

William & Mary Journal of Race, Gender, and Social Justice

Volume 2 (1995)
Issue 1 *William & Mary Journal of Women and
the Law*

Article 3

October 1995

Feminist Legal Scholarship on Rape: A Maturing Look at One Form of Violence Against Women

Morrison Torrey

Follow this and additional works at: <https://scholarship.law.wm.edu/wmjowl>



Part of the [Criminal Law Commons](#)

Repository Citation

Morrison Torrey, *Feminist Legal Scholarship on Rape: A Maturing Look at One Form of Violence Against Women*, 2 Wm. & Mary J. Women & L. 35 (1995), <https://scholarship.law.wm.edu/wmjowl/vol2/iss1/3>

Copyright c 1995 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmjowl>

ESSAY

FEMINIST LEGAL SCHOLARSHIP ON RAPE: A MATURING LOOK AT ONE FORM OF VIOLENCE AGAINST WOMEN

MORRISON TORREY*

It is a horrifying reality for women—we have more to fear from those who say they love us than from strangers. Every crime of violence against women—child sexual abuse,¹ rape,² domestic battery,³ even murder⁴.—is more likely to be committed

* Professor of Law, DePaul University College of Law. The author would like to thank the friendly readers who contributed to this essay: Pauline Bart, Jennifer Wriggins, and the members of the Chicago Feminist Law Teachers and Friends Colloquium. Also, my able research assistants, Heidi Lambros, Jennifer Beagle and Shawn Ryan, provided substantial aid. Additionally, I thank Dean John Roberts and the Dean's Faculty Research Fund of DePaul University College of Law for supporting my work on this essay.

1. According to Diana E.H. Russell, over one quarter of girls have experienced sexual abuse before the age of 14, and over one third by the age of 18. DIANA E.H. RUSSELL, *THE SECRET TRAUMA: INCEST IN THE LIVES OF GIRLS AND WOMEN* 312 (1986). Over 15% of men experienced some form of sexual abuse as children. WOMEN'S ACTION COALITION, *WAC STATS: THE FACTS ABOUT WOMEN* 57 (1993) [hereinafter *WAC STATS*] (citing The National Resource Center on Child Sexual Abuse). According to a 1992 report, fewer than 20% of children are abused by strangers. *Id.*

2. One out of every three women will be the victim of a sexual assault during her lifetime. *Sharing the Burden of Abuse: Men Take Steps Against Male Violence*, BOSTON GLOBE, Oct. 17, 1990, at 81, col. 2 (citing Federal Bureau of Investigation statistics). Approximately three out of four women who are raped knew their attacker. *WAC STATS*, *supra* note 1, at 49 (citing NATIONAL VICTIM CENTER AND CRIME VICTIMS RESEARCH AND TREATMENT CENTER, *Rape in America, A Report to the Nation* (1992), and *The Mind of the Rapist*, NEWSWEEK, July, 23 1990 (quoting U.S. Bureau of Justice Statistics)).

3. One out of every two married women will be beaten on at least one occasion by her husband. Joan Zorza, *The Criminal Law of Misdemeanor Domestic Violence, 1970-1990*, 83 J. CRIM. L. & CRIMINOLOGY 46 (1992). Pregnancy is a high risk time for women — one out of every six pregnant women is abused physically and/or sexually during pregnancy. Judith McFarlane et al., *Assessing for Abuse During Pregnancy: Severity and Frequency of Injuries and Associated Entry into Prenatal Care*, 267 JAMA 3176, 3177 (1992). The male partner is the perpetrator in over 95% of domestic assaults. *WAC STATS*, *supra* note 1, at 55 (citing *Myths and Facts about Domestic Violence* (adapted from Domestic Violence Project, Ann Arbor, MI)).

4. Women commit less than 15% of the homicides in the U.S. *WAC STATS*, *supra* note 1, at 56 (citing NATIONAL CLEARINGHOUSE FOR THE DEFENSE OF BATTERED WOMEN, PHILADELPHIA, Statistics, 1988 (1989)). Approximately nine out of ten murdered women are murdered by men, half of them by a male partner. *Id.* (citing LORI HEISE, VIOLENCE HEALTH AND DEVELOPMENT PROJECT, CENTER FOR WOMEN'S GLOBAL LEADERSHIP, RUTGERS UNIV., GENDER VIOLENCE AS HEALTH ISSUE (fact sheet) (1992)).

by someone we know and trust than by a stranger. Complicating the private aspects of violence against women is the nature of the crime. Sex crimes are perceived and treated differently than all other crimes of coercion and violence.⁵ Whereas it is probably true that most, if not all, women fear being raped on a daily basis (or at least think about preventive measures every day),⁶ the reality is that beatings by lovers are the greatest single cause of injury to women in the United States—more than car accidents, rapes and muggings combined.⁷ This essay addresses the evolution of feminist legal scholarship concerning rape.⁸

Beginning in the 1970s, spurred by Susan Brownmiller's landmark and widely-read book, *Against Our Will: Men, Women and Rape*, women began to break the silence about rape.⁹ Brownmiller's work challenged traditional notions about rape, rapists, and rape victims, and sparked new research and scholarship about criminal sexual conduct. She critiqued all aspects of rape law, including its definition (which excluded all sexual conduct except penile-vaginal penetration),¹⁰ the marital rape exemption,¹¹ the requirement of resistance,¹² the determination of nonconsent,¹³ and numerous evidentiary issues.¹⁴ In addition, she was one of the first feminist scholars to link pornography and prostitution

5. For example, Susan Estrich notes that nonconsent traditionally has been a required element in several crimes, including theft, assault, battery, and trespass. SUSAN ESTRICH, REAL RAPE 29 (1987). However, she states that rape is unique because it, and only it, requires victims to demonstrate their nonconsent through physical resistance. *Id.*

6. MARGARET T. GORDON & STEPHANIE RIGER, THE FEMALE FEAR: THE SOCIAL COST OF RAPE 8 (1989).

7. WAC STATS, *supra* note 1, at 55 (citing LYNNE SOWDER, Y CARE, CHICAGO, Facts on Domestic Violence); HEISE, *supra* note 4. Domestic battery is the problem most women face today.

8. For reasons of space limitations, this essay does not review the literature on the relationship between domestic battery and rape. However, at least 60% of battered women are sexually abused by their partners. WAC STATS, *supra* note 1, at 55 (citing MYTHS AND FACTS ABOUT DOMESTIC VIOLENCE (adapted from Domestic Violence Project, Ann Arbor, MI)).

9. Some of the other feminists writing about rape were DIANE E.H. RUSSELL, THE POLITICS OF RAPE: THE VICTIM'S PERSPECTIVE (1974); ANDRA MEDEA & KATHLEEN THOMPSON, AGAINST RAPE (1974); KATHLEEN BARRY, FEMALE SEXUAL SLAVERY (1979); and SUSAN GRIFFIN, RAPE: THE POWER OF CONSCIOUSNESS (1979). As Griffin remarked in her classic article, "the obscurity of rape in print exists in marked contrast to the frequency of rape in reality..." Susan Griffin, *Rape: The All-American Crime*, RAMPARTS, Sept. 1971, at 26, 27.

10. SUSAN BROWN MILLER, AGAINST OUR WILL: MEN, WOMEN, AND RAPE 424 (1975).

11. *Id.* at 427-28.

12. *Id.* at 430-32.

13. *Id.*

14. See, e.g., *id.* at 433 (questioning the relevancy of a victim's sexual history).

with rape¹⁵ and to discuss "date" or "acquaintance" rape.¹⁶ As a result of the questions raised by Brownmiller and other feminists, people began to see rape not just as violence or sex, but as a form of "mass terrorism" and an act of male domination over women.¹⁷

The most prominent response to this feminist critique was an attempt to reform criminal rape law.¹⁸ Early American courts had required the "utmost resistance" in order to demonstrate nonconsent in rape prosecutions.¹⁹ This notion was derived from the male judge's stereotype of the chaste and virtuous woman—that she would do everything in her power, even die, rather than be violated. Obviously, this notion was not formed by a realistic view of a woman's relatively powerless position in society nor through any evaluation of empirical data. Unfortunately, this arcane view persisted deep into the 20th century when courts continued to find that no rape was committed "unless the woman oppose[d] the man to the utmost limit of her power."²⁰

15. *Id.* at 438. However, other feminists have also addressed this connection. See, e.g., ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1979); CATHARINE A. MAC-KINNON, *FEMINISM UNMODIFIED* (1987).

16. BROWNMILLER, *supra* note 10, at 450.

17. As one prominent author stated:

Rape is an act of aggression in which the victim is denied her self-determination. It is an act of violence which, if not actually followed by beatings or murder, nevertheless always carries with it the threat of death. And finally, rape is a form of mass terrorism, for the victims of rape are chosen indiscriminately, but the propagandists for male supremacy broadcast that it is women who cause rape by being unchaste or in the wrong place at the wrong time—in essence, by behaving as though they were free.

Griffin, *supra* note 9, at 35.

18. One of the first contemporary law review articles taking rape seriously was written by Vivian Berger in the late 1970s. See *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1 (1977) (specifically addressing issues about rape shield laws). However, it is interesting to note that there was a proliferation of student notes and comments on rape-related subjects during the 1970s. See generally *id.* (referencing many student notes and comments).

19. See, e.g., *Brown v. State*, 127 Wis. 193, 106 N.W. 536 (1906) (reversing a rape conviction because the victim had not adequately demonstrated her nonconsent and stating: "Not only must there be entire absence of mental consent or assent, but there must be the most vehement exercise of every physical means or faculty within the woman's power to resist the penetration of her person, and this must be shown to persist until the offense is consummated."); *People v. Dohring*, 59 N.Y. 374 (1874).

20. *People v. Hughes*, 41 A.D.2d 333, 343, N.Y.S.2d 240, 242 (N.Y. App. Div. 1973) ("It is difficult to conclude that the complainant here waged a valiant struggle to uphold her honor."). This is just one example of how courts apply myths instead of reality in rape prosecutions. See generally Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013 (1991).

Moreover, even though traditional notions of appropriate sexual conduct were based on a moralistic view that the only acceptable sexual conduct was that which occurred within the legal confines of marriage,²¹ marriage itself did not protect women from forced sex. Wives were presumed to consent; husbands had an absolute right to have intercourse with their wives.²² By defining rape as intercourse with a woman "not his wife," a majority of states immunized husbands from prosecution as late as 1977; other states simply relied on the common law exemption.²³

Because liberal feminism was the dominant strain of the women's movement in the 1970s and 1980s,²⁴ the classic liberal ideology of privacy, autonomy, and individual choice shaped emerging rape reform. The influence of liberalism can be discerned in three major changes: (1) the concept of "consent" became the essential difference between lawful and unlawful conduct;²⁵ (2) "sexual coercion came to be viewed as individual and gender neutral rather than institutional and sex specific,"²⁶ thus remaining con-

21. See Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 781 (1988).

22. The source of the marital rape exemption is attributed to seventeenth century jurist Lord Chief Justice Hale who opined that "the husband cannot be guilty of a rape committed by himself upon his lawful wife for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract." MATTHEW HALE, *THE HISTORY OF THE PLEAS OF THE CROWN* 628 (R.H. Small ed. 1847). We can also thank Lord Chief Justice Hale for the prevailing homily that rape charges are "easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent." *Id.* at 634.

23. ESTRICH, *supra* note 5, at 73. Some states even included cohabitants and former spouses within the exemption. See Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45, 48 (1990). Even when states eliminate the marital exemption, it is extremely difficult to obtain convictions. See MARY BECKER, ET AL. *CASES AND MATERIALS ON FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY* 237-44 [hereinafter *TAKING WOMEN SERIOUSLY*]; Lisa D. Waggoner, *New Mexico Joins the Twentieth Century: The Repeal of the Marital Rape Exemption*, 22 N.M. L. REV. 551 (1992); *To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment*, 99 HARV. L. REV. 1255 (1986).

24. See *TAKING WOMEN SERIOUSLY*, *supra* note 23, at 17-27 ("Liberal feminism became dominant within the women's movement . . . Liberalism, with its use of widely accepted cultural norms such as individualism and its commitment to incremental change within the existing order, was inevitably less threatening, and in some ways more effective than radical or socialist feminism.").

25. Chamallas, *supra* note 21, at 782.

26. Jo Dixon, *Feminist Reforms of Sexual Coercion Laws*, in *SEXUAL COERCION: A SOURCEBOOK ON ITS NATURE, CAUSES, AND PREVENTION* 161, 166 (Elizabeth Grauerholz and Mary A. Koralewski eds., 1991). In reality, rape is *not* gender neutral; men commit rape. According to the U.S. Federal Bureau of Investigation, in 1991 over 98% of those persons arrested for forcible rape were male; 99% of those convicted of forcible rape were male. *Uniform Crime Reports*, FBI, U.S. Dept. of Justice (1991).

sistent with the liberal emphasis on gender neutral humanism; and (3) rape was characterized as "violence" as opposed to "sex" with the adoption of the sexual assault and battery approach to legislative reform.²⁷

Responding to liberal feminist demands for reform, many states made legislative changes in the common law of rape. Today, almost all states have modified their rape statutes to some degree. Reforms address concerns with evidentiary rules that assume women to be liars, such as the requirement of independent evidence corroborating the victim's story,²⁸ the limitation on testimony concerning the victim's prior sexual history,²⁹ the abrogation of the fresh complaint doctrine,³⁰ the prohibition on cautionary jury instructions,³¹ the removal or creation of partial marital exemptions,³² the modification (from "utmost" to "earnest" to "reasonable") or elimination of standards of proof of resistance,³³ the admission of expert testimony on Rape Trauma Syndrome,³⁴ and the renewal of the attempt to define "consent."³⁵

27. Dixon, *supra* note 26, at 166.

28. See, e.g., Karla Fischer, *Defining the Boundaries of Admissible Expert Psychological Testimony on Rape Trauma Syndrome*, 1989 U. ILL. L. REV. 691, 696 (1989); Dawn M. DuBois, *A Matter of Time: Evidence of a Victim's Prompt Complaint in New York*, 53 BROOK. L. REV. 1087, 1098 (1988).

29. Commonly known as the "rape shield rule," the rule generally excludes testimony about the victim's prior sexual activity unless such activity was with the defendant (apparently assumed to be relevant as to consent) or the testimony explained the presence of other physical evidence, such as semen. See, e.g., FED. R. EVID. 412; TAKING WOMEN SERIOUSLY, *supra* note 23, at 232-37. However, many defense attorneys and others argue that such a rule violates the defendant's 6th Amendment right of confrontation. See, e.g., Lara E. Simmons, *Michigan v. Lucas: Failing to Define the State Interest in Rape Shield Legislation*, 70 N.C. L. REV. 1592 (1992); Peter M. Hazelton, *Rape Shield Laws: Limits on Zealous Advocacy*, 19 AM. J. CRIM. L. 35 (1991).

30. See Torrey, *supra* note 20, at 1041-45, 1066.

31. See *id.* at 1045-46.

32. See *id.* at 1063-64. Most states, although they have eliminated the marital exemption, accord a lower level of criminality to marital rapes. See Lisa Bernstein, *Trends in Marital Rape Laws: Progress or Facade?*, 2 UCLA WOMEN'S L.J. 273 (1992); TAKING WOMEN SERIOUSLY, *supra* note 23, at 241-44.

33. Exactly how to determine "reasonableness" perpetuates the debate between objective and subjective standards. See TAKING WOMEN SERIOUSLY, *supra* note 23, at 758-67 (discussion of the "reasonable person" standard in the context of sexual harassment law).

34. See Torrey, *supra* note 20, at 1064-65.

35. Martha Chamallas, in her comprehensive article on the legal control of sexual conduct, summarized how three states approached reform:

Landmark reform legislation in Michigan eliminated the consent issue altogether and framed the crime of rape solely in terms of the type and amount of force used by the defendant. Underlying the Michigan approach is a presumption that certain types of coercive behavior (for example, where a weapon is displayed) are per se unlawful. In such cases, there is no need to

In 1974, Michigan adopted a criminal sexual conduct statute.³⁶ This statute is probably the most complete reflection of the liberal view of rape as a sex neutral crime of violence.

Radical feminists attacked these liberal reforms on multiple levels. In the most abstract, radical feminists are concerned with the power disparity between men and women and believe that women's subordinate position is not solely a result of biased governmental actions but also a result of the greater economic and social power exerted by men in the private sphere.³⁷ Because liberalism is directed at limiting governmental intrusion in the private sphere, radical feminists charge that these reforms are incapable of correcting the oppression of women that occurs in both the public and private spheres.

In addition, some feminists attacked the failure of liberal feminism to address adequately racism and its impact on rape law.³⁸ Kimberle Crenshaw articulates how the consideration of rape law as a reflection of male control over female sexuality is an oversimplification for women of color:

Rape statutes generally do not reflect *male* control over *female* sexuality, but *white* male regulation of *white* female

address the question of the subjective consent of the victim.

Other states have taken a different approach and have tried to rehabilitate the concept of consent by defining consent from the victim's standpoint. Wisconsin, for example, has narrowed the definition of consent to include only those overt acts or words of the victim indicating freely given consent. Under such a standard, a man is subject to criminal prosecution if he has sexual intercourse with a passive woman without first securing her express consent. Additionally, Illinois has demonstrated more trust in the credibility and reliability of rape complainants by shifting the burden of production to the defendant to present some evidence of consent before the issue is interjected into the criminal prosecution. This represents an important change from the traditional allocation which assigns the victim's lack of consent as an element of the state's case.

Chamallas, *supra* note 21, at 799-800 (citations omitted).

36. MICH. COMP. LAWS ANN. § 750.520a (West 1991).

37. See, e.g., CATHARINE A. MACKINNON, *Difference and Dominance*, in FEMINISM UNMODIFIED 32-45 (1987).

38. See, e.g., Kristin Bumiller, *Rape as a Legal Symbol: An Essay on Sexual Violence and Racism*, 42 U. MIAMI L. REV. 75 (1987); Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 157-60; Erin Edmonds, *Mapping the Terrain of Our Resistance: A White Feminist Perspective on the Enforcement of Rape Law*, 9 HARV. BLACKLETTER J. 43 (1992); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585, 598-601 (1990); Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT L. REV. 359 (1993); Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103 (1983).

sexuality. Historically, there has been absolutely no institutional effort to regulate Black female chastity. Courts in some states had gone so far as to instruct juries that, unlike white women, Black women were not presumed to be chaste. Also, while it was true that the attempt to regulate the sexuality of white women placed unchaste women outside the law's protection, racism restored a fallen white woman's chastity where the alleged assailant was a Black man. No such restoration was available to Black women.

The singular focus on rape as a manifestation of male power over female sexuality tends to eclipse the use of rape as a weapon of racial terror. When Black women were raped by white males, they were being raped not as women generally, but as Black women specifically. Their femaleness made them sexually vulnerable to racist domination, while their Blackness effectively denied them any protection. This white male power was reinforced by a judicial system in which the successful conviction of a white man for raping a Black woman was virtually unthinkable.³⁹

This critique maintains the interconnectedness of sexism and racism.

Due to the emerging importance of "consent" as part of the liberal rape reform agenda, many feminist legal scholars targeted this issue as a legal doctrine. In general, feminist critiques of the legal definition of consent to sexual activity fall into three categories: (1) true consent is not possible until women are no longer subordinated by men; (2) consent is often presumed or implied in non-stranger rape; and (3) prevalent sexual mythology encourages men to disbelieve women when they say "no." The difference between male and female experiences of "coercion" exacerbates the problem—sometimes it may seem as if the sexes are speaking different languages. Men tend to find coercion in physical or economic pressure; however, women feel it emotionally and psychologically as well. Martha Chamallas summarizes the difficulty of this issue:

Perhaps more than in other areas of the law, the concept of consent as it relates to sexual activities is a complicated notion. Central to both the lay and legal notions of consent are considerations other than the subjective desires of the parties. Consent is a devilishly malleable term which may describe a

39. Crenshaw, *supra* note 38, at 157-59 (citation omitted).

wide spectrum of responsive behavior, ranging from the mere failure to engage in active resistance, to active participation in and encouragement of another's initiatives. For that reason, a decision as to what conduct constitutes consent in any particular context may mask value judgments implicit in the choice of definition. A determination of sexual consent may, for example, serve as a proxy for moral judgments about the behavior of the parties or as a shorthand method for classifying certain forms of sexual behavior as normal. Particularly in an era greatly influenced by Freudian psychology, there was a willingness to label sexual conduct as consensual, even if it could be seen as fulfilling only the unconscious desires of the actors. The Freudian concern for the ill effects of repression also provided a theoretical justification for a loose operative definition of consent.⁴⁰

In her important book analyzing the law's treatment of non-stranger rape, Susan Estrich agrees with the feminist assertion that in a society where women have less power than men, viewing a simple "yes" as consent is misguided:

I am quite certain that many women who say yes to men they know, whether on dates or on the job, would say no if they could. I have no doubt that women's silence sometimes is the product not of passion and desire but of pressure and fear. Yet if yes may often mean no, at least from a woman's perspective, it does not seem so much to ask men, and the law, to respect the courage of the woman who does say no and to take her at her word. . . . As for intent, unreasonableness as to consent, understood to mean ignoring a woman's words, should be sufficient for liability. Reasonable men should be held to know that no means no; and unreasonable mistakes no matter how honestly claimed, should not exculpate.⁴¹

The feminist legal scholar Catharine MacKinnon also explores the twin concepts of coercion and consent:

Consent is supposed to be women's form of control over intercourse, different from but equal to the custom of male initiative. . . . The law of rape presents consent as free exercise of sexual choice under conditions of equality of power without exposing the underlying structure of constraint and dispar-

40. Chamallas, *supra* note 21, at 795 (citations omitted).

41. ESTRICH, *supra* note 5, at 102-03.

ity. . . . The law of rape divides women into spheres of consent according to indices of relationship to men. Which category of presumed consent a woman is in depends upon who she is relative to a man who wants her, not what she says or does. These categories tell men whom they can legally fuck, who is open season and who is off limits, not how to listen to women. The paradigm categories are the virginal daughter and other young girls, with whom all sex is proscribed, and the whorelike wives and prostitutes, with whom no sex is proscribed. Daughters may not consent; wives and prostitutes are assumed to, and cannot but. [sic] Actual consent or nonconsent, far less actual desire, is comparatively irrelevant. If rape laws existed to enforce women's control over access to their sexuality, as the consent defense implies, no would mean no, marital rape would not be a widespread exception, and it would not be effectively legal to rape a prostitute.⁴²

In analyzing the consent problem, feminist political philosopher Carol Pateman focuses on the evolution of consent theory.⁴³ Ironically, she finds that consent theorists have consistently attempted to suppress the radical and subversive implications of their own arguments: "writers on consent have been assisted in this endeavour by the contemporary consensus that women, and the relationship between the sexes, are of no special relevance to political theory."⁴⁴ She writes that "[c]onsent as ideology cannot be distinguished from habitual acquiescence, assent, silent dissent, submission or even enforced submission. Unless refusal of consent or withdrawal of consent are real possibilities, we can no longer speak of 'consent' in any genuine sense."⁴⁵

The concept of consent is a thorny one,⁴⁶ however, perhaps more than any other single legal issue. The idea of consent concerns fundamental problems of a society in which one group dominates all others and defines legal doctrine according to its own experiences ("neutrality").

42. CATHARINE A. MACKINNON, *Rape: On Coercion and Consent*, in TOWARD A FEMINIST THEORY OF THE STATE 171, 174-75 (1989).

43. CAROL PATEMAN, *Women and Consent*, in THE DISORDER OF WOMEN: DEMOCRACY, FEMINISM AND POLITICAL THEORY 71 (1989).

44. *Id.* at 72.

45. *Id.*

46. Another aspect to "consent" theory is the problem of statutory rape. See Michelle Oberman, *Turning Girls into Women: Re-Evaluating Modern Statutory Rape Law*, 85 J. CRIM. LAW & CRIMINOLOGY 15 (1994); Frances Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984).

Radical feminists assert that it is a mistake to characterize rape as violence rather than sexualized violence.⁴⁷ As a practical matter, prosecuting rapes that may lack physical violence, such as date and marital rape, is more difficult under a characterization of rape as simply violence.⁴⁸ Moreover, to categorize rape as a violent assault obscures the unique meaning and understanding of the indignity and harm of rape. Rape is a different and more serious affront than assault. To label rape as merely assault denies the reality of what *rape*, as opposed to other physical assaults, does—rape is an objectification and denial of the basic humanity of the victim.⁴⁹

However, as Lynne Henderson has pointed out, “[t]he rape-as-violence argument did succeed in disentangling rape from sex, and therefore harm from pleasure, in the minds of many.”⁵⁰ This separation of violence and sex is an attempt to analogize rape to experiences that men can relate to, i.e., violence, because, after all, to them sex is pleasure, not harm. Henderson also identified the problematic aspect of speaking a language that men understand: “The rape-as-violence argument leaves unchallenged most male interpretations of heterosexual relations. In calling rape ‘violence,’ feminists have enabled many men to distinguish what they have done from what rapists do, because they haven’t caused

47. As Catharine MacKinnon so aptly puts it, “[w]hen acts of dominance and submission, up to and including acts of violence, are experienced as sexually arousing, as sex itself, that is what they are. . . . Violence is sex when it is practiced as sex.” CATHARINE A. MACKINNON, *Sexuality*, in FEMINISM UNMODIFIED 6 (1987).

48. Dixon, *supra* note 26, at 170.

49. While I do not intend in any way to minimize the trauma and harm of physical assaults, there are several aspects to rape that set it apart. For example, it remains primarily a sex specific crime, i.e., women are raped by men. Because sexual activity is involved, traditional notions of shame and guilt may result. There is a pervasive societal belief that women “deserve” or “want” to be raped, or even enjoy it. This is manifested in four rape myths: (1) only women with “bad” reputations are raped; (2) women are prone to sexual fantasies; (3) women precipitate rape by their appearance and behavior; and (4) women, motivated by revenge, blackmail, jealousy, guilt, or embarrassment, falsely claim rape after consenting to sexual relations. *See generally* Torrey, *supra* note 20. The physical consequences of rape also differ—there is a likelihood of pregnancy, sexually transmitted diseases, and, now, AIDS. *See generally* Gerard Mantese et al., *Medical and Legal Aspects of Rape and Resistance*, 12 J. LEGAL MED. 59 (1991). Even family members and friends may suffer from the far-reaching effects of rape. *Id.*; *see also* Brande Stellings, *The Public Harm of Private Violence: Rape, Sex Discrimination and Citizenship*, 28 HARV. C.R.-C.L. L. REV. 185, 185 (1993) (“Rape profoundly alters women’s sense of themselves and the world around them. . . . But unlike victims of other crimes, women who have been raped cannot ever feel fully secure in their persons, because all of the precautions in the world cannot eradicate the single biggest risk factor for rape—their femaleness.”).

50. Lynne Henderson, *Rape and Responsibility*, 11 LAW & PHIL. 127, 156 (1992).

external physical damage that they can understand as violence."⁵¹

Yet another stinging criticism is that many of these so-called reforms, including the emphasis on consent, still focus attention not on the actions of the perpetrator but on how the victim behaved before, during, and after the alleged rape.⁵² For example, feminists arguing for the admission of expert testimony about Rape Trauma Syndrome ("RTS") as evidence in rape prosecutions supported a preoccupation about the actions of the victim.⁵³

Ironically, we now know that the legislative changes have not made any difference in the arrest, prosecution and conviction of rapists. Empirical studies of rape reforms in Michigan,⁵⁴ Washington,⁵⁵ California,⁵⁶ Canada,⁵⁷ and six urban environments⁵⁸ were remarkably identical—there was virtually no change in the crim-

51. *Id.* at 157.

52. Dixon, *supra* note 26, at 163. Another aspect of this focus on the victim rather than the perpetrator has been the discussion of "victim talk." See, e.g., Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411 (1993).

53. Rape Trauma Syndrome ["RTS"] testimony is sometimes admitted to explain that the alleged victim reacted in ways consistent with someone suffering from RTS even though her behavior may not conform to commonly held beliefs about how rape victims react. See generally Toni M. Massaro, *Experts, Psychology, Credibility, and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony*, 69 MINN. L. REV. 395 (1985).

54. See Julia Horney & Cassia Spohn, *The Impact of Rape Reform Legislation*, NATIONAL INSTITUTE OF JUSTICE (1989) (rape reform in Michigan had little impact on the way criminal justice officials evaluated rape cases).

55. See Wallace D. Loh, *The Impact of Common Law and Reform Rape Statutes on Prosecution: An Empirical Study*, 55 WASH. L. REV. 543, 618 (1980) ("Compared to the common law statute, the findings clearly indicate that the Washington reform legislation has not changed how prosecutors screen and file cases, with the consequence that the total proportion of convictions remains the same.").

56. See Kenneth Polk, *Rape Reform and Criminal Justice Processing*, 31 CRIME & DELINQ. 191 (1985) ("One goal of criminal law reform regarding rape has been to enhance convictions. Data from California, in which several such reforms have been introduced, indicate that between 1975 and 1982: (1) police clearance rates for rape have remained relatively unchanged; (2) the rate of court filings for rape increased slightly; (3) the probability of a conviction once a case reached court was relatively unchanged; but that (4) there was a strong upward trend for cases of rape (and other serious felonies) to lead to an institutional sentence.").

57. See Julian V. Roberts & Robert J. Gebotys, *Reforming Rape Laws: Effects of Legislative Change in Canada*, 16 LAW & HUM. BEHAV. 555 (1992) (although there was a significant increase in the number of rapes reported concurrent with passage of the legislation, "the legislation has had no discernible effect upon the immediate criminal justice response to reports of sexual aggression").

58. Cf. Julia Horney & Cassia Spohn, *Rape Law Reform and Instrumental Change in Six Urban Jurisdictions*, 25 LAW & SOC'Y REV. 117 (1991) (although the authors conclude that rape reform had only a limited ability to affect case outcomes, their study did find that rape victims were treated more sensitively).

inal justice response following reform. The results indicated that the only change was a significant increase in the number of reports of rape concurrent with the passage of the legislation and its attendant publicity; but that increase diminished over time. Maybe there is no "model statute" solution to rape law, because the problem is not the words of the law so much as our interpretation of those words.⁵⁹ This interpretational problem is rooted in a society in which one group (the perpetrators) has economic, political, and social power over the other group (the victims).

Radical feminists are now directing their efforts in a variety of areas. Serious questions are being raised about essential differences between stranger and non-stranger rapes and rapists.⁶⁰ For instance, are the circumstances involved in the two types of rape sufficiently variant to justify creating a new statute specifically addressing non-stranger rape? Recently, feminists active in the anti-rape movement have more directly challenged the myths of male innocence and female guilt in their campaign against "date rape," emphasizing that it is the man who rapes and who is responsible for what he does with his penis.⁶¹ In order to deal with the complex problems involved in non-stranger sexual assault, Lynne Henderson urges us to develop a more "positive" account of heterosexuality because without it feminism will continue to have "difficulty maintaining a distinction between rape and intercourse, between a profoundly damaging experience and an immensely pleasurable one."⁶²

Another indication of the heightened sophistication and candor of feminist legal scholarship about rape is Mary Coombs' article acknowledging the dangers of exploring, through telling our

59. ESTRICH, *supra* note 5, at 58.

60. See, e.g., SALLY K. WARD ET AL., *ACQUAINTANCE AND DATE RAPE: AN ANNOTATED BIBLIOGRAPHY* (1994); see also, Lois Pineau, *Date Rape: A Feminist Analysis*, 8 L. & PHIL. 217 (1989).

61. Henderson, *supra* note 50, at 159; see, e.g., Karen M. Kramer, *Rule by Myth: The Social and Legal Dynamics Governing Alcohol-Related Acquaintance Rapes*, 47 STAN. L. REV. 115 (1994).

62. Henderson, *supra* note 50, at 163. Stephen Schulhofer argues in support of adopting a theory of "sexual autonomy" in rape law. Stephen Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 LAW & PHIL. 35, 58 (1992). Donald A. Dripps urges us to think of sex as a commodity and therefore rape as theft. 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 (1992). But see Robin L. West, *Legitimizing the Illegitimate: A Comment on Beyond Rape*, 93 COLUM. L. REV. 1442 (1993); Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT L. REV. 359 (1993). For a powerful refutation of the theory of "sex as contract," see Martha A. Fineman, *A Legal (and Otherwise) Realist Response to 'Sex As Contract,'* 4 COLUM. J. GENDER & L. 128 (1994).

stories, what we consider sexual violation as opposed to sexual pleasure:

As part of the long-term struggle for understanding and transformation, we need to examine our own experiences of sexuality and the social and psychological dynamics of those experiences. The world is not divided neatly into good sex, on the one hand, and rape and violation on the other. There are situations that fit into neither category: endured sex; "bad" sex; degrading, unpleasant, and offensive encounters; sex when one participant wants to please the other or is willing to tolerate sex for the partner's good qualities. Women need to explore the full range of arguably sexual activities and their reactions to them.⁶³

As Kim Lane Scheppele explains, "[w]hat is needed still is the *re-vision* of rape, learning to *see differently* in law how men and women communicate and interact."⁶⁴

We are learning more and more from listening to what the social and behavioral sciences can tell us about rape, rapists, and rape victims.⁶⁵ Many feminists are urging us to use this information to dispel the many myths commonly held about rape that serve to punish women who do not conform to those myths.⁶⁶ Because these sciences seem to suggest that we can "debrief" commonly held false beliefs and stereotypes about rape,⁶⁷ feminists have initiated educational projects. For instance, there are now judicial and prosecutorial education projects geared to educating the decisionmakers in the criminal justice system.⁶⁸ Education offers a potential solution to ending the epidemic of violence against women that reform of the justice system has failed to provide.

63. Mary I. Coombs, *Telling the Victim's Story*, 2 TEX. J. WOMEN & L. 277, 311 (1993) (citations omitted).

64. Kim L. Scheppele, *The Re-Vision of Rape Law*, 54 U. CHI. L. REV. 1095, 1114 (1987) (book review of ESTRICH, REAL RAPE).

65. See, e.g., Kimberly A. Lonsway & Louise F. Fitzgerald, *Rape Myths In Review*, 18 PSYCHOL. WOMEN Q. 133 (1994); articles cited in Torrey, *supra* note 20.

66. See, e.g., Torrey, *supra* note 20; Sue A. Gregory, *Rape and Child Sexual Assault: Dispelling the Myths*, 14 U. HAW. L. REV. 157 (1992).

67. See, e.g., Neil M. Malamuth & James V.P. Check, *Debriefing Effectiveness Following Exposure to Pornographic Rape Depictions*, 20 J. SEX RES. 1 (1984).

68. The National Judicial Education Project focuses on this problem. See, e.g., Lynn H. Schafran, *Women in the Criminal Justice System: Writing and Reading About Rape: A Primer*, 66 ST. JOHN'S L. REV. 979 (1993); Lynn H. Schafran, *Maiming the Soul: Judges, Sentencing and the Myth of the Nonviolent Rapist*, 20 FORDHAM URB. L.J. 439 (1993).

Feminist legal scholarship has matured to such a degree that we can now publicly comment on the failures of the past. For example, the reliance upon RTS testimony has been roundly criticized by Susan Stefan not just because it can be manipulated by defense attorneys to attack the credibility of individual victims who do not suffer from the documented forms of RTS,⁶⁹ but because (1) it suggests that there is a right and wrong way to react to rape, thus delegitimizing personal reactions and resulting in labelling the victims rather than the perpetrators as "sick;" and (2) it removes the issue of rape from the political sphere, suggesting that the victims rather than society are sick.⁷⁰

As part of their concern that rape is not taken seriously, several feminist scholars analyzed the treatment of rape in criminal law casebooks⁷¹ and treatises,⁷² as well as in the classroom.⁷³ But feminist law school casebooks, such as *Cases and Materials on Feminist Jurisprudence: Taking Women Seriously*,⁷⁴ are beginning to address not just the technical criminal law aspects of rape but also other issues of importance, such as the effects of violence against women, the viability of civil as opposed to criminal actions against rapists, and even ways to stop a rape attempt.⁷⁵

69. This is one manifestation of a phenomenon we have come to know as "equality with a vengeance," e.g., the proliferation of reverse discrimination lawsuits that has resulted in the elimination of alimony and maternal preferences in custody disputes.

70. See generally Susan Stefan, *The Protection Racket: Rape Trauma Syndrome, Psychiatric Labeling, and Law*, 88 NW. U. L. REV. 1271 (1994).

71. Nancy S. Erickson, *Final Report: 'Sex Bias in the Teaching of Criminal Law'*, 42 RUTGERS L. REV. 309 (1990); Nancy S. Erickson, *Sex Bias in Law School Courses: Some Common Issues*, 38 J. LEGAL EDUC. 101 (1988); Nancy S. Erickson, *Legal Education: The Last Academic Bastion of Sex Bias?*, 10 NOVA L.J. 457 (1986).

72. Mary I. Coombs, *Crime in the Stacks, or A Tale of a Text: A Feminist Response to a Criminal Law Textbook*, 38 J. LEGAL EDUC. 117 (1988).

73. See, e.g., Nancy S. Erickson & Mary Ann Lamanna, *Sex-Bias Topics in the Criminal Law Course: A Survey of Criminal Law Professors*, 24 U. MICH. J.L. REF. 189, 208 (1990) (even though rape is one of the most frequently included topics in the criminal law course, i.e., elements of the crime were covered by 86.3% of the professors responding to the survey, on average the teachers spent just over one and one-half hours on the topic); see also Susan Estrich, *Teaching Rape Law*, 102 YALE L.J. 509 (1992); James J. Tomkovicz, *On Teaching Rape: Reasons, Risks, and Rewards*, 102 YALE L.J. 481 (1992).

74. TAKING WOMEN SERIOUSLY, *supra* note 23; see also BEVERLY BALOS & MARY L. FELLOWS, *LAW AND VIOLENCE AGAINST WOMEN: CASES AND MATERIALS ON SYSTEMS OF OPPRESSION* (1994); KATHARINE T. BARTLETT, *GENDER AND LAW: THEORY, DOCTRINE, COMMENTARY* (1993); MARY J. FRUG, *WOMEN AND THE LAW* (1992).

75. See, e.g., PAULINE B. BART & PATRICIA H. O'BRIEN, *STOPPING RAPE: SUCCESSFUL SURVIVAL STRATEGIES* (1985) (analysis of 94 interviews with women 18 or older who had been attacked and avoided being raped (51) or had been raped (43) in the two years prior to the interviews), reprinted in part in TAKING WOMEN SERIOUSLY, *supra* note 23, at 251-54.

Lest I appear too optimistic, let me finish with a quotation from Susan Estrich's article, *Sex at Work*, in which she notes that all of the discriminatory aspects of rape law have now been incorporated into sexual harassment doctrine:

In the last analysis, reform failed not because feminists are not good at writing statutes, but because if there is one area of social behavior where sexism is entrenched in law—one realm where traditional male prerogatives are most protected, male power most jealously preserved, and female power most jealously limited—it is in the area of sex itself, even forced sex. Guns and gangs may be recognized as criminal, but to go beyond that is to enter a man's protected preserve, in life and in law. In life, this male domain is protected by the wielding of real power—economic, physical, psychological, and emotional. In law, it is protected by doctrines of consent, corroboration, fresh complaint, and provocation. It is protected by manipulating these doctrines to embrace female stereotypes which real women cannot meet. It is protected by a definition of reasonableness that pits this woman against that ideal, that pits one woman against the rest. It is protected by punishing women who are weak for their weakness, and women who are exceptional for their strength. It is protected, in short, by the operation of sexism in the law.⁷⁶

Regardless of doctrinal or philosophical differences among feminists, one thing is clear: women will never be free until they are free from sexual aggression.

76. Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 814-15 (1991).