is described with the statutory definitions of rape instead of the term “rape” itself, women report a rate of victimization that is eleven times greater than when the word rape is used.¹⁷²

Consider the following quotes, all taken from women describing what they labeled as a “bad hook-up” experience.

167. Anderson, *supra* note 162, at 982.

168. Arnold S. Kahn et al., *Calling It Rape: Differences in Experiences of Women Who Do or Do Not Label Their Sexual Assault as Rape*, 27 *PSYCHOL. WOMEN'S Q.* 233, 233 (2003).

169. Mary P. Koss et al., *Stranger and Acquaintance Rape: Are There Differences in the Victim's Experience*, 12 *PSYCHOL. WOMEN Q.* 1, 6 (1988).

170. LYNN M. PHILLIPS, *FLIRTING WITH DANGER: YOUNG WOMEN'S REFLECTIONS ON SEXUALITY AND DOMINATION* 196 (2000).

171. Heather Littleton et al., *Risky Situation or Harmless Fun? A Qualitative Examination of College Women's Bad Hook-up and Rape Scripts*, 60 *SEX ROLES* 793, 802 (2009) [hereinafter *Risky Situation*]; see also Heather Littleton et al., *Rape Acknowledgement and Post Assault Behaviors: How Acknowledgement Status Relates to Disclosure, Coping, Worldview and Reactions Received from Others*, 21 *VIOLENCE & VICTIMS* 761, 762 (2006) [hereinafter *Rape Acknowledgement*] (stating students resist adopting a definition of rape that is inconsistent with what their “rape script” tells them rape is).

172. Leah E. Adams-Curtis & Gordon B. Forbes, *College Women's Experiences of Sexual Coercion: A Review of Cultural, Perpetrator, Victim and Situational Variables*, 5 *TRAUMA VIOLENCE & ABUSE* 91, 98 (2004).

*I was trapped at a party. I wanted to get out of there.*¹⁷³

*He just mauled me in my drunken stupor. I wanted to cry and throw up. I felt used.*¹⁷⁴

*He forced sex on me when I was obviously disinterested. I just wanted it to be over.*¹⁷⁵

*He didn't respect my requests. He used me for his own physical pleasure.*¹⁷⁶

*I wouldn't say no, but I wouldn't say yes either. So I was passive and he's kind of a forceful guy.*¹⁷⁷

*[They] took advantage [that] I was wasted. I felt horrible and used and experienced pain for days.*¹⁷⁸

One could conclude, as Professor Rubinfeld presumably would, that because the men involved in these incidents did not use force to get sex, these women were not raped.¹⁷⁹ One could conclude, using Lynne Henderson's reflections, that these women were not raped because they did not experience the "phenomenological harm of thinking [they] were experiencing [their] own death."¹⁸⁰ If one uses the affirmative consent standard developed in some states¹⁸¹ and often adopted by universities for their codes of conduct,¹⁸² all of these women could be considered

173. Elizabeth L. Paul & Kristen A. Hayes, *The Causalities of Casual Sex: A Qualitative Exploration of the Phenomenology of College Students' Hookups*, 19 J. SOC. & PERS. RELATIONSHIPS 639, 654 (2002).

174. *Id.*

175. *Id.* at 655.

176. *Id.* at 657–58.

177. Laina Y. Bay-Cheng & Rebecca K. Eliseo-Arras, *The Making of Unwanted Sex: Gendered and Neoliberal Norms in College Women's Unwanted Sexual Experiences*, 45 J. SEX RES. 386, 394 (2008).

178. See Paul & Hayes, *supra* note 173.

179. Indeed, Professor Rubinfeld would probably argue that the victims in the studies understood what "rape" is, while the reformers and legislators who changed so many legal definitions did not. See *supra* text accompanying notes 42–47.

180. Henderson, *supra* note 144.

181. See *supra* text accompanying notes 34–37.

182. Many universities already require an affirmative consent standard. See, e.g., Office of the Dean of Students, *Sexual Misconduct at the University of*

victims of rape or sexual assault. If one used the moderate definition of force, like the one used by the judge in *John Z.*,¹⁸³ these women would probably also be rape victims.

Research with college-age populations has found that in incidents like those just described, women:

did not believe they were personally at risk and they attributed their undesired sex not to the man's pressure or force but to their own lack of ability to think clearly or resist. . . . These women seem to have presumed that men are going to have sex with a woman unless the woman forcefully resists, and her inability to resist meant to [them] that what happened was not rape.¹⁸⁴

Comparably, Professors Laina Bay-Cheng and Rebecca Eliseo-Arras have argued that the "neoliberal" rhetoric of "self-determination and personal responsibility . . . lead[s] women to blame themselves for unwanted sex."¹⁸⁵

Professor Michelle Oberman and I have recently argued that women help protect themselves against rape's injury by constructing away the crime.¹⁸⁶ Raised to believe they have sexual agency even if research continues to confirm that they do not usually exercise it, young women today would rather see their failure to resist as an affirmative act that resulted in unwanted sex, than see his failure to stop as the affirmative act that resulted in rape. Women's understanding of their own agency may help diminish any injury: "Perhaps the spirit is not murdered if women interpret their decision not to fight back, to get it over with, to let it happen, as a kind of control that keeps their souls intact."¹⁸⁷

Given that rape's injury is so dependent on the psychological and cultural construction of sex, there are powerful reasons to resist thinking of oneself as having been raped. People "regard[] rape as a potentially life-altering experience that has a

Oregon, UNIV. OF OR. (2013), <https://uodos.uoregon.edu/StudentConductandCommunityStandards/SexualMisconduct.aspx>; *Student Manual: University Policies & Regulations*, UNIV. OF CHI. 8, http://studentmanual.uchicago.edu/sites/studentmanual.uchicago.edu/files/uploads/StudentManual_2014-15%20updated%20032615.pdf (last visited Oct. 17, 2015); *Yale University Sexual Misconduct Scenarios*, YALE UNIV. (Sept. 9, 2013), <http://smr.yale.edu/sites/default/files/files/Sexual-Misconduct-Scenarios.pdf>.

183. See Oberman, *supra* note 90, at 387.

184. Arnold S. Kahn et al., *Calling It Rape*, 27 *PSYCHOL. WOMEN'S Q.* 233, 240 (2003).

185. Bay-Cheng & Eliseo-Arras, *supra* note 177, at 388.

186. See generally Baker & Oberman, *supra* note 32 (examining sexual agency of young women).

187. *Id.* at 47.

persistent and perhaps life-long negative impact.”¹⁸⁸ Professor Anderson quotes one resister, who was physically injured while she resisted, but who avoided being raped: “[T]hank goodness he broke my jaw instead of raping me. I like my sex life. I didn’t want my sex life screwed up. A broken jaw is easy to deal with.”¹⁸⁹

Can one help oneself avoid a “screwed up” sex life and “life-long negative impacts” by interpreting a past event as within one’s control even if one did not feel in control at the time?¹⁹⁰ If one has not been raped, one does not necessarily have to blame oneself for letting the rape happen. One might blame oneself for getting too drunk, or having sex one didn’t want, but the extent and severity of the blame are likely different—precisely because rape is socially understood as more traumatic than that. If one can avoid life-altering injury by interpreting away the crime, isn’t that a particularly effective form of resistance?

Recall the rape reform movement’s desire to give women voice, to respect women’s decision-making capacity and prevent the law from assuming her consent. In order to do that, rape laws were re-written to allow for rape convictions even if women did not exercise agency or make a clear decision. The laws were designed to incorporate the reality of women’s passivity, but many contemporary women reject that depiction of themselves. Whether they act passively or not, they do not want to see themselves or have others see them as passive.

The irony here is striking. Potential rape victims are—in fact if not in law—resurrecting the resistance requirement, the one traditional element of the crime that no one defends on theoretical grounds. In their own minds, they were not raped because they had the ability to resist and chose not exercise it. In cases where one is not phenomenologically experiencing one’s own murder, believing in one’s own agency may be the best resistance strategy there is.

188. *Risky Situation*, *supra* note 171, at 801.

189. Anderson, *supra* note 162, at 984. Rape victims are more likely than the rest of the population to experience fear of sex and arousal dysfunction. See Patricia A. Resick, *The Psychological Impact of Rape*, 8 J. INTERPERSONAL VIOLENCE 223, 232–33 (1993). These studies assume that someone identifies as a rape victim.

190. At least one study has found that victims’ conceptualization of the assault can be influenced by experiences after the assault. See *Rape Acknowledgment*, *supra* note 171, at 774.

This re-envisioning of the event may not work in the long term. Given the psychological nature of rape's injury, even women who attempt to construct away their injury may still have life-altering consequences. At least one study concluded that "[b]oth unacknowledged and acknowledged victims [of forced, unwanted or incapacitated sex] reported elevated psychological distress, damage to their worldview, and engaging in extensive coping efforts."¹⁹¹ These injuries often manifest themselves later, after memories have faded and many people have moved on. The idea of pursuing the assailant after so much time has passed is even more difficult than pursuing him directly after the assault.

B. VICTIM AGENCY AND THE CRIMINAL PROCESS

Even for women who do not try to re-envision the event so as to give themselves more agency, the importance of reclaiming their sense of agency can explain why they do not turn to the criminal law for prosecution. By invoking the criminal regime designed to protect them, rape victims can make their injury worse.

A woman who reports as a rape victim is usually taken first to medical authorities who scrutinize her story for possible medical implications. Then she is confronted by police who must scrutinize her story to determine whether they should proceed. If she is convincing enough for the police, she is taken to the prosecutor, who—as the General Sinclair saga undoubtedly shows—must scrutinize her story to determine whether it is an appropriate one for prosecution. And, if it is an appropriate one for prosecution, she must be prepared to tell her story, again and again and again, publicly. She must arm herself against an onslaught of (perfectly appropriate) attacks on her credibility by the defense team, and ultimately surrender the decisions about how her story gets told to the prosecuting attorneys, who take command of the case. It is hard to imagine a process more potentially damaging to one's agency.

Women who choose not to press charges may realize how injurious the process itself is likely to be and allow that to guide their decision. Studies confirm that women who pursue criminal prosecution suffer from more self-doubt and self-blame

191. *Id.*

than those who do not.¹⁹² And it is self-doubt and self-blame that are associated with greater PTSD. Winning at trial does not necessarily alleviate the injury. The victim in *John Z.* was devastated by the trial,¹⁹³ and the victim in the Steubenville case was ostracized.¹⁹⁴

In sum, there are a multitude of reasons why victims may be resistant to acknowledging they were raped and/or using the criminal process designed to redress their injury. If one sees oneself as a victim, one acknowledges a powerlessness and a lack of control. One has failed to be the agent one wants to be. If one experiences the act as traumatic, regardless of how empowered one felt during it, the healthiest response may be to block out the specifics of the crime.¹⁹⁵ This makes many victims bad witnesses. To become a better witness, indeed, to make it at all possible for the criminal justice system to vindicate their injuries, they must re-live the traumatic incident, over and over again, and have their interpretation of the events subject to constant scrutiny by allies, foes and theoretically neutral strangers.

Feminist and other critics of the law's treatment of rape have maintained for years that entrenched misogyny and patriarchy lead to police unfounding¹⁹⁶ cases, prosecutors refusing to prosecute cases and defense counsel being given liberty to torment victims on the stand.¹⁹⁷ That critique may have merit, but even if reformers were able to dislodge all that misogyny and patriarchy, the context in which most acquaintance rape happens, the means of establishing facts at trial, and the protections that our system must afford criminal defendants inevitably result in a process for rape enforcement that is likely to

192. See Patricia Yancey Martin & R. Marlene Powell, *Accounting for the "Second Assault": Legal Organizations' Framing of Rape Victims*, 19 L. & SOC. INQUIRY 853, 856 (1994) (citing various studies showing that "prosecution per se harms victims") One of these studies showed "that women whose cases were prosecuted were less well off psychologically six months after the rape than were those whose cases were not prosecuted." *Id.*

193. See Oberman, *supra* note 90, at 397.

194. See Macur & Schweber, *supra* note 95, at D7 (observing that the victim has been ostracized by the community).

195. See Garrison, *supra* note 61.

196. Police "unfound" cases when they determine that the victims' accounts are not credible enough. See Schafran, *supra* note 98.

197. See *supra* note 98.

exacerbate the unique psychological injuries that rape victims suffer.¹⁹⁸

C. VICTIM INJURY AND BLAME

It is not only themselves that rape victims want to protect when they resist the label rape. Victims are often uncomfortable labeling the men who were negligent, recklessly indifferent with regard to consent, or even a bit forceful, as rapists. Over the last twenty years there has been extensive academic theorizing on the appropriate mens rea for rape,¹⁹⁹ but the only decision maker that really matters in this inquiry is the victim. If she does not see the man as culpable, she will not label what happened to her as rape. Consider the comments of one college student: “there were reasons these guys were led to believe I would do those things.”²⁰⁰ Of course there were reasons that “those guys” thought they could do what they did. Everyone was following the sexual scripts that rape reform tried to rewrite. Everyone had learned that her not saying no was permission for him to go forward. The law can try to revoke that permission, but if individuals still internalize the script, victims are not going to feel comfortable charging “those guys” with rape.

The tough-on-rapists movement described in Part III makes the idea of labeling such incidents as rape all the more difficult. What does it say about the women who might report rape if by doing so they are saying that they, and probably their friends, enjoyed socializing with, and often having consensual sex with, the kind of deviant psychopaths whom we single out for stigmatizing treatment because they are rapists?

Champions of the force requirement might use women’s reluctance to blame men as proof that rape requires force. As a

198. See *supra* Part II.

199. See also Schulhofer, *supra* note 37, at 279–86 (discussing approaches to negligence in rape trials). Compare ESTRICH, *supra* note 46, at 96–98 (advocating for a negligence standard), with LAFAVE, *supra* note 17, at 899 (“The severe penalties imposed for [sexual assault] . . . and the serious loss of reputation following conviction make it extremely unlikely that the Legislature intended to exclude as to those offenses the element of wrongful intent.”). For a comprehensive look at how incoherent and non-transparent the law with regard to mens rea for rape is and the interaction between statutory prescriptions and judicial determinations, see Robin Charlow, *Bad Acts in Search of a Mens Rea: Anatomy of Rape Law*, 71 FORDHAM L. REV. 263 (2002).

200. Bay-Cheng & Eliseo-Arras, *supra* note 177 (describing perceived reasons for unwanted sexual experiences).

theoretical matter, that reasoning is tautological; but as a practical matter, it is irrefutable. Women's reluctance to blame men for rape comes from the lingering cultural confusion over what rape is. If everyone came to view the traditional sexual scripts as pernicious and outdated, like the rule of thumb for domestic violence,²⁰¹ it would be much easier to blame men for proceeding without consent. If people thought about consenting to sex the way we think about consenting to a medical procedure, that is, if people recognized that the decision of whether to go forward is firmly vested in the person to be touched and invaded, not in the doctor who may really want to operate, then the women who currently resist blaming men would likely be much more willing to do so. If rape reform had succeeded in dismantling the old scripts, victims would likely see what "those guys" did as "bad enough" to be willing to blame them.²⁰²

As a practical matter, however, the power to expand the scope of behavior that can be defined as rape is inevitably in the hands of victims. If they believe in male entitlement, they will not be willing to punish the men who are just pursuing that to which they are entitled. As one of Elizabeth Paul's college subjects said, perhaps not even realizing the power that she had to make law and social meaning, "[w]hen you blame it on the other person, it sounds *rapish*."²⁰³ And if you choose not blame it on someone else, it will not be rape.

V. THE PROMISE OF TITLE IX

A. ANOTHER CRIMINAL ATTEMPT

The draft changes to the Model Penal Code, circulated by the American Law Institute last year, attempt to deal with the failure of rape reform to change the norm of male entitlement to sex by proposing not only more gradations in kinds of felony

201. See U.S. COMM'N ON CIVIL RIGHTS, UNDER THE RULE OF THUMB, BATTERED WOMEN AND THE ADMINISTRATION OF JUSTICE, 2 (1982), <http://www.law.umaryland.edu/marshall/usccr/documents/cr12w8410.pdf> (explaining the traditional rule that permitted a husband to beat his wife with any rod no wider than his thumb).

202. Rubinfeld argues that many coercive and deceitful sexual acts short of what he calls rape are not "that bad." See Rubinfeld, *supra* note 6, at 1416.

203. Elizabeth Paul, *Beer Goggles, Catching Feelings, and the Walk of Shame: The Myths and Realities of the Hookup Experience*, in RELATING DIFFICULTY: THE PROCESS OF CONSTRUCTING AND MANAGING DIFFICULT INTERACTION 141, 148 (D. Charles Kirkpatrick et al. eds., 2006).

sexual assault crimes, but also a new misdemeanor, § 213.4, called “Sexual Intercourse without Consent.”²⁰⁴ Section 213.4 is an “embrace of an affirmative-consent requirement.”²⁰⁵ It makes clear that no one should feel entitled to sex unless one’s partner gives clear indications of consent. According to the drafters, by making a misdemeanor of going forward in the absence of consent, § 213.4 reflects “the increasing recognition that sexual assault is an offense against the core value of individual autonomy, the individual’s right to control the boundaries of his or her sexual experience, rather than a mere exercise of physical dominance.”²⁰⁶ By lessening the severity of the crime, from a felony to a misdemeanor, the drafters also probably hoped to make it easier for women to come forward to blame perpetrators.

While § 213.4 is certainly well-meaning, this Article—particularly when filtered through the politics of modern criminal law enforcement—suggests that the adoption of this new misdemeanor will do little to change the norm of male entitlement to sex. There may be convictions under § 213.4, but they will likely be plea deals or trial verdicts that represent a compromise in a case that was really about force. No one will see what change is arguably necessary before the norm of male entitlement to sex can change: the law punishing nonconsensual sex qua nonconsensual sex.

Prosecutors do not like to lose. Their professional future, and an efficient allocation of their department’s resources, depend on them accumulating convictions at trial.²⁰⁷ Money spent on a lost trial is wasted money. Thus, prosecutors will often take a plea to a misdemeanor over a chance of an acquittal at trial. Imagine again the General Sinclair case, but with no lies about a cell phone and with an allegation of more force—perhaps he really did pin her arms against her back or choke her as he forced her mouth to his penis. As discussed in Part II, even this “better” case will be exceedingly difficult to prove. It simply would not be that hard for a defense team to sow the seeds of reasonable doubt. In any standard prosecution, i.e., not one being scrutinized by the national media because the mili-

204. See ALI Draft, *supra* note 23, § 213.4, at 67.

205. See *id.* § 213.4 cmt., at 68.

206. *Id.*

207. “Defeats at trial are costly for prosecutors, both because trials are costly and because defeats are salient—they are relatively rare . . . and hence vivid, both to prosecutors and to the public.” Stuntz, *supra* note 103.

tary has gotten into so much trouble for not taking rape seriously,²⁰⁸ the prosecution will know just how easily the defense can create doubt and escape prosecution. They will take a plea to the misdemeanor. And without a realistic possibility of a conviction based on force, defendants will have little reason to even plead to the misdemeanor.

Unlike the standard legislative expansion of criminal law, which involves the enactment of a new law that is easier to prove than the real crime it is targeting,²⁰⁹ the addition of § 213.4 will not create an offense that is any easier for the prosecution to prove. Therefore it is very unlikely that prosecutors will bring cases under § 213.4 alone. Consider the late Professor William Stuntz's example of the relationship between the crime of burglary and the crime of possessing burglar's tools.²¹⁰ Stuntz suggested that legislators enacted the second, lesser crime to allow for prosecutions when it was too hard to establish guilt for the target crime of burglary (because proving burglary requires proving intent to commit burglary, which is difficult). More uniformly, Stuntz argued that when the elements of a target crime are ABC, legislators often enact a new crime, AB, which lets prosecutors choose whether to prosecute based on their sense of C, regardless of whether they can prove C.²¹¹ Hence, in reality, prosecutors are only likely to prosecute for possession of burglar's tools when they think that the defendant actually did intend to commit burglary.

The relationship between § 213.4 and the felony sexual assault provisions will not operate in the same way. It will be no easier to prove sex without consent than it is to prove sex with force. Indeed, it may be more difficult. The traditional definition of rape required "(A) carnal knowledge of a woman, . . . (B) through force, and (C) against her will."²¹² The most serious sexual assault offenses still usually require (A) "an act of sexual intercourse (B), secured through "physical force . . . or . . . threat of physical force."²¹³ Section 213.4 suggests that B is not

208. See Blinder & Opper, *supra* note 70.

209. See Stuntz, *supra* note 103, at 537.

210. See *id.* at 538.

211. *Id.* at 519.

212. See LAFAVE, *supra* note 17, at 891.

213. See, e.g., ALI Draft *supra* note 23, § 213.1, at 1.

always necessary. Thus there is a crime in AC, not only in ABC or AB.²¹⁴

Section 213.4 embodies the rape reformer ideal, but eliminating B does not make the prosecutors' proof any easier. Proving B (force) has always established C (lack of consent), but proving C on its own, as discussed above, is incredibly difficult. It is not at all akin to proving the possession of burglar's tools. There is little reason to presume that prosecutors will believe they can win a conviction for AC any more easily than they could win a conviction for AB or ABC.

Thus, there is little reason to believe that prosecutors will ever bother to try a § 213.4 case on its own, without some sort of threat of a more serious conviction as well. AC cases will be too hard to win and the payoff, because it is only a misdemeanor, will be small. No prosecutor will bother. This means that notwithstanding the potential symbolic effect of criminalizing sex without consent,²¹⁵ no one will see the criminal law punishing sex without consent, because prosecutors will not prosecute the crime. The criminal law will not be effective in shifting the norm of male entitlement to sex.

B. THE CIVIL LAW DIFFERENCE

The Department of Education's (DOE) recent campaign to recast sexual assault as a problem of sex discrimination, not necessarily a problem of criminal law enforcement, minimizes most of the impediments to rape reform identified above. Everyone's perspective and incentives can change once sexual assault is seen as a campus-wide behavioral problem, the responsibility for which resides with the university. For it to work, though, everyone must understand that the campus process is not necessarily convicting "rapists." Campus tribunals should not present themselves as criminal courts, and they should

214. Reformers also argued that rape could involve many forms of nonconsensual sexual activity in addition to "carnal knowledge." See *supra* text accompanying note 24.

215. Oberman and I have endorsed keeping the "baseline of no" laws even if they are primarily symbolic because that symbolism sends an important message about the importance of mutuality in sex. See Baker & Oberman, *supra* note 32. Stuntz notes that the symbolic effect of a norm-pushing law that is not prosecuted may cut in opposite directions. On the one hand, establishing a crime of nonconsensual sex may send an important message about what the state views as wrong. On the other hand, seeing the state never enforce that crime "might send precisely the opposite message." Stuntz, *supra* note 103, at 521.

fight any outside attempts to construe them as such. As Catharine MacKinnon understood twenty-five years ago, when so many women feel violated by behavior that conforms to established norms, the problem is that women are raped, “but not by [] rapist[s].”²¹⁶ University procedures must focus more on helping the women who are hurt than on punishing the men as rapists.

1. The Problems Avoided

a. *Underenforcement*

With a civil, intra-university regime, there will not be the same disincentive problems, just discussed, with bringing sexual assault cases at the margins that involve non-consent without force. Unlike criminal prosecutors who have to worry about their own careers if they prosecute a hard-to-win case that results in an acquittal, the DOE has made clear that universities have to worry about the opposite problem. “Regardless of whether a harassed student . . . files a complaint under the school’s grievance procedures . . . a school that knows, or reasonably should know, about possible harassment must promptly investigate to determine what occurred and then take appropriate steps to resolve the situation.”²¹⁷ Unlike prosecutors, whose decisions not to prosecute routinely escape any kind of scrutiny,²¹⁸ the DOE articulates a plan to scrutinize all decisions not to prosecute.²¹⁹ Indeed, a decision not to prosecute is likely to be subject to more vigorous questioning than an investigation that ended in acquittal, because at least the latter result suggests that the university is taking the potentially discriminatory situation seriously. Moreover, universities have very broad discretion to craft behavioral standards as they choose; thus they can prohibit behavior that the state, through the criminal law, could not prohibit.²²⁰

216. See MACKINNON, *supra* note 117.

217. U.S. DEP’T OF EDUC., OFFICE OF CIVIL RIGHTS, DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE BACKGROUND, SUMMARY AND FAST FACTS 4 (2011) [hereinafter DEAR COLLEAGUE LETTER].

218. See Stuntz, *supra* note 103, at 547–48 (noting prosecutors’ freedom not to prosecute and the likelihood that they won’t prosecute a sympathetic defendant).

219. See DEAR COLLEAGUE LETTER, *supra* note 217, at 19.

220. See *Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238, 244 (D. Vt. 1994) (noting that the university could punish an offense of “disrespect for persons” even if it did not believe the student was guilty of rape); *Holert v.*

b. *Burden of Proof*

The DOE has made the determination that universities must use a preponderance of the evidence standard, not the criminal standard or even a clear and convincing evidence standard, in adjudicating matters of sexual assault and coercion.²²¹ An environment in which men feel free to remain indifferent to women's feelings and desires is an environment in which women are not likely to feel that they are being treated with the equal respect and dignity that Title IX requires.²²² Women are entitled to redress if they can prove that men's entitlement to nonconsensual sex has an injurious and discriminatory effect on their learning environment. Women do not have to show bodily injury or psychological trauma in order to make a compelling claim that the way men are treating them is demeaning and having a detrimental effect on their educational environment. Women can prove that by showing, by a preponderance of the evidence, that men continue to disregard their consent when engaging in sex.

What women are not necessarily entitled to under Title IX is the imposition of any kind of criminal conviction or criminal sanction on the perpetrator. But universities need not—and indeed should not—conflate their internal disciplinary procedures with criminal proceedings. Precisely because discrimina-

Univ. of Chi., 751 F. Supp. 1294, 1301 (N.D. Ill. 1990) (explaining that though cleared of criminal harassment charges, complainant could still be expelled from the university for harassing behavior in violation of the university's own standards); Paul E. Rosenthal, *Speak Now: The Accused Student's Right To Remain Silent in Public University Disciplinary Proceedings*, 97 COLUM. L. REV. 1241, 1245–46 (1997) (noting universities have discretion to institute their own moral and ethical requirements for conduct).

221. In its Dear Colleague Letter, issued on April 4, 2011, the Department of Education explained that it believes that discrimination doctrine requires that schools use a preponderance of the evidence standard, not beyond a reasonable doubt or a clear and convincing evidence standard for establishing sexual harassment or violence. DEAR COLLEAGUE LETTER, *supra* note 217, at 10–11. A higher standard of proof would likely result in discrimination because women who were assaulted, but could only establish it with 55% or 65% certainty, for instance, would not be able to secure any redress. *See id.*

222. *See* U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS OR THIRD PARTIES ii (2001) <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>, (detailing the compliance standards the DOE uses to enforce Title IX and explaining that Title IX prohibits harassing conduct that “interfere[s] with a student’s academic performance and emotional and physical well-being,” and that “[p]reventing and remedying sexual harassment in schools is essential to ensuring a safe environment in which students can learn”).

tion requires a lesser standard of proof, it would be unfair to the accused to have a university disciplinary action be treated as a determination of criminality. It is not. It is a finding of discriminatory treatment that should not bring with it the moral condemnation that criminal sanctions engender.

c. Criminal Stigma and Due Process

The difference in consequence between being found responsible for civil discrimination, or possibly a university-created offense like “disrespect of persons,”²²³ and being found criminally responsible for rape or sexual assault provides the third reason why the DOE solution is likely to be more effective than criminal rape reform. By identifying the men who treated them badly, women will not necessarily be suggesting that these men are pathological or even criminal. It is important that universities not treat the men that way.

Initial reports indicate that many universities have failed to grasp their opportunity and responsibility to treat sexually predatory behavior as something other than an incident of profound moral turpitude. Stories abound of universities running what seem to be kangaroo courts, affording men little process and expelling them after cursory fact-finding.²²⁴ All the DOE’s guidance requires, however, is a “prompt and equitable resolution”²²⁵ of a sexual assault matter. The university must take “prompt and effective steps to respond to sexual harassment or violence,”²²⁶ but the guidance leaves it up to the university to determine what those steps should be.

Public universities must provide due process,²²⁷ and many commentators have argued that private universities owe any accused student a comparably protective amount of process.²²⁸

223. See *Fellheimer*, 869 F. Supp. at 244.

224. See Judith Grossman, Opinion, *A Mother, a Feminist, Aghast*, WALL ST. J., Apr. 17, 2013, at A15; James Taranto, Opinion, *An Education in College Justice*, WALL ST. J., Dec. 7–8, 2013, at A13; John Laureman, *College Men Accused of Sexual Assault Say Their Rights Are Violated*, BLOOMBERG NEWS (Dec. 16, 2013), <http://www.bloomberg.com/news/articles/2013-12-16/college-men-accused-of-sexual-assault-say-their-rights-violated> (all reporting cases of colleges affording defendants minimal protection and often expelling him).

225. DEAR COLLEAGUE LETTER, *supra* note 217, at 8.

226. *Id.* at 16.

227. *Id.* at 12.

228. See Thomas R. Baker, *Cross-Examination of Witnesses in College Student Disciplinary Hearings: A New York Case Rekindles an Old Controversy*, 142 EDUC. L. REP. 11, 12–14 (arguing that due process, particularly the right

That process probably requires a hearing, a right to counsel, and notice, but these protections are not that difficult or costly to provide.²²⁹

The most problematic procedural protection in sexual misconduct hearings is the right to confront the witness. As Parts II and IV detail, the process of preparing a witness for confrontation and the right of defendant's counsel to scrutinize the witness' credibility are often brutal on those victims who dare to press charges. On the other hand, the need to confront witnesses is strongest when credibility is crucial. If, as some critics seem to suggest,²³⁰ it is essential that an accused student be given the opportunity to confront his accuser in the manner afforded to him by the criminal law, then the process will inevitably chill victims' willingness to come forward.²³¹

There is no easy answer here. The right to confrontation may be critical for men who have been falsely accused, but it is demonstrably harmful to women who have been victimized.²³² If universities provide full criminal rights to alleged abusers there will be underenforcement of the university rules proscribing predatory behavior, and there will very likely be more of

to cross-examine, is crucial in disciplinary hearings); Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289, 331–37 (1999) (arguing that universities have a duty of good faith and fair dealing under contract law); Lisa Tenerowicz, *Student Misconduct at Private Colleges and Universities: A Roadmap for "Fundamental Fairness" in Disciplinary Proceedings*, 42 B.C. L. REV. 653, 687–92 (2001) (stating that the following ought to be present in student disciplinary proceedings: written notice of the charges, presumption of innocence, impartial hearing, right to confront witnesses, and the right to counsel).

229. Because a finding of sexual misconduct could result in suspension or expulsion, and because these cases usually involve contested fact, "some kind of hearing" is almost certainly necessary. *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 35 U.S. 78, 95 n.5 (1978) (Powell, J., concurring) ("A decision relating to the misconduct of a student requires a factual determination as to whether the conduct took place or not. The accuracy of that determination can be safeguarded by the sorts of procedural protections traditionally imposed under the Due Process Clause."); *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (stating that serious disciplinary consequences demand a hearing). To date, many universities seem to have resisted providing notice and opportunities for counsel, but it is not clear why they have been so resistant to these basic protections. See *Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238, 244 (D. Vt. 1994) (stating that a university must provide notice of charges against a defendant); Grossman, *supra* note 224 (alleging that her son's college disciplinary hearing would not allow him representation).

230. See *supra* notes 6–8.

231. See *supra* Part IV.B.

232. See Martin & Powell, *supra* note 192.

that behavior. The more robust the right to confrontation becomes, the less likely victims will be to come forward. Reasonable minds may differ on whether university cultures would rather accept an inevitable amount of predatory behavior,²³³ or an adjudicatory system that potentially punishes people who have not violated university rules. But that is the choice. It is folly to suggest that a school can provide full criminal safeguards and punish all or even most sexual assaults. For all of the reasons elucidated above, the criminal process simply does not work that well for these kinds of sexual encounters.

There may be acceptable alternatives to the traditional right to confrontation. Courts have allowed victims to testify out of sight of the accused, which may help diminish the trauma.²³⁴ One commentator has suggested using audiotape;²³⁵ another has suggested allowing the defendant to present questions to the hearing board, which could then ask them of the witness.²³⁶ Providing these procedures may be able to immunize a university from a due process challenge, even if the university uses the preponderance standard to determine whether the prohibited conduct occurred.

The best and most effective way of ensuring an adequate amount of protective process for the accused, however, is to simply reduce the severity of the penalty. The Supreme Court has made clear on numerous occasions that procedural due process is a flexible doctrine and that the amount of process due depends on the scope and nature of the liberty interest in jeopardy.²³⁷ Understandably, because rape has been a crime for so

233. General Patton assumed as much of soldiers. “[I]n spite of [his] most diligent efforts, there would unquestionably be some raping” by his men. BROWNMILLER, *supra* note 15, at 73.

234. See *Cloud v. Trs. of Bos. Univ.*, 720 F.2d 721, 725 (1st Cir. 1983) (stating that procedure was adequately protective of defendant’s rights even though witness was allowed to testify out of defendant’s sight).

235. Baker, *supra* note 228, at 25.

236. Tenerowicz, *supra* note 228, at 691.

237. *Lehr v. Robertson*, 463 U.S. 248, 261 (1983) (holding that a biological father who has not developed a relationship with his child is not due very much process before his rights are terminated because his failure to develop a relationship minimizes the importance of his liberty interest in an on-going relationship with his child); *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816 (1977) (discussing process due to foster parents before the state removes a foster child and concluding that very little process is due because the risk of erroneous deprivation of the child being returned to his or her natural parents is so small); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (laying out balancing test that weighs the importance of the personal interest

long²³⁸ and because so many people continue to view rapists as distinctly evil,²³⁹ universities have tended to expel or at least suspend anyone found responsible for any form of sexual assault, or even “disrespect of persons,” if that disrespect involved sexual contact.²⁴⁰ But universities do not have to do so. In many instances, particularly if the tribunal feels that situational factors (everyone was drunk, many other men were behaving the same way, the verbal and non-verbal signals with regard to consent were ambiguous for quite a while), it may be appropriate to render a relatively modest punishment, like a notation on a college record and protection for the complainant.

DOE’s guidance requires that the complainant be protected from having to encounter or worry about regularly encountering the perpetrator.²⁴¹ This seems to suggest that DOE thinks that perpetrators will not necessarily be suspended or expelled. The less severe the punishment, the less the need for extensive, confrontational process that runs the risk of deterring too many women from coming forward.

Doing something small to an individual is not the same as doing nothing at all, but many schools seem caught in an all or nothing binary. In one incident made public by an alleged victim, Harvard University refused to ask an alleged perpetrator to move dormitories, despite evidence that the alleged victim was suffering severely from the perpetrator’s co-residence in her dorm.²⁴² The behavior in question skirted the line of what the university officially prohibited.²⁴³ The University apparent-

at stake in light of the risk of erroneous deprivation of that interest, the value of additional safeguards and the state’s interest in providing alternative or lesser process).

238. See *supra* Part I.A.

239. See *supra* Part III.

240. See *Fellheimer v. Middlebury Coll.*, 869 F. Supp. 238, 244 (D. Vt. 1994) (finding that a university expelled a student for “disrespect of persons,” even though a tribunal could not find that he had committed rape).

241. See *DEAR COLLEAGUE LETTER*, *supra* note 217, at 16–17 (suggesting that escort services be provided to the complainant and that class schedules and dorm assignments be coordinated so that the two students do not come into regular contact with each other).

242. *Dear Harvard: You Win*, *THE HARVARD CRIMSON* (Mar. 31, 2014), <http://www.thecrimson.com/article/2014/3/31/Harvard-sexual-assault>.

243. This is the victim’s account of what happened:

He was a friend of mine and I trusted him. It was a freezing Friday night when I stumbled into his dorm room after too many drinks. He took my shirt off and started biting the skin on my neck and breast. I pushed back on his chest and asked him to stop kissing me aggres-

ly therefore felt powerless to ask the young man to re-locate, or to reprimand him for behavior that while not a clear violation of university sexual assault policy, would nonetheless seem to be an obvious violation of appropriate student conduct norms.²⁴⁴

Perhaps the administrators simply did not believe the alleged victim. If they thought she was making it up, or misremembering too much of it, then doing nothing is appropriate. But if they believed her and still did nothing to reprimand obviously odious conduct that clearly had an on-going detrimental effect on the victim, then Harvard rendered itself paralyzed for no good reason. The idea that forcing a college student at one of the most elite universities in the world to move dormitories is somehow a kind of punishment that requires full criminal process is absurd. The accused would still be free to graduate, in his chosen major, with his social networks intact.

In those instances in which it seems appropriate to render a small individual punishment, it may also be appropriate to institute a broader, community-wide measure aimed at changing norms. If everyone at the party was doing it, or everyone at the school regularly does it, it may be especially unjust to single one man out for punishment, but particularly appropriate to require much more comprehensive training and education for the community at large. When it is clear that community norms (which the university has the authority to set and enforce)²⁴⁵ were violated, even if it is unclear who violated them, dorm-wide or fraternity-wide or household-wide punishments could be imposed. For years, universities have used honor codes to collectivize responsibility for individual transgressions.²⁴⁶ Sure-

sively. He laughed. He said that I should “just wear a scarf” to cover the marks. He continued to abuse my body, hurting my breast and vagina. He asked me to use my mouth. I said no. I was intoxicated, I was in pain, I was trapped between him and the wall, and I was scared to death that he would continue to ignore what I said. I stopped everything and turned my back to him, praying he would leave me alone. He started getting impatient. “Are you only going to make me hard, or are you going to make me come?” he said in a demanding tone. It did not sound like a question. I obeyed.

Id.

244. Students need some notice of what code of conduct standards are, but it is hard to believe that this man could maintain that he thought his behavior was consistent with a basic requirement of respect for other students. He was probably entitled to be confused about whether his behavior constituted sexual assault, but not about whether his behavior was appropriate.

245. See *supra* note 220 and accompanying text.

246. See Eric Roberts, *Honor Codes Across the Country*, STANFORD UNIV.

ly, if a school can impose punishment on student A because student A knew or should have known student B cheated and did not report it, then a school can impose punishment on student A because he knew or should have known that student B was taking advantage of a fellow member of the community who was too scared or too drunk to protect herself.

Thirty-five years ago, before Catharine MacKinnon published *Sexual Harassment of Working Women*,²⁴⁷ most everyone accepted the inevitability of boys being boys and the workplace being inundated with lewd, obnoxious and pestering sexual behavior perpetrated by men toward women. Within twenty years those norms had changed radically and most everyone knew that previously commonplace behavior was inappropriate and unfair to women.²⁴⁸ The norms of workplace behavior did not change because everyone read MacKinnon's book nor because the perpetrators of the lewd, obnoxious behavior were thrown in jail. The norms changed, in large part, because businesses were found vicariously liable for the behavior of their employees.²⁴⁹ Sexual harassment training is now a part of almost every workplace. If universities understood the problem of sexual assault the way employers understand the problem of sexual harassment, that is, as an environmental problem, likely created and fostered elsewhere, but which nonetheless has become universities' responsibility, universities could likely do much to change the current culture that results in twenty percent of college women being assaulted.

d. The Agency Dilemma

There is still the issue of whether victims will be as resistant to labeling themselves as victims of discrimination as they are to labeling themselves as victims of sexual assault. Coming forward as a victim of discrimination may allow a vic-

<http://cs.stanford.edu/people/eroberts/cs181/projects/honor-code/honorcodes.html> (last visited Aug. 31, 2015) (explaining standard honor code procedures and linking to other schools that have them).

247. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* (1979).

248. See Kahan, *supra* note 78, at 635 (citations omitted).

249. See Faragher v. City of Boca Raton, 524 U.S. 775, 798–810 (1998) (holding that an employer is held vicariously liable for discriminatory conduct by a supervisor); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 754–66 (1998) (affirming that firms can be vicariously liable if they do not take affirmative steps to prevent harassment).

tim to identify as someone who is helping future women who would be hurt by the same institutional forces, as opposed to someone who blames a man because she was too weak to help herself. Women still may not come forward, though. As Kristin Bumiller revealed in her study of race and sex discrimination, victims often distrust the legal process, resent the need for it, and remain skeptical of how much good it can do. So they often do not pursue legal remedies, even if they feel entitled to them.²⁵⁰

Bumiller's work suggests that victims of discrimination have complicated and mixed feelings about their victimization. Victims on college campuses may feel the same way, but university disciplinary procedures offer a potentially more hospitable and nurturing process for victims than does the civil law. Moreover, because universities are more closed, paternalistic environments, they may be able to protect victims who do come forward from being ostracized.²⁵¹ At present, there is also a groundswell of grassroots support for organizing potential victims on college campuses to push for change.²⁵² There is a powerful institutional actor, DOE, validating the idea of their injury and supporting any attempts to come forward. Even women who defend current sexual norms on college campuses because they see them as better than the more restrictive sexual norms that came before acknowledge that contemporary campuses fall far short of an "egalitarian" ideal.²⁵³ Focusing on egalitarian-

250. See KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* 99–103 (1989).

251. I don't mean to sugar coat this problem. In my twenty years of teaching law school, for every one woman I have known who has been willing to report a professor or fellow student for inappropriate sexual behavior, there have been at least three students who just don't want to call attention to themselves. Shockingly, to me, it is often their mothers who tell them not to report anything officially.

252. See Libby Sander, *Two Worlds, One Problem*, CHRON. HIGHER EDUC., Mar. 24, 2014 (describing parallel problems with sexual assault in the military and on college campuses and reporting that "attention is acute. In both worlds, survivors—as many identify themselves—are driving the discussion. They are optimistic that a combination of grass-roots advocacy, legislative action and sustained media exposure will lead to meaningful progress"); see also Pérez-Peña & Taylor, *supra* note 65 (describing activity at Columbia University); Robin Wilson, *Ads Urge Students To Think Twice About Colleges with a "Rape Problem,"* CHRON. HIGHER EDUC., May 15, 2014 (describing campaign by a group called UltraViolet to target ads at people accepted at colleges who have been lax in enforcing sexual assault prohibitions).

253. See ROSIN, *supra* note 56, at 18 (quoting a Yale graduate who acknowledges that college is not an "egalitarian sexual wonderland . . . [b]ut

ism, or the lack thereof, is probably the best strategy; but it is no guarantee of success.

2. Is It Enough?

Changing the norm of male sexual entitlement on university campuses, even if successful, may seem like an incomplete remedy. Only 42% of Americans between the ages of 18–24 go to college.²⁵⁴ Still, “norm cascades” can follow from relatively small but concentrated efforts to change norms.²⁵⁵ DOE’s efforts have generated a great deal of press.²⁵⁶ At least one United States Senator has launched her own investigation of sexual assault on college campuses.²⁵⁷ Particularly if there is pent-up frustration with the status quo—as there may be not just among women, but among others who have come to view the male behavior as wrong if not criminal—the status quo of what is acceptable can change rapidly.²⁵⁸ On college campuses, if people get used to seeing men held accountable, not necessarily expelled, but punished for their behavior, such that they have diminished freedom to pick their classes, or their dorm, or di-

compared to when girls are punished for any sexual experience before marriage, it’s much better”).

254. See *Fast Facts: Back to School Statistics*, NAT’L CTR. FOR EDUC. STATISTICS, <http://nces.ed.gov/fastfacts/display.asp?id=372> (last visited Oct. 17, 2015).

255. See CASS R. SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* 38 (1997) (“Norm cascades occur when societies are presented with rapid shifts toward new norms.”).

256. From January to July of 2014, the New York Times alone had 37 different stories about sexual assault on college campuses. *Sexual Assault Stories in the New York Times*, N.Y. TIMES, query.nytimes.com/search/sitesearch/ (limit search date range to 1/1/2014 to 7/31/2014; then search “sexual assault” and “college campus”). With the publication of the discredited Rolling Stone story on an alleged rape at the University of Virginia, coverage of sexual assault on college campuses seemed to be everywhere. See generally Richard Pérez-Peña, *University Officials Blast Coverage*, N.Y. TIMES, Dec. 20, 2014, at A15.

257. *Sexual Violence on Campus: How Too Many Institutions of Higher Education Are Failing To Protect Students*, SENATOR CLAIRE MCCASKILL (July 9, 2014), <http://www.mccaskill.senate.gov/imo/media/doc/SurveyReportwithAppendix.pdf>.

258.

People’s private judgments and desires diverge greatly from public appearances. For this reason, current social states can be far more fragile than is generally thought—as small shocks to publicly endorsed norms and roles decrease the cost of displaying deviant norms and rapidly bring about large-scale changes in publicly displayed judgments and desires.

SUNSTEIN, *supra* note 255.

minated freedom to go to parties, then people will cease to see this behavior as normal or inevitable.²⁵⁹ Once a significant, likely influential, segment of society sees a given behavior as unacceptable, their understanding of what is permissible can cascade downward.

The campaign against drunk driving may provide an important lesson in this regard. Most people who have studied the issue believe that the significant decrease in the amount of drunk driving that started in the 1990s was not the result of increases in criminal enforcement rates or increased criminal penalties, but came from an extra-legal campaign to alter the norms that had invested people with a sense of entitlement to drive after drinking.²⁶⁰ What changed was not the number of laws against drunk driving or an increased likelihood of being stopped, but the way people thought about drinking and driving. As Dan Kahan concluded, “[i]nformal enforcement of the law, in the form of privately imposed stigma, was the gentle nudge that shook loose the . . . norms that condoned drunk driving.”²⁶¹ DOE’s campaign represents a comparable campaign to change the social norms that condone legally proscribed behavior. People and institutions outside the criminal law seek to change norms so that, ultimately, the criminal law can be enforced.

Even if a proliferation of discrimination claims does not make it any easier to secure criminal convictions, eroding the norm of male entitlement to sex will reduce the amount of non-consensual sex. As Professors Paul Robinson and John Darley observe, “[t]he real power to gain compliance with society’s rules of prescribed conduct lies not in the threat or reality of official criminal sanction, but in . . . [t]he networks of interpersonal relationships in which people find themselves, [and] the social norms and prohibitions shared among those relationships”²⁶² Erosion of men’s sense of sexual entitlement may not make enough people willing to criminally punish non-consensual sex, but it should further decrease men’s likelihood

259. This may be particularly true for college students, for whom the freedom to choose one’s roommates and one’s parties is likely considered particularly important.

260. See Kahan, *supra* note 78, at 633–34 (discussing Mothers Against Drunk Driving (MADD) and the moral campaign to decrease drunk driving).

261. *Id.*

262. Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 457 (1997).

of engaging in increasingly non-normative behavior. The moniker “rape reform” suggested that what reformers cared about was changing the definition of rape. They did. But surely they were just as concerned with decreasing the amount of non-consensual sex. It may be the best way to reduce non-consensual sex is to treat it as something distinct from rape.

The danger, from a feminist perspective, is that treating sexual misconduct as less serious than the common understanding of rape may trivialize men’s conduct and lead to far too little moral condemnation of men’s sense of entitlement to sex. But taking the opposite approach, criminalizing what had been normative conduct in the name of protecting women’s right to sexual autonomy has not worked well to date either. And, for the reasons suggested above, it is not likely to be particularly effective at further eroding the norm of male entitlement to sex going forward. It may be time, and DOE has suggested that it is time, to try something new.

Focusing on discrimination instead of rape also helps switch the focus away from victim injury and onto what is wrong with perpetrator behavior. This may be useful because, as Part IV suggested, the subjective, psychological and non-physical nature of rape’s injury often generates a quagmire of commentary that fails to produce consensus on how and why women are hurt by rape. Even if we cannot adequately describe the injury resulting from that non-consensual sex, the extent to which college women must confront predatory male sexual behavior is striking.²⁶³ If DOE’s efforts can generate consensus that the perpetrator behavior is problematic, even if not criminal, because it forces women to endure insults and hardships that men rarely have to endure, then the questions regarding how women are hurt recede into the background. It does not matter exactly how they are hurt if there is a general understanding that they are treated unfairly and it is men who are treating them that way.

CONCLUSION

This Article has argued that the criminal law has been unable to prosecute as rape a tremendous amount of non-consensual sex because it is too difficult to prove beyond a reasonable doubt, because the law’s treatment of rape sends pro-

263 . See MICHAEL ET AL., *supra* note 30, at 223.

foundly inconsistent messages about who rapists are and how bad rape is, and because women resist seeing themselves as rape victims. DOE's attempt to re-cast sexual assault as a discriminatory harm may allow universities to unearth and punish far more non-consensual sex than the criminal law has been able to. This may then lead to more substantial erosion of the social norm that validates male entitlement to sex because people will see men punished for assuming that their entitlement to sex overrides a woman's quiet desire not to go forward. If that norm is more successfully eroded, criminal prosecution may then become easier as male entitlement to sex begins to seem less legitimate.

There is some convergence, then, between what I've suggested here and Professor Rubinfeld's insistence that the force requirement be part of the definition of rape. At least in the short term, perhaps the criminal law of rape should focus only or mainly on those instances in which force or threat of force is apparent. The criminal law should do this not because the injury that women suffer in rape is so much worse or qualitatively different when force is involved, but because proving force is all the criminal law can do, and it is all many women seem willing to let the criminal law try to do. Professor Rubinfeld argues that the feminist attempt to make force irrelevant was theoretically unsound and normatively problematic. This Article counters that it is the theory and normative commitments that are irrelevant. Assuming basic allegiance to criminal due process, including criminal standards of proof and rights to impeachment and confrontation, the criminal law simply cannot do what feminists asked it to do. The law of sex discrimination, particularly applied in an educational setting, quite possibly could.