WHY RAPE SHOULD NOT (ALWAYS) BE A CRIME

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Abstract

This article advances a novel and controversial argument, that the criminal law is simply not up to the task of policing sexual assault and has undermined the very anti-rape norms that reformers intended that law to cultivate. The on-going initiative to curb the prevalence of sexual misconduct on college campuses abandons the criminal law and uses discrimination doctrine to dislodge the norms that criminal rape reform tried, but failed, to transform. It is necessary because the rape reform movements of the 1970s and 80s asked too much of the criminal law. Rape reformers tried to make a woman’s willingness to have sex – her consent – the centerpiece of the rape inquiry. They wanted to upend a norm that validated men’s sense of entitlement to sex. While these efforts to shift norms may have gotten the theory of rape right, they failed to appreciate inherent limitations in the criminal process. The criminal burden of proof for non-consent is too high for an effective conviction rate for sexual assaults that do not involve force. The criminal stigma associated with rapists, reified by popular “tough-on-rapist” measures, undermines attempts to criminalize commonplace behavior. And the complicated relationship between rape’s injury, women’s agency and the criminal law means that many women are unwilling to see themselves as rape victims and especially unwilling to invoke the criminal process to vindicate their injury. Discrimination doctrine avoids all these problems, but still allows for the policing of predatory male behavior. Effective enforcement of discrimination doctrine could, in turn, affect more lasting change to the social norms that condone men’s appropriation of sex, and thus pave the way for comprehensive enforcement of the criminal law as reformed. The key will be treating what is happening on college campuses as something other than rape. The de facto monopoly of criminal law over rape should end not despite its effects on social norms, but because of it.

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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, notwithstanding 20 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 80s, 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 sex\(^4\) 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 so that 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

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\(^1\) On May 1, 2014, the Department of Education (“DOE”) released the names of 55 colleges and universities that it was investigating for potentially discriminatory practices relating to sexual assault on campus. Jennifer Steinhauer and David Joachim, 55 Colleges Named in Federal inquiry into Handling of Sexual Assault Cases, New York Times, May 1, 2014. That list has now grown to 64 and includes some of the countries most prestigious universities. Tyler Kingcade, 64 Colleges Are Now Under Investigation for their Handling of Sexual Assault, http://www.huffingtonpost.com/2014/06/30/colleges-under-investigation-sex-assault_n_5543694.htm

\(^2\) Press Release, US Dept of Education Releases List of higher Education Institutions with open Title IX Sexual Violence Investigations, ED.gov, May 1, 2014 (emphasis added)

\(^3\) Id.

\(^4\) A “culture of sexual entitlement” is how an independent commission recently described the norms that enabled if not caused two different sexual assaults perpetrated by Boston University’s ice hockey team. See Report of the Men’s Ice Hockey Task Force, http://www.bu.edu/presidejnt/reports/hockey-task-force. Dianna 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 through his head was ‘Me Graham. Horny. You woman.’” DIANA E. RUSSELL, THE POLITICS OF RAPE: THE VICTIM’S PERSPECTIVE 93. (1974).

\(^5\) Rape scholar Cassia Spohn writes that the goal of many rape reformers viewed the law’s traditional
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 for why the criminal law has not been more successful in 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 no behavior is 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 de-normalize 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-rapist 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.

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 119, 121 (1999).
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 justifications for rape law, both old and new. 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) re-make of rape into an individual criminal injury to autonomy. It then briefly discusses recent rejections of the liberal/feminist position. 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 non-consensual sex, the norms of male entitlement that rape reformers originally tried to dislodge may be eroded sufficiently for the criminal law to effectively combat non-consensual 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, or they insist that universities provide criminal law safeguards for those accused. But the offense that many men on college campuses are being accused of is not rape. It is discriminatory conduct.

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7 See for instance, Jed Rubenfeld, Mishandling Rape, http://www.nutimes.com/2014/11/16/opinions/Sunday/mishandling-rape.html (sexual assault on campus should mean what it means in the criminal law); Caroline Kitchens, “Overreaching on Campus Rape,” THE NATIONAL REVIEW, 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 because those rules did not provide adequate opportunity to investigate facts and confront witnesses. See Opinion, Rethink Harvard’s Sexual Harassment Policy, THE BOSTON GLOBE, 10/16/14.
responsible for such conduct, the men should not be considered rapists. Indeed, because 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.

I. THE THEORIES OF RAPE

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 $50 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 makes sense when women are viewed as property because rape causes economic injury to the men who own women.11 The criminalization of 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

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9 KEITH BURGESS-JACKSON, RAPE: A PHILOSOPHICAL INVESTIGATION 68 (1996)
10 JAMES BRUNDAGE, 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 clearly proved upon him, upon the oath of the complainant, that I
   adjudged him to pay unto John Biggs damages 5 guineas . . .
   Ray Porter, Rape – Does it Have Historical Meaning? in RAPE: AN HISTORICAL AND CULTURAL
   INQUIRY 217 (Tomaselli & Porter, eds., 1989)
12 See BURGESS-JACKSON, supra note 9 at 48 (arguing also “To the conservative, the rapist sets back
   not just a particular man’s interest in exclusive possession and control of his property, but the interest
   of society as a whole in having strong patriarchal marriages and families.”) See also David
   Dzenhaus, John Stuart Mill and the Harm of Pornography, 102 ETHICS: AN INTERNATIONAL
   JOURNAL OF SOCIAL, POLITICAL AND LEGAL PHILOSOPHY 550 (1992) ( “Conservatives think that the
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 began to place responsibility on the victim to raise “a hue and cry” and there was an active debate about how much evidence of resistance was needed to secure prosecution. For some, “weeping and wailing” were sufficient. Others wanted more significant signs of force.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 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. 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. 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 the body that is touched or invaded. Nonconsensual 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. Force and resistance have nothing to do with it.

17 WAYNE LAFAVE, CRIMINAL LAW 891-92 (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 95-97.
19 “[A]ll that distinguishes [rape] from ordinary sexual intercourse is lack of consent.” RICHARD
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.  

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. First, they enacted statutes that criminalized nonconsensual sex secured without any use of force and they eliminated the resistance requirement. The law of aggravated battery polices force; 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 require 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. Thus, at least as written, 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 non-violent 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.

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20 For a comprehensive account of rape as a violation of women’s sexual autonomy see Stephen Schurhofer, Unwanted Sex: The Culture of Intimidation and the Failure of Law (1998) (concluding chapter entitled “Taking Sexual Autonomy Seriously”)

21 Spohn, supra note [Error! Bookmark not defined.] at 124 (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.

23 American Law Institute, Model Penal Code: Sexual Assault and Related Offenses, Tentative Draft No. 1, General Commentary, 68 (2014) [hereinafter, “ALI Draft”] (only 12 states maintain the traditional force requirement). But see also, John F. Decker and Peter G Baroni, “No” Still Means Yes: The Failure of the Nonconsent Reform Movement in American Rape and Sexual Assault Law, 101 J. CRIM & CRIMIN. 1081, 1084 (2013) (28 states allow the prosecution to convict by showing the victim did not consent; 9 states appear to allow for conviction with only non-consent, but to establish lack of consent, the prosecution must prove force or inability to consent; 16 states do not have non-consent offenses – though 15 of these 16 allow “incapacity to consent” to substitute for force.)

24 Professor Patricia Falk lists 7 different “non-violent” categories of behavior that are often
Third, reformers enacted evidentiary shield laws that barred evidence of women’s prior sexual behavior.\textsuperscript{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 – that a woman had consented to sex before did not mean she consented this time.\textsuperscript{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.\textsuperscript{27} Women were supposed to say no when they meant yes or to not say anything at all.\textsuperscript{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

\begin{itemize}
\item[(i)] abuse of trust;
\item[(ii)] abuse of authority;
\item[(iii)] nonconsensual sex without force;
\item[(iv)] sex with coercion through extortion;
\item[(v)] sex with a drunk or drugged victim who is not capable of knowingly consenting;
\item[(vi)] sex with a mentally incapacitated person who is not capable of knowingly consenting; and
\item[(vii)] sex secured through fraud.
\end{itemize}

See Patricia Falk, \textit{Not Logic, but Experience: Drawing on lessons from Real World Thinking About the Riddle of Rape by Fraud}, 123 \textit{Yale L. J. Online} 353 (2013).

\textsuperscript{25} See e.g., \textit{Federal Rule of Evidence} 412.

\textsuperscript{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, \textit{Once A Rapist? Motivational Evidence and Relevancy in Rape} Law 110 \textit{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).

\textsuperscript{27} Robin Warshaw and Andrea Parrot, \textit{The Contribution of Sex-Role Socialization to Acquaintance Rape} in \textit{ACQUAINANCE RAPE: THE HIDDEN CRIME} 75 (A. Parrot and L. Bechofer eds. 1991) (“From their socialization in childhood and adolescence, [men and women] develope[!] different goals related to sexuality . . . [M]en are supposed to single-mindedly go after sexual intercourse with a female, regardless of how they do it . . . [W]omen should passively acquiesce or use any strategy to avoid sexual intercourse.”)

\textsuperscript{28} Id.
passive acquiescence. Men tend to interpret women’s non-verbal actions as indicia of desire to consent, when women do not mean for those actions to be interpreted even as sexual interest, much less consent. 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.

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,” and others have called the “Yes Model.” 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. California recently adopted an affirmative consent standard to be applied at all colleges and universities receiving state funding. Other states have just proved more willing to convict men who proceed in the face of ambiguity. Some states have also adjusted the mens rea for rape so that negligence in determining whether a woman consented is sufficient to secure rape conviction. The proposed revisions to the Model Penal Code, discussed in Part VA below, explicitly adopt an affirmative consent requirement.

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29 Eugene Kanin, Date Rape: Unofficial Criminals and Victims, 9 VICTIMOLOGY 95, 97 (1984) (perpetrators mistook victims fear as acquiescence)
30 Michelle Anderson, Negotiating Sex, 78 S. CAL L REV 1401, 1476 (2005) (citing studies).
31 ROBERT T. MICHAEL ET AL., SEX IN AMERICA: A DEFINITIVE STUDY 223 (1995) (suggesting that there is a “gender chasm” when it comes to perceptions on whether sex was forced).
33 Anderson, supra note 30 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 . . .” (sec. 940.225(5)). In Florida Statutes (2007) rape is defined as sex without “intelligent, knowing and voluntary consent” (sec. 794.011(5)). In Washington Revised Code Annotated (2008), the 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” (sec. 9A.44.010(7)). The state of California codified an affirmative consent standard to be applied at all California colleges and universities receiving state funding, but did not adopt an affirmative consent standard into its criminal code generally. See https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140SB967
35 State v. Reid, 479 A. 2d 1291 (Me. 1984); Commonwealth v. Lopez, 745 NE.2d 961 (Mass. 2001); In Interest of MTS, 609 A 2d 1266 (NJ 1992).
37 See infra Part VA
Notwithstanding these changes, the number of rape reports that lead to arrest has declined significantly since 1970. Conviction rates have not increased. 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. 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. Using the law’s reticence to treat sex secured by deception as rape, 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. 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,” as do slavery and torture. Sex secured without force does not result in a comparable injury. For Rubenfeld, rape is forcible rape. Everything else – sex with an intoxicated

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38 See Cory Rayburn Yung, Rape Law Fundamentals, SSRN, p. 43
39 Id. at 43-44. Spohn, supra note Error! Bookmark not defined. at 129.
41 See Rubenfeld, supra note Error! Bookmark not defined.. YALE LAW JOURNAL ON-LINE published a forum after Rubenfeld’s article came out, in which Professors Tom Dougherty, Patricia Falk, Gowri Ramachandran and Deborah Turkheimer all took issue with Rubenfeld’s insistence on force. See http://www.yalelawjournal.org/forum. See also Kiel Brennan-Marquez, A Quite Principled Conceit, 80 U Chi L Rev 81 (2013) (arguing that all criminal statues 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, http://www.dorfonlaw.org/2013/05/the-role-of-consent-in-defining-rape.html (saying no should be enough, because once someone has said no and the other person doesn’t stop, there is an implicit threat in place); Yung, supra note 38.
42 Rape-by-deception usually involves a man impersonating another man or claiming to be someone that he is not. See Rubenfeld, supra note Error! Bookmark not defined. at 1375-76.
43 Id.
44 Id at 1434
45 This is an obvious, if implicit rejection of Professor Susan Estrich’s argument of 30 years ago. SUSAN ESTRICH, REAL RAPE (1987) 5-7 (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 Rubenfeld’s
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.\textsuperscript{46}

By (re)making force an essential part of rape, Rubenfeld 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,\textsuperscript{47} jurors have very little way of determining that someone did not consent to an act.\textsuperscript{48} 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.

Rubenfeld does not ground his conceptualization of rape law in arguments about enforceability or culpability though.\textsuperscript{49} He grounds his argument in the nature of the injury.\textsuperscript{50} Applying his theory to the problem 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, \textit{Delineating the Heinous: Rape, Sex, and Self-Possession}, 123 YALE L.J. ONLINE 370, 372 (2013)

\textsuperscript{46} Rubenfeld supra note \textit{Error! Bookmark not defined.} at 1435-1442 (discussing why sex with unconscious, drunk and underage “partners” should not be considered rape). Rubenfeld appears sometimes to argue that these acts should be treated as batteries, id. at 2013 (“sexual 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 49.

\textsuperscript{47} The existence of videotape can even fail to establish the consent question definitively. See infra text accompanying notes 78-83.

\textsuperscript{48} 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 Schulhoffer, supra note 36 at 284-285 (discussing the objective and subjective standards and noting that neither party is likely telling the complete truth) and Part II infra.

\textsuperscript{49} 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. Rubenfeld, supra note \textit{Error! Bookmark not defined.} at 1442 (intoxicated) and 1440 (sleeping).

\textsuperscript{50} Most of the criticism of Rubenfeld 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
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 says as the fundamental problem: “that almost no college rapists are criminally punished,” because victims go through a college process, not the criminal law.\(^{51}\) 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 Rubenfeld’s view, those who use force) will be criminally punished.

The analysis that follows explains why Professor Rubenfeld and other DOE critics’ faith in the criminal process to adjudicate and punish sexual assault is misplaced. But the mere presence of Rubenfeld’s article, and the uproar around it, indicates that rape reformers were not as successful as the legislative changes suggest they were 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.\(^{52}\)

\[^{51}\] See Rubenfeld, supra note Error! Bookmark not defined. 51.

\[^{52}\] David P. Bryden and Sonja Lengnick, Rape in the Criminal Justice System, 87 CRIM L & CRIMINOLOGY 1194, 1316 (1997); Katharine K. Baker, Sex, Rape and Shame, 79 B.U. L. REV 663,
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. 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 a consent, though, the problems of proof become paramount. In an age when hook-ups are the norm for college students, when sex on first dates is common, and when many people celebrate the liberating opportunities of sex without relationship, there are many reasons to believe an alleged victim might have consented. Often, alleged rapes start with consensual touching. 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. 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 she usually must

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690 (1999).


54 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 Rosenbury and J. Rothman, Sex In and Out of Intimacy, 59 Emory L. J. 809 (2010) (arguing that sex without intimacy or relationship affords women freedom that has been denied them in relationships).


56 Mary P. Koss et al, Stranger and Acquaintance Rape: Are there Differences in the Victim’s Experience, 12 PSYCHOL. WOMEN Q 1 (1988) (10% of victims who acknowledged being rape 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).
take the stand, her memory, her credibility and her character are inevitably at issue; she is the only proof.\textsuperscript{57}

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,\textsuperscript{58} thus their memories are likely to be fuzzy. Even without alcohol, rape victims “tend to have less clear and vivid memories than victims of other types of traumatic or unpleasant experiences.”\textsuperscript{59} Indeed, blocking out the event from one’s memory has been found to be a healthy psychological response. It helps diminish the on-going trauma that rape victims suffer.\textsuperscript{60} In other words, the healthier the victim, the worse she is as a witness.\textsuperscript{61}

Even if victims can recall what happened, even if they did not just close their eyes and cry,\textsuperscript{62} 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.\textsuperscript{63}

\textsuperscript{57} Evidence rules allow any witness’ credibility to be impeached. See \textit{Fed. Rule Evid.} 607 and 608. If a defendant never testifies, his credibility is not openly questioned.

\textsuperscript{58} M. Mohler-Kuo, G. Dowdall, M.P. Koss & H. Wechsler, \textit{Correlatives of Rape While Intoxicated in a National Sample of College Women}, 65 \textit{J. of Stud. on Alcohol} 37 (2004) (72% of college rape victims reported being intoxicated during the rape). Bryden and Lengnick, supra note 52 at 1350 (citing earlier studies showing between 75 to 90% of sexual assaults on college campuses involving alcohol).


\textsuperscript{60} Id.

\textsuperscript{61} 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, \texttt{http://www.rollingston.com/cultur/features/a-raoe-on-campus-20141119}, Those who work with rape victims know that it is actually very unlikely that a victim would remember every moment. See Garrison, supra note 59.

\textsuperscript{62} “No one [tells you] that you should not shut your eyes and cry for fear that this is really happening.” ESTRICH, \textit{supra} note 45 at 2 (1996) (Professor Estrich describing her own rape and how difficult it can be to recollect the incident for the police when they ask.)

\textsuperscript{63} See, for instance, Richard Perez-Pena and Kate Taylor, \textit{Fight Against Sexual Assaults Holds Colleges to Account}, New York Times, May 3, 2014 (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 them an embarrassing subject [which felt] really gross.”); Walt Bogdanich, \textit{Reporting Rape, and Wishing She Hadn’t: Inside One College’s Response When a Student Came Forward}, New York Times, 7/13/14 (“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
There is only so much that rape shield laws can place off limits in a trial. No court is going to exclude the victim’s past sexual behavior with the alleged perpetrator. No court can exclude incidents about which she may have lied in the past. No court can make it easy for her to talk about her own embarrassment, and possible fear, and sense of powerlessness during a sexual encounter. 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. A female captain under his command, a cryptologic linguist, had what everyone acknowledged was a three year affair with General Sinclair. 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.” She testified that “I know I didn’t pull away from him, but I didn’t want to do it.”

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; 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 Rubenfeld - would suggest that they were not rape.

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64 Bryden and Legnick, supra note 52 at 1287 (“[S]ome measure of evidence about the complainant’s character and habits will inevitably be available to the jury.”)
65 FRE 412(b)(1)(b) provides a specific exception for consensual sex with the accused.
66 See Federal Rule of Evidence 608.
67 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 IVA.
68 Alan Binder and Richard Oppel Jr., How a Military Sexual Assault Case Foundered, NYT 3/12/14
69 Choking and strangulation tend to leave minimal signs of injury, M Funk & J. Schoppel, Strangulation Injuries, 102 Wisc. Medical J 43 (2003), and are risk factors for later violence, K. Laughon, P. Renker, N. Glass and B Parker, Revision of the Abuse Assessment Screen to Address nonlethal Strangulation, 37 J. of OB. Gynecologic & Neonatal Nursing 502-507 (20080. The victim in the Sinclair case also alleged that he threatened to kill her if she told his wife about their affair. See Binder and Oppel, supra note 68.
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.\footnote{All of these arguments were made by the defense in the Sinclair case. See id.} Like many victims of rape, she had consensual sex with him again.\footnote{See Garrison, supra note 59 at 624.} 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’ 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.\footnote{See generally FRE 608, allowing character evidence for truthfulness even though the rules disallow character evidence for other traits.} 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.\footnote{Blinder and Oppel, supra note 68 (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 to 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.)} Victim credibility is all there is in a case like this.

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.\(^74\) 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 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.\(^75\) 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:

\[\text{[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. She began to struggle, screaming at him to stop, yelling at him to get off. He didn’t stop.}
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Afterward he laid 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.\(^76\)

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, or 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 remotely credible manner, the criminal burden of proof entitles him to a finding of not guilty.\(^77\)

\(^74\) 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, 623-625 (2000).

\(^75\) Perez-Pena and Taylor, supra note 63.

\(^76\) Anna Bahr, Accessible, Prompt and Equitable:” An Examination of Sexual Assault at Columbia, THE BLUE AND WHITE, http://theblueandwhite.org/2014/02/11/accessibe-prompt-and-equitable

\(^77\) Universities are not bound to use the criminal burden, see infra Part VB1b, but the Columbia tribunal still found the evidence of assault too indeterminate to hold the defendant responsible. See
Even when there is corroborating evidence, proof problems abound. In 2006, an Illinois high school student accused Adrien Misbrenner and several other men of rape, after she learned there was a videotape of them having sex with her while she was very intoxicated. 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, scribbling obscenities on her body and inserting a cigarette butt into her vagina. 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 Misbrenner.

The tape was in three segments. 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 Misbrenner 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 the word “whore” on her chest and stuck things inside her. To the jurors, it was unclear how soon after Misbrenner’s intercourse the last segment was taped.

Notably, one juror said “I think they should still go for the civil trial. There’s a different standard there.” “Clearly we knew what those young men did was wrong. Clearly they took advantage of her. But there was reasonable doubt.” Rape jurors take reasonable doubt seriously. After an acquittal in an army sexual misconduct trial several years before the Misbrenner case, a juror explained, “it’s not that we did not believe the woman. It’s that we had reasonable doubt.”

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Perez-Pena and Taylor, supra note 63.
79 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 Juror Says Case “Insult Not Assault,” Daily Herald (Arlington Heights, IL) (March 18, 2006.)
80 Id.
81 Id.
82 Id.
A California judge who tried *California v. John Z.* 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 to the judge without a jury, and the judge made a finding of force, presumably because the defendant pushed the girl onto the bed. In a subsequent interview, the judge opined that no jury would have found the defendant guilty as he did, and he was not sure that he himself would convict again on identical facts. The prosecution’s appellate lawyer assigned to defend the verdict on appeal expressed comparable doubts. Several experienced sex crimes prosecutors, when asked their opinion about this case, expressed shock that the prosecution had gone forward with this case. They thought it was too hard to win.

*John Z* and the recent convictions in the videotaped case from Steubenville, Ohio, show that occasionally the law can do what reformers wanted. It can criminalize nonconsensual sex qua nonconsensual sex. 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. 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

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85 In re John Z, 29 Cal 4th 1141 (2003). This case is reproduced in many casebooks also because the woman acknowledged saying yes before she said no.
86 John Z. involved two boys having sex with a 16 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 Junction of Teen Sex and the Law*, 38 LAW & SOC. INQ. 344 (2013) (in depth description of the case and the lawyers and judges involved in it).
87 Id at 387.
88 Id. at 387 (interview with trial judge)
89 (“I don’t lose any sleep over 99% of the cases being prosecuted . . . This case is in the 1% for me.”) Id. at 389.
90 Id at 376 (experienced prosecutors wondering how the case ever made it through the prosecutor’s screening process with “so many proof problems.”)
91 For a description of the case, see Juliet Macur and Nate Schweber, *Rape Case Unfolds on Web and Splits City*, NEW YORK TIMES, 12/17/12. The incident was also covered extensively on cable news. http://www.washingtonpost.com/blogs/erik-wemple/wp/2013/03/18/cnn-is-getting-hammered-for-steubenville-coverage/
92 There was a finding of force in John Z, but it was a minimal amount of force (pushing the victim back down on a bed). See Oberman, note 86 at 386.
written. 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.

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 suggested, that by requiring evidence of consent the law is killing the spontaneity, ruining the romance, and demanding cold hard contracts for sex. Those claims are readily dismissed because (i) talking about sex does not necessarily ruin it and (ii) women’s safety is far more important than men’s dreams of romance. 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 do not get brought or they get brought but do not result in convictions. What kind of message does the

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93 See generally Morrison Torrey, When Will We Be Believed, 24 U Cal Davis L Rev 1013 (1991) (detailing ways in which police, prosecutors and jurors refuse to believe women); Lynn Hecht Schafran, Writing and Reading About Rape: A Primer, 66 ST. JOHN’S L. REV 979, 1010-11 (1993) (police and prosecutors “unfound” cases that do not fit into stranger rape paradigm); ROSE CORRIGAN, UP AGAINST A WALL: RAPE REFORM AND THE FAILURE OF SUCCESS 80 –100 (2014) (police and prosecutors often do not take rape claims seriously).

94 The court-martial judge chastised the Army for letting the political pressure to enforce sexual assault rules cloud their judgment of whether this was an appropriate case to press. See Blinder and Oppel, supra note 68


96 Jason Vest, The School that Put Sex to the Test: At Antioch, A Passionate Reaction to Consent Code, WASHINGTON POST, 12/3/1993 (reporting that sex continues to be a regular part of life at Antioch College despite the mandatory communication-before-sex requirement.) See also Jane Cross, Combatting Rape on Campus in a Class on Sexual Consent, NEW YORK TIMES, 9/25/93 at A1, A9.

97 See Baker, supra note 52 at 690 (“there is a mystery and spontaneity to non-verbal communication, but it can also be very dangerous.”); Lynn Henderson, Rape and Responsibility, 11 LAW AND PHIL 127, 162 (1992) (much of women’s “fear, shame and anger” at being assaulted could be “easily avoided” with communication). The drafters of the new Model Penal Code also make this argument. “False positives” (assuming someone is consenting when she is not) “present a far greater danger” than “false negatives” (assuming someone is not consenting). ALI Draft, supra note 23 at 69.

98 See supra text accompanying note 90 (experienced prosecutors would not have brought the John Z case because it would have been too hard to win and too hard on the victim.) See also William Stuntz, The Pathological Politics of Criminal Law, 100 Mich L Rev 505, 570 (2001) (discussing disincentive for prosecutors to bring cases that are hard to prove).
result in Misbrenner 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 it cannot prove that it happened. Criminal enforcement efforts will not be very effective in moving people toward a belief in the underlying conduct’s criminality if those enforcement efforts do not result in convictions.99

III. THE COMPETING CONSTRUCTIONS OF THE RAPIST

The second major impediment for the rape reform movement came 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.” As Susan Estrich argued with the title of her book, the goal was to treat all kinds of rape as “Real Rape,”100 though many people realized that it was going to be difficult to secure convictions for this new kind of rape.101 The problem stemmed from just how commonplace acquaintance rapist behavior was.

99 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 wrong. Rape reform may have moved attitudes away from a tendency to blame women and toward an acknowledgement that what the men did was wrong. Compare Baker, supra note 25 at 587-88 (discussing various prominent cases in which jurors or the public refused to blame the accused men because, though they acknowledged that the accused men used force to secure sex, they thought the women deserved it) with reactions to the cases discussed here. Misbrenner’s own mother said that what her son did was “not nice,” see Chuck Goudie, Outcome of Video Rape Case is No Cause for Celebration, CHI. DAILY HERALD, 3/6/06, and interviews with jurors make clear that the jurors saw the behavior as wrong. See supra note (82). People sympathetic to the football players in Steubenville acknowledged that they were “not being decent human beings.” Macur and Schweber, supra note 91. No one whom Professor Oberman spoke to her in her in-depth study of the John Z case defended John Z’s actions. See Oberman, supra note 86 at 399.
100 Estrich, supra note 45.
101 See infra text accompanying notes 111-113.
Significant numbers of men admit to having committed rape.\textsuperscript{102} Even more men admit to having coerced sex, when coercion is defined along a spectrum of ignoring women’s protests, to using physical force.\textsuperscript{103} Studies document that men rape without even realizing that they have done so.\textsuperscript{104} Men, \textit{understandably}, confuse women’s passivity for consent because many men know that women can be passive even when they want to consent to sex.\textsuperscript{105} Men believe that women say no when they mean yes.\textsuperscript{106} And some women do say no when they mean yes.\textsuperscript{107}

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.\textsuperscript{108} Men are encouraged to compete with other men with regard to sexual conquests.\textsuperscript{109} 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.\textsuperscript{110}

\textsuperscript{102} Mary P. Koss, \textit{Hidden Rape: Sexual Aggression and Victimization in a National Sample of Students in Higher Education}, in 2 \textit{RAPE AND SEXUAL ASSAULT} 1, 11 (Ann Wolbert Burgess, ed. 1988) (1 in 12 men admitted to having raped). This is a dated study, but given the number of sexual assaults that occur on college campuses today, it would be surprising if significantly fewer men admitted to having done it. See L Sieben, \textit{Education Dept Issues New Guidance for Sexual-Assault Violations}, Retrieved from \textit{CHRONICLE OF HIGHER EDUCATION}: http://chronicle.com/article/Education-Dept-Issues-New/127004/ (estimating 1 in 5 women on college campuses are victims of sexual assault)


\textsuperscript{104} See Kanin, supra note 29 at 97.

\textsuperscript{105} See Anderson, \textit{supra} note 30 at 109 (discussing women’s passivity); Baker, \textit{supra} note 52 at 674 (discussing literature on how women are socialized to be passive); Andrew Taslitz, \textit{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 of views.”)

\textsuperscript{106} Henderson, \textit{supra} note 97 at 141-142 (discussing the “no means yes” understanding. Note also the (honest) conversation with the judge in the John Z case, who acknowledged that he never took the first “no” seriously. See Oberman, \textit{supra} note 86 at 386.

\textsuperscript{107} One 1988 survey found that 39% of women at a Texas university had indicated that they did not want to have sex even though they did. Charlene L Muehlenhard & Lisa C Hollabaugh, \textit{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 (1988)

\textsuperscript{108} Baker, \textit{supra} note 52 at 675-679 (discussing the link between sexual performance and idealized masculinity)

\textsuperscript{109} See Baker, \textit{supra} note 26 at 606 (discussing instances in which men use sex and sexual conquest as a kind of competition or competition with other men)

\textsuperscript{110} For sure, the rape reform movement included attempts to educate men about the harms of
Rape reformers knew this. They knew that they were trying to unpack 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 “when so many rapes involve honest men and violated women . . . is the woman raped, but not by a rapist?” 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, 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."

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.

acquaintance rape, but studies done with college populations suggest that these training programs have often not been successful in helping men think of a potential hook-up partner as more than a sexual conquest. See Katharine K. Baker, Sex and Equality, 93 BU L REV ANNEX 11 (2013) (citing studies of hook-up culture and how commonplace it is for men to disregard women’s desires).

111 CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 183 (1989)
112 Susan Estrich, Palm Beach Stories, 11 LAW AND PHIL 5, 32-33 (1992)
113 Lynne Henderson, supra note 97 at 175-76.
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 sexual assault crimes, but also a new misdemeanor, §213.4, called “Sexual Intercourse without Consent.” 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.” 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 men.

While certainly well-meaning, the analysis in 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

192 See ALI Draft, supra note 23 Section 213.4, p. 67.
193 See Id., comments, p 68.
194 Id.
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 is arguably necessary before the norm of male entitlement to sex can change: the law punishing nonconsensual sex qua nonconsensual sex.

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, 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’ example of the relationship between the crime of burglary and the crime of possessing burglar’s tools. 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,

195 “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 98 at 570.
196 See Blinder and Oppel, supra note 68.
197 See Stuntz, supra note 98 at 537
regardless of whether they can prove C.\textsuperscript{198} 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 “carnal knowledge (A) . . . through force (B) and against her will (C).”\textsuperscript{199} The most serious sexual assault offenses still usually require “act of sexual intercourse” (A) secured through “physical force . . . or threat of physical force” (B).\textsuperscript{200} Section 213.4 suggests that B is not always necessary. There is a crime in AC, not only in ABC or AB.\textsuperscript{201}

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,\textsuperscript{202} 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.

\textsuperscript{198} Id. at 519
\textsuperscript{199} See supra note 1717
\textsuperscript{200} See e.g., § 213.1, ALI Draft p. 1, supra note 23
\textsuperscript{201} Reformers also argued that rape could involve many forms of nonconsensual sexual activity in addition to “carnal knowledge.” See supra text accompanying notes 21.
\textsuperscript{202} 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 and 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.” See Stuntz, supra note 98 at 520.