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PINK ELEPHANTS IN THE RAPE TRIAL: THE PROBLEM OF TORT-TYPE DEFENSES IN THE CRIMINAL LAW OF RAPE

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I. INTRODUCTION

Like many female civil libertarians, I often feel trapped in the feminist defense attorney dilemma. On the one hand, I am and always will be a woman. I have suffered through sexual harassment. I have been the recipient of unfair discrimination. I have carefully analyzed issues of social role and stereotype. Of course, I possess strong opinions on the subject of rape. I follow the feminist scholars. I listen to Susan Estrich:

Conduct is labeled criminal "to announce to society that these actions are not to be done and to secure that fewer of them are done." It is time — long past time — to announce to society our condemnation of simple rape, and to enforce that condemnation "to secure that fewer of them are done." The message of the law to men, and to women, should be made clear. Simple rape is real rape.¹

I know that as a woman, I am to condemn rape as the most invidious of crimes. I also realize that rape, in particular, is a crime that cannot be analyzed outside a social context. As the literature expresses quite vehemently, rape is not as simple as an act done by one individual to another, whose criminality is determined by a fair trial. Rape laws and trials implicate extensive historical and social attitudes that reflect the existing patriarchy:²

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1. SUSAN ESTRICH, REAL RAPE 104 (1987) (quoting H. L. A. HART, PUNISHMENT & RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 6 (1968)).

2. Feminists observe:

Patriarchy, a social system that privileges male over female power in spheres of endeavor our society values highly, is at the core of most feminist theory. Feminist theory focuses on the social mechanisms by which male power is perpetuated, urging ways to break the patriarchal yoke. Consistent with this view, rape is seen not as the act of an isolated, disturbed individual, but as a social mechanism for keeping women subordinated. Rape keeps women in their

[R]ape law reflects the sexually coercive society in which it operates. Although frowning upon aggressive sexual behavior at the extremes, our male-dominated society accepts a certain amount of coercion, aggression or violence against women as a normal, even desirable, part of sexual encounters.³

place, and fear of rape and other sexualized violence keeps women passive, sensitive to male needs, fearful of venturing out alone at night in public spaces, and dependent on the protection and presence of a man. Women therefore alter their behavior in endless ways, not because it serves their individual needs, but because it serves their men.

Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN'S STUD. 387, 394-95 (1996) (footnotes omitted).

3. Lani Anne Remick, Comment, *Read Her Lips: An Argument for a Verbal Consent Standard in Rape*, 141 U. PA. L. REV. 1103, 1104 (1993).

Two recent cases in the media complicate the theory that rape jurisprudence merely reflects the existing patriarchy. One case appears to support this theory. Dateline NBC recently ran a story on a Massachusetts case, *Commonwealth v. Cross*, 609 N.E.2d 88 (Mass. 1993), in which thirty-three year old female teacher, Karen Cross, was convicted of the statutory rape of a 15 year old male student. The case came down to the word of the complainant against the word of the defendant. The defense attorney revealed that the complainant could not remember many basic facts, such as what the defendant was wearing right before the alleged rape. The prosecution introduced a letter the defendant wrote to the complainant. Although the letter never referenced any sexual encounters, it did at one point state, "I can't get you off my f—ing mind." The jury deliberated for three days before returning a guilty verdict. During the interview, they all agreed there was little, if any, hard evidence of the sexual encounter. One juror stated, "I was very reluctant to find Karen Cross guilty despite the facts or what — what very few facts there were in essence. There wasn't very much concrete evidence in my opinion." The jury felt, however, that Cross had acted "inappropriately" and "unprofessionally." One juror asked, "Would a mature teacher write that [letter] to a student?" The jury, it seems, applied the same patriarchal rationale applied in female-victim rape cases. The same juror who said there was not enough evidence later stated, "I had to finally admit she was guilty because I sensed that she was a lonely and frustrated woman." *Dateline NBC: Teacher's Pet?: Karen Cross, Teacher, Accused of Raping Student* (NBC television broadcast, Mar. 26, 1997). In many female-victim rape cases, the jury analyzes "inappropriate" behavior as assumption of risk of rape. See *infra* text accompanying notes 72-78. In the *Cross* case, the jury analyzed the defendant's "inappropriate" behavior as assumption of risk of a rape accusation and subsequent conviction.

Juxtaposed is the recent Brown college sexual assault case. The facts were relatively uncontested: Sara was drunk. Adam was drunk. Adam had reason to believe Sara was drunk. He took her to his room where she initiated sexual intercourse. He did not refuse. The Brown administration expelled Adam for sexual misconduct but later reduced the penalty to probation. An interesting phenomenon resulted on Brown's campus. Sara was hailed a hero for speaking out. No one seemed to condemn her for being "falling down" drunk at a fraternity party. No one seemed to care that she had engaged in a casual sexual relationship. No one stigmatized her. This reaction was a far cry from what the literature indicates the social response to be. Adam, on the other hand, became a campus outcast. He received threats. He was stigmatized a rapist. D. Morgan McVicar, *Gray Area At Brown: A Night of Drinking and a Chance Encounter at an Ivy League School: Was It a Simple Case of Bad Judgment or Was It Rape?*, ORANGE COUNTY REG., Jan. 3, 1997, at E1. This case raises several interesting issues. Perhaps the patriarchy is not as strong as it once was. Maybe only student at Brown, an Ivy League school with a large liberal component, would

In addition, I have read all the statistics: One in five college students admit to having been "physically forced" to have sexual intercourse by a date.⁴ Only sixteen percent of all rapes are ever reported to the police.⁵ Finally, I know the extent to which rape harms the victim. "Rape is one of the most brutal, invasive and degrading forms of criminal victimization. Researchers have thoroughly documented that victims of rape suffer intense trauma, and profound and lasting injury."⁶ I know this not just from reading, but also from personal experience. I am one of the millions of women that, according to statistics, have experienced such harm. This combination of knowledge and personal experience informs the feminist side of my dilemma.

On the other hand, I am an aspiring defense attorney. I am a civil libertarian who sincerely believes in the rights of the criminal defendant.⁷ I think social reforms should not come at the expense of individual liberty. For example, I believe incriminating evidence

react this way. There seems to be some evidence of this, given the large public outcry against the Brown administration's initial decision to expel. To many, this case signaled that rape reform had gone too far. As early as 1992, members of the public have cried out against "militant" rape reform:

[W]omen's growing militancy on the issue of date rape . . . has alarmed many men. "The political momentum has swung to the other side of the gender gap" "We live in a time of sexual inquisition." Other men express fears that a misunderstood gesture or a vengeful woman could land them in court.

Mary Nemeth et al., *Chilling the Sexes: Women's Growing Militancy About Harassment and Date Rape Alarms Many Men*, MACLEAN'S, Feb. 17, 1992, at 42, 43 (citation omitted).

4. This was a study conducted at the University of South Dakota and Cornell University in 1985. ESTRICH, *supra* note 1, at 12 (citing BOSTON HERALD, Sept. 22, 1985, at 6).

5. See NATIONAL VICTIM CENTER AND CRIME VICTIMS RESEARCH AND TREATMENT CENTER, RAPE IN AMERICA: A REPORT TO THE NATION 6 (1992) [hereinafter NATIONAL VICTIM CENTER].

6. Steven B. Weisburd & Brian Levin, "On the Basis of Sex": Recognizing Gender-Based Bias Crimes, 5 STAN. L. & POL'Y REV. 21, 30 (1994). The authors elaborate:

The detrimental effects include any immediate physical injury sustained during the victimization as well as the risk of pregnancy and sexually transmitted diseases, including HIV/AIDS. In the long term, most rape victims report various forms of serious emotional harm as well. Victims often experience "rape trauma syndrome" or some variant of Post-Traumatic Stress Disorder (PTSD), which is a chronic psychological disorder characterized by sleeplessness, hypervigilance, fearfulness and anxiety, and coping difficulties. Other reported psychological and emotional problems include phobic responses, eating disorders, denial, shock, guilt, hostility and blame, helplessness and dependency, hypersensitivity, and general functioning disturbances.

Id. at 30-31 (footnotes omitted).

7. See Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 771 n.27 (1986) ("Indeed, within the ACLU, there was controversy concerning the proper scope of rape-shield legislation — a not surprising fact considering the ACLU's strong commitment both to women's rights and to the rights of criminal defendants.").

should be excluded, even if true and highly relevant, if obtained in violation of a criminal defendant's constitutional rights. Additionally, a criminal defendant should be able to present any evidence that is probative of his innocence, unless its prejudicial effect substantially outweighs its probative value.⁸ Even then, in close cases, judges should err on the side of admitting exculpatory evidence.

In the same vein, I believe that the social goals of encouraging rape reporting and reforming the rape trial process should not outweigh the individual criminal defendant's rights. For example, the social goal of encouraging rape reporting should not compromise the defendant's fair trial guarantees. Many experts indicate that underreporting is largely caused by the victim's slim chance of vindication at trial.⁹ In response, legislatures could make rules requiring, say, every fourth rape case to result in conviction. Such laws would obviously increase convictions and probably lead to more reporting of rapes. One could object, however, to the government determining the "correct" rate of reporting a crime and adjusting the outcome of trials to create that reporting rate. In addition, this legislation obviously would violate the defendant's right to fair trial and due process. Although it would cause more guilty defendants to be convicted, it would also put more innocent defendants in jail. It seems obvious that such legislation would not be a fair method of addressing rape underreporting.

Yet one could argue that this is precisely what many rape reform laws do. They increase conviction rates in nearly as arbitrary a way by tinkering with the evidence a criminal defendant is permitted to present or by shifting legal definitions and burdens. While such reforms cause higher reporting and conviction rates, they inevitably cause more innocent people to be reported and convicted. Such reforms also risk infringing upon other constitutional guarantees.¹⁰ These considerations inform the civil libertarian side of my dilemma.

This struggle between women's rights and defendants' rights has been highlighted in the ongoing debate over rape legislation:

8. This is stock evidentiary analysis under Rule 403 of the Federal Rules of Evidence. See *infra* note 95.

9. See Weisburd & Levin, *supra* note 6, at 31-32 (discussing the slim chance of convicting and incarcerating rapists).

10. See, e.g., *Olden v. Kentucky*, 488 U.S. 227, 231-33 (1988) (*per curiam*) (ruling that the exclusion under Kentucky's rape shield laws of evidence offered to impeach the complainant violated the defendant's confrontation right under the Sixth Amendment to the U.S. Constitution); see also *infra* text accompanying notes 140-44.

[R]ape statutes are designed to both protect women and convict those persons guilty of the crime. To many, these two objectives seem irreconcilable. Reflected throughout the legislative and adjudicatory history of rape laws is a fear that the larger goal of protecting women will be achieved at the price of convicting some innocent men.¹¹

This tension is evident in the current jurisprudential discourse. First, it arises in the debate over the proper definition of rape: Force, consent, affirmative nonconsent, or affirmative consent. To combat some of the problems with the consent inquiry,¹² current reformers call for a return to a pure force standard.¹³ Others

11. Victoria J. Dettmar, Comment, *Culpable Mistakes in Rape: Eliminating the Defense of Unreasonable Mistake of Fact as to Victim Consent*, 89 DICK. L. REV. 473, 474 (1985) (footnote omitted).

12. See Cynthia A. Wicktom, Note, *Focusing on the Offender's Forceful Conduct: A Proposal for the Redefinition of Rape Laws*, 56 GEO. WASH. L. REV. 399, 400-01 (1988) (footnote omitted):

Rape laws, which focus on the victim's nonconsent, inadequately define the crime and thereby contribute to the criminal justice system's failure to reduce the occurrence of rape. Compared to other crimes against the person, the reporting, arrest, and conviction rates for rape are very low. The inadequate definition of rape contributes to these low rates because the focus on the victim's conduct discourages reporting, the element of nonconsent is difficult to prove, and therefore, prosecutors are reluctant to bring cases and juries are reluctant to convict. The inadequacies of rape law threaten the safety and independence of women, who are the overwhelming majority of rape victims in the United States.

13. Initially, United States rape law focused on force and resistance. Complainants had to make a showing of extreme force by the defendant and utmost resistance on their part. See *Reynolds v. State*, 42 N.W. 903, 904 (Neb. 1889) ("voluntary submission by the woman while she has power to resist, no matter how reluctantly yielded, removes from the act an essential element of the crime of rape"), *overruled by* *Fulton v. Nebraska*, 81 N.W.2d 177 (Neb. 1957). The realization, through social science, that women submit to rape against their wills even where there is no tangible physical force, led to the incorporation of a consent standard. Under this standard, the relevant inquiry is whether or not the complainant consented to the sexual intercourse. See *Commonwealth v. Sherry*, 437 N.E.2d 224 (Mass. 1982).

Variations of this standard abound, requiring different measures of mens rea. One variation is the subjective victim intent standard, in which the relevant fact is whether or not the victim actually consented. Another variation is the subjective defendant intent standard in which the relevant fact is whether or not the defendant actually believed the victim consented. Next is the objective defendant intent standard in which the relevant fact is whether or not a reasonable person would have believed the victim did not consent. Given the increasing number of fraternity related rapes and date rapes involving alcohol, an increasingly visible subset of the consent inquiry is whether or not the victim had the capacity to consent, or whether or not the defendant knew or had reason to know the victim was not capable of consenting. See, e.g., MD. CODE ANN., Crimes and Punishments § 463(2) (1957) (proscribing intercourse with a person "[w]ho is mentally defective, mentally incapacitated, or physically helpless, and the person performing the act knows or should

advocate an affirmative consent standard, requiring the defendant to show the complainant said "yes."¹⁴ Although tinkering with the definition of rape seems like a permissible way to increase convictions and reporting, it has many of the same problems as simply increasing the conviction rate. Affirmative consent standards, for example, require defendants to show that they received permission to engage in sexual intercourse. If they cannot, a presumption of nonconsent arises.¹⁵ While this presumption will put more actual

reasonably know the other person is mentally defective, mentally incapacitated, or physically helpless").

It becomes increasingly evident that the consent inquiry was a messy affair. Calling into question a victim's past behavior, requiring resistance as evidence of past consent, and analyzing a victim's behavior and appearance as evidence of consent led to calls for a reformation of the consent standard. See, e.g., Wicktom, *supra* note 12, at 400-12. As a result, some reformers advocated a return to the force standard:

By removing the element of the victim's nonconsent and defining rape by the forceful nature of the offender's conduct, the burden-shifting statute more closely resembles other laws criminalizing violent acts against the person, such as robbery and assault. These laws criminalize the forceful taking of property or the intention to inflict injury without proof of the victim's nonconsent. Furthermore, assault laws do not allow the victim's consent to be used as a defense except in exceptional circumstances.

Id. at 425 (footnotes omitted). There are, however, several problems with the force definition of rape. First, it ignores the social science that leads to the consent standard. In addition, it decriminalizes criminal activity and criminalizes legitimate activity. On the one hand, there are cases in which force is not evident but the victim has not consented to sex. A force standard decriminalizes those incidents. On the other hand, sexual behaviors vary wildly. Many people do, in fact, consensually incorporate force into their sexual regimen. The harm caused by rape does not merely result from force. It results from complex psychological conditions caused by a victim's engagement in sexual intercourse against her will. The mere presence of force, if consented to, does not cause the harm. The force standards thus criminalize behavior that is not harmful. Moreover, it makes no sense to conceptualize force in sexual relations outside an additional consent inquiry. Any form of sex involves a physical penetration of the body. It is *inherently* forceful. Consent to this "invasion" makes the physical penetration not an assault.

14. Reformers go so far as to argue that lack of affirmative consent (neither asking for nor receiving a "yes") should raise a presumption of nonconsent:

A verbal standard . . . accords with the principle of maximum autonomy for women. A requirement of verbal consent at the time of sexual activity would result in a near-perfect correlation between legal and actual indications of consent: there could be no question that the behavior is intended to be an indication of consent to sexual activity; the intended recipient of the signal would be clear; and finally, no inference could be drawn from irrelevant consent to sexual encounters on other occasions. Under such a standard, the only "behavior" from which a woman would be required to refrain in order to preserve her right to legal protection of her sexual autonomy would be an entirely reasonable one — verbal indication of consent at the time of sexual activity.

Remick, *supra* note 3, at 1126.

15. Experts explain:

The prosecution's case would consist of proof of: 1) sexual activity, and 2) verbal nonconsent or absence of verbal consent. Proof of verbal nonconsent would

rapists in jail (men who engage in sex with nonconsenting victims), it will also put more innocent men in jail (men who engage in sex with consenting victims).¹⁶ The only difference is that the innocent man who does not ask permission is defined by the law as a criminal. Merely defining away the possibility of jailing innocents will not satisfy the civil libertarian side of the feminist defense attorney.¹⁷

raise an irrebuttable presumption of nonconsent (a "no" means "no" standard). Proof of the absence of affirmative verbal consent would raise a rebuttable presumption of nonconsent; the burden of proof would then shift to the defendant to show through evidence of nonverbal signals that the complainant had actually consented to the sexual activity in question despite her lack of verbal consent. Actual consent would have to be proved beyond a reasonable doubt

Id. at 1129. Although successful at eliminating the undesirable aspects of consent inquiry, this standard has its own set of problems. First, merely shifting the burden of proof of consent will not necessarily eliminate the inquiry into the complainant's past and present behavior. Arguably, the defendant has more of an incentive to introduce any kind of proof of consent that he can, given that he now has to overcome the hurdle of proving his defense beyond a reasonable doubt. It is also not clear why the defendant would have to prove his defense beyond a reasonable doubt, as opposed to, say, by a preponderance of the evidence. Moreover, this standard criminalizes behavior which, in all fairness, does not deserve punishment on the level of violent stranger rape. A defendant who does not ask for affirmative consent is guilty under this standard, even if the complainant initiated sexual intercourse and, in fact, consented to it.

16. Those in favor of affirmative consent respond as follows:

Imposing a duty to inquire as to consent before participating in potentially nonconsensual intercourse comports with the distribution of responsibility characteristic of other criminal offenses, which never excuse the defendant because of his or her victim's failure to prevent the crime. Why in rape should the burden be on the potential victim to prevent harm from coming to herself rather than upon the potential perpetrator to refrain from harming another?

Id. at 1138. While it is true that the woman should not assume the risk of being raped simply because she has not uttered certain words, a man should not have to assume the risk of being convicted of rape when the sex was, in fact, consensual just because he forgot to ask permission. This standard creates a crime in which not only is there no mens rea or actus reus, there is also no harm to the complainant. Even in other crimes where mens rea and actus reus are not required, *see* *Tison v. Arizona*, 481 U.S. 137 (1987) (upholding conviction of defendants for first degree murder even where there was no specific intent and the defendants were not the trigger-men), there is usually, at least, some tangible harm to the victim. The apparent unfairness of the affirmative consent standard may, in the end, invite the jury to nullify when it is clear the defendant did not ask permission, but there is little evidence of nonconsent.

17. In response to these problems with the definition of rape, Professor Alan Dershowitz has suggested staircasing rape offenses. The most penalized offense would be, for example, violent stranger rape and the lowest, negligent non-asking. The problem with this way of defining rape is that it does not address the problems affirmative consent standards seek to avoid. District Attorneys will charge defendants with the highest penalized rape as possible. Defendants will then defend against such charges by putting in evidence of consent, including embarrassing evidence of the past and present behavior of the complainant. Professor Alan Dershowitz, Seminar in Criminal Law at Harvard Law School (Feb. 1995).

Another way of reforming the rape trial process is by starting from the ground up and changing social attitudes about women and rape.¹⁸ Obviously, changing social attitudes in no way affects the rights of the accused. It is, however, a long row to hoe. Instituting a massive campaign of sexual reeducation is difficult in this time of limited funds, mass media, and popular sexual culture. Moreover, many feel that the government should not be in the business of telling its citizens what to think and what not to think. Finally, such a solution may be merely supplemental to solving legal problems within the rape trial itself.

The tension between feminism and fair trial is also present in the rape shield debate. As argued above, it is illegitimate to sacrifice an essentially fair trial in order to solve the social problem of underreporting. Reforms targeted at correcting flaws internal to the rape trial process, however, would actually further a fair trial and comply with constitutional requirements:

If the evidence sought to be excluded by a rape-shield statute is irrelevant, or if its probative value is substantially outweighed by prejudice, the sixth amendment does not mandate its admissibility. It is beyond dispute that a criminal defendant has no constitutional right to present irrelevant, prejudicial evidence in his or her behalf.¹⁹

In this vein, rape shield advocates contend that shield laws address both social problems outside of the trial and legal evidentiary problems within the trial.²⁰ The problem with rape shield laws,

18. Experts observe:

Societal ascription of stereotypical male and female sexual roles informs both men's and women's understanding of sexual communication. "Little boys pick up the message that they are supposed to be powerful, not act like a 'sissy,' and compete at all times" When these boys become men, they may feel pressured to "conquer a woman sexually" and "not submit to any of her requests." Because their understanding of sexual interaction is informed by these assumptions, "[m]en . . . frequently misinterpret the intent of various dating behaviors and erotic play engaged in by their opposite-sexed partners."

Remick, *supra* note 3, at 1144-45 (citing Ann Norton, *Talking Back to Sexual Pressure*, *WHOLE EARTH REV.*, Summer 1992, at 111; Lois Pineau, *Date Rape: A Feminist Analysis*, 8 *LAW & PHIL.* 217, 221 (1989)).

19. Galvin, *supra* note 7, at 806.

20. Experts observe:

Proof of sexual conduct was treated as a species of "character" evidence, a form of circumstantial evidence offered at trial in order to prove that a person possessing a particular character trait acted in conformity with that trait on the occasion in question. . . . This inferential use of character . . . is sharply circumscribed by a set of rules and exceptions once described as a "grotesque

however, is that they, at once, do too much and too little.²¹ They do too much in that they do not merely ensure the proper admission of evidence, but arguably exclude permissible evidence for social policy reasons. In this sense, they are like the above example of convicting every fourth rape defendant. They do too little in that they allow in certain evidence of victim behavior that may have an impermissible effect on the jury (i.e. contributory behavior from which the jury will infer that "she asked for it"). This impermissible effect on the jury of evidence of contributory behavior is one of the most unjust aspects of the criminal rape trial and is the subject of this paper.

This paper hopes to temper the feminist defense attorney dilemma. It identifies the foremost legal error in the rape trial as the "widespread bootlegging of the tort concepts of contributory negligence and assumption of the risk into the working law of rape."²² The importation of tort-type defenses into the criminal rape trial is a legal flaw within the trial process that calls for a legal solution. Eradicating such defenses is not an attempt to address external social problems surrounding rape by tinkering with the trial process. Rather, it addresses a legal problem within the rape trial itself. When acquittals occur based on such victim precipitation defenses, they occur impermissibly. Thus, any increases in convictions arising from reforms that narrowly target this trial problem are justified increases.

Part II of the paper will describe the extent to which the tort defenses of contributory negligence and assumption of risk have been incorporated into the law of rape. It will explore the pervasiveness of victim precipitation considerations in social attitudes, statutory law, common law, attorneys' attitudes, judges' attitudes, and jury deliberations. Part III analyzes rape shield reform. First, it surveys the structure of, and policies behind, rape shield laws. It then exposes how rape shield laws, at once, do too much and too little. It shows that rape shield reforms have been utilized at the

structure" which is "archaic, paradoxical and full of compromises and compensations."

Id. at 777 (citing *Michelson v. U.S.*, 335 U.S. 469, 486 (1948) (footnotes omitted)).

21. This will be explored in further detail in Part III. See *infra* notes 137-61 and accompanying text.

22. Terri Villa-McDowell, *Privacy and the Rape Victim: The Inconsistent Treatment of Privacy Interests in Two Recent Supreme Court Cases*, 2 S. CAL. REV. L. & WOMEN'S STUD. 293, 327 (1992). The author continues, "[t]he study of rape is an especially illustrative example of how victimology can become the art of blaming the victim . . ." Juries and judges react extremely harshly to the complainant whenever she seems in any way to have brought the attack upon herself." *Id.* at 328 (citations omitted). Tort-type defenses are also known as "victim precipitation" defenses. See Winters, *infra* note 31.

expense of defendants' constitutional rights and highlights the failure of rape shield laws to address the bootlegging of tort defenses into the rape trial. Part IV explains why the importation of tort defenses into the criminal law of rape is improper. Finally, Part V proposes reforms aimed at eliminating this problem.

II. THE PERVASIVENESS OF TORT DEFENSE IN RAPE LAW

The importation of tort defenses into the criminal rape trial is a problematic and pervasive aspect of modern rape law:

One of the most repugnant characteristics of contemporary rape cases where the rapist is a person known to the victim . . . is an unspoken standard, enforced by legal arguments and believed by juries, of something like "contributory negligence" as negating the rapist's culpability.²³

This legal problem is distinct from evidence problems targeted by rape shield laws.²⁴ The evidence problems targeted by shield laws mainly involve the jury "improperly" inferring either consent or propensity to lie from past behavior or unchaste character.²⁵ The problem of tort defenses involves *implying* consent from certain actions on the part of the victim.²⁶ The actual consent of the victim is immaterial to this type of a defense. If a woman "asked for it" by dressing or acting a certain way, whether or not she ultimately consented, becomes irrelevant to whether the rape is justified. Evidence of victim precipitation varies. It may include evidence of past sexual behavior of the victim (unchastity),²⁷ social behavior of the victim with regard to the defendant (going on a date or drinking with the defendant),²⁸ dress of the victim,²⁹ status of the victim

23. Garrett Epps, *Any Which Way But Loose: Interpretive Strategies and Attitudes Toward Violence in the Evolution of the Anglo-American "Retreat Rule,"* 55 LAW & CONTEMP. PROBS. 303, 330 n.161 (1992).

24. The problem is one of jury nullification rather than impermissible inferences. See *infra* notes 146-61 and accompanying text for a fuller discussion of these evidence problems.

25. See, e.g., Remick, *supra* note 3, at 1121 (identifying "the problem of unjust inferences from a woman's actions or inaction").

26. See Kenneth W. Simons, *The Puzzling Doctrine of Contributory Negligence*, 16 CARDOZO L. REV. 1693, 1729 (1995) (describing assumption of risk and contributory negligence principles as "plaintiff's strict responsibility" justified by "consensual rationale").

27. See *infra* notes 34-35 and accompanying text.

28. See *infra* note 40 and accompanying text.

29. *Underwear OK'd as Evidence in Smith Case*, CHI. TRIB., Oct. 31, 1991, at 2 (discussing the belief that "someone who buys their underwear at Victoria's Secret cannot be a victim of a sexual battery").

(prostitute or married to the defendant),³⁰ socially undesirable behavior of the victim (hitchhiking),³¹ and even race of the victim.³²

The legal problem of importing tort defenses has its roots in community attitudes. Ann Landers, purveyor of "proper" social attitude, has stated, "the woman who 'repairs to some private place for a few drinks and a little shared affection' has, by her acceptance of such a cozy invitation, given the man reason to believe she is a candidate for whatever he might have in mind."³³ Society ingrains these attitudes in children as they grow up. A 1979 study of fourteen- to seventeen-year-old Caucasians living in Los Angeles revealed that the teenagers often incorporated victim precipitation into their opinions on rape. They felt that women with a "loose" reputation were far less likely to be viewed as legitimate victims than women who engaged in sexual activity short of coitus. Fifty-four percent of the respondents said that aggressive sex was justified if the woman "led him on." Fifty-one percent said it was justified when the woman "got him excited."³⁴ Midwestern college men identified a different set of victim contributory behavior as justifying sexual intercourse. Being a "known teaser" ranked highest at justifying unconsensual intercourse, and "economic exploitation" came second. Being "more or less a regular date" ranked lowest at justifying sexual intercourse.³⁵

Much of society's attitude toward victim precipitation is based on "rape myths," which embody the idea that women are to blame for rape:

30. See Jane Gross, *To Some Rape Victims, Justice Is Beyond Reach*, N.Y. TIMES, Oct. 12, 1990, at A14 (noting that the criminal justice system disregards rape allegations made by prostitutes); see also *infra* notes 41-43 and accompanying text (discussing the marital exemption).

31. See Kathleen Winters, *United States v. Shaw: What Constitutes an "Injury" Under the Federal Rape Shield Statute*, 43 U. MIAMI L. REV. 947, 952 n.31 (1989) ("Victim Precipitation' . . . is applied to cases in which the victim either puts herself in a vulnerable situation (hitchhiking, going to a man's apartment) or retracts from an earlier agreement to have sex.").

32. See GARY LAFREE, *RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT* 219-20 (1989) (observing that jurors are less likely to believe black women who complain of rape).

33. John D. Ingram, *Date Rape: It's Time for "No" to Really Mean "No,"* 21 AM. J. CRIM. L. 3, 33 (1993) (quoting Ann Landers, BOSTON GLOBE, July 29, 1985, at 9).

34. LINDA BROOKOVER BOURQUE, *DEFINING RAPE* 67 (1989) (citing R. Giarusso et al., *Adolescents' Cues and Signals: Sex and Assault*, Paper Presented at the Western Psychological Association Meeting in San Diego, California (Apr. 1979)).

35. See *id.* at 66-68 (citing E. J. Kanin, *Date Rapists: Differential Sexual Socialization and Relative Deprivation*, 14 ARCHIVES SEXUAL BEHAV. 219-35 (1985)).

[R]ape myths are familiar to us all — women mean “yes” when they say “no”; women are “asking for it” when they wear provocative clothes, go to bars alone, or simply walk down the street at night; only virgins can be raped; women are vengeful, bitter creatures “out to get men”; if a woman says “yes” once, there is no reason to believe her “no” the next time; women who “tease” men deserve to be raped; the majority of women who are raped are promiscuous or have bad reputations; a woman who goes to the home of a man on the first date implies she is willing to have sex; women cry rape to cover up an illegitimate pregnancy; a man is justified in forcing sex on a woman who makes him sexually excited; a man is entitled to sex if he buys a woman dinner; women derive pleasure from victimization.³⁶

Rape myths can pervade all aspects of the rape trial from the prosecutor’s decision to try the case³⁷ to jury deliberations.³⁸ Scholars and social scientists have legitimized these myths by including them in their analyses of rape. Social scientist Menachem Amir undertook a comprehensive study of psychological and sociological factors contributing to forcible rape. After studying victim precipitation, he concluded, in part, that “if penal justice is to be fair it must be attentive to these problems of degrees of victim responsibility for her own victimization.”³⁹ Such a belief that criminal law should incorporate rather than exclude rape myths is also manifest in scholarly work like Wigmore’s treatise on Evidence:

Modern psychiatrists have amply studied the behavior of errant young girls and women coming before the courts in all sorts of cases. Their psychic complexes are multifarious, distorted partly by inherent defects, partly by diseased derangements or abnormal instincts, partly by bad social environment, partly by

36. 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, 1014-15 (1991).

37. See BOURQUE, *supra* note 34, at 100 (observing that prosecutors, in particular, did not feel it was rape when couples “had been drinking or had previously engaged in consensual sex”).

38. See Euphemia B. Warren, *She’s Gotta Have It Now: A Qualified Rape Counselor-Victim Privilege*, 17 CARDOZO L. REV. 141, 189 n.12 (1995) (observing that “perhaps the most frightening aspect of these ‘rape myths’ is the effect they can have on a jury deciding a rape case.”). See also VALERIE P. HANS & NEIL VIDMAR, *JUDGING THE JURY* 204 (1986) (“Since the jury reflects the attitudes and biases of the community, jurors deciding rape cases will represent the anger, ambivalence, and myths that characterize public views of rape. Inevitably, these attitudes affect their perspectives and ultimately their decisions in cases of rape.”).

39. MENACHEM AMIR, *PATTERNS IN FORCIBLE RAPE* 276 (1971).

temporary physiological or emotional conditions. . . . The real victim, however, too often . . . is the innocent man⁴⁰

Historically, rape statutes have included these tort-type defenses in a variety of ways. For many years states enforced a "marital exemption" to the law of rape.⁴¹ The marital exemption was a tort-type defense premised on the theory that a woman's decision to marry implied consent to all sexual relations with her husband.⁴² Under this exemption, the assumption of risk of rape could not be retracted by a married woman.⁴³ Catherine MacKinnon has characterized the marital exemption as the theory that marriage creates an irrebuttable presumption of consent.⁴⁴ As the feminist movement gained momentum, courts and legislatures began to reconsider the marital exemption. In the 1984 case of *People v. Liberta*,⁴⁵ Judge Wachtler struck the marital exemption from the New York Penal Law:

[A] marriage license should not be viewed as a license for a husband to forcibly rape his wife with impunity. A married woman has the same right to control her own body as does an unmarried woman. If a husband feels "aggrieved" by his wife's refusal to engage in sexual intercourse, he should seek relief in the courts governing domestic relations, not in "violent or forceful, self-help."⁴⁶

Not only did Judge Wachtler condemn the marital exemption in particular, he also criticized all assumption of risk arguments in the rape context, observing that "[rape] is a degrading, violent act which violates the bodily integrity of the victim and frequently

40. 1 J. WIGMORE ON EVIDENCE § 924a, at 736 (Chadbourn Revision 1970). Wigmore also observed that "[t]he unchaste (let us call it) mentality finds incidental but direct expression in the narration of imaginary sex incidents of which the narrator is . . . straightforward and convincing." *Id.*

41. *See, e.g.*, N.Y. PENAL LAW § 130.35 (1980) (defining "female" for the purpose of rape law as "any female person who is not married to the actor").

42. *See People v. Meli*, 193 N.Y.S. 365, 366 (Sup. Ct. 1922) (justifying the marital exemption "on account of the matrimonial consent which [the wife] has given, and which she cannot retract").

43. *See id.*

44. Catherine MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 648-49 (1983).

45. 474 N.E.2d 567 (N.Y. 1984), *reprinted in* CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 392 (Sanford H. Kadish & Stephen J. Schulhofer eds., 5th ed. 1989) [hereinafter CRIMINAL LAW AND ITS PROCESSES].

46. *Id.* at 393 (quoting *State v. Smith*, 85 N.J. 193, 206 (1981)).

causes severe, long-lasting physical and psychic harm. To ever imply consent to such an act is irrational and absurd."⁴⁷

With the rise of views like Judge Wachtler's, states began to change the marital exemption. First, states made the exemption inapplicable to couples who were divorced or no longer cohabiting.⁴⁸ Second, states tempered the exemption, making it more of a rebuttable presumption of consent. The Model Penal Code observes that "marriage or equivalent relationship, while not amounting to a legal waiver of the woman's right to say 'no,' does imply a kind of generalized consent that distinguishes some versions of the crime of rape from parallel behavior by the husband."⁴⁹ This mere tempering is certainly a far cry from the elimination of the marital exemption that Judge Wachtler had in mind. In addition, a number of state rape statutes continue to incorporate a "voluntary social companion exception"⁵⁰ that reduces the degree of felony for rape, much like the way provocation reduces first degree murder to manslaughter.⁵¹

Courts formalistically incorporated assumption of risk principles in rape law by specifying certain complainant behavior as elements of the crime. For example, courts required the complainant to demonstrate that she "resisted to the utmost."⁵² Many have analyzed the resistance requirement as part of the consent determination. In this sense, lack of resistance constitutes *prima facie* evidence of consent. The fact that resistance was an absolute requirement, however, indicates that it embodied more of an assumption of risk analysis. Courts required complainants to show

47. *Id.*

48. Alabama, Illinois, and South Dakota still allow the exemption even when the couple is separated by formal court order. Only a divorce can remove the exemption. See CRIMINAL LAW AND ITS PROCESSES, *supra* note 45, at 398.

49. MODEL PENAL CODE AND COMMENTARIES § 213.1 cmt. 8(c), at 344 (1980). The commentary continues:

At a minimum, therefore, husbands must be exempt from those categories of liability based not on force or coercion but on a presumed incapacity of the woman to consent. . . . The major context of which those who would abandon the spousal exclusion are thinking, however, is the situation of rape by force or threat. The problem with abandoning the immunity in many such situations is that the law of rape, if applied to spouses, would thrust the prospect of criminal sanctions into the ongoing process of adjustment in the marital relationship.

Id. at cmt. 8(c), at 344-45.

50. See, e.g., DEL. CODE ANN. tit. 11, §§ 773-775 (1987); ME. REV. STAT. ANN. tit. 17-A, §§ 252-253 (West 1983).

51. See *infra* note 170 for a discussion of the provocation defense.

52. See, e.g., *People v. Taylor*, 268 N.E.2d 865, 868 (Ill. 1971) (holding that the victim must "show such resistance as will demonstrate that the act was against her will").

resistance even in cases where resistance would have placed them in danger.⁵³ Basically, a woman assumed the risk of a rape by failing to resist. Although most jurisdictions have replaced "resistance to the utmost" with "reasonable resistance,"⁵⁴ vestiges of the requirement continue to influence common law in many jurisdictions.

Courts have also incorporated tort principles into the common law of rape in less formalistic ways. Although they explicitly reject assumption of risk and contributory negligence as technical defenses to rape,⁵⁵ courts incorporate these principles in less explicit ways. For example, they make it part of the assessment of victim credibility. In *Gordon v. State*, the Court of Appeals of Alabama observed, "We are of the opinion, but slight, if any, credence could be accorded to the testimony of the unfortunate perverted woman involved. Not only because of her abnormal conduct as disclosed by the undisputed testimony"⁵⁶

The abnormal behavior consisted of drinking and asking the defendant to have a drink with her.⁵⁷ Courts have also engaged in tort-type analysis by specifically noting victim precipitation

53. See, e.g., *Gonzales v. State*, 516 P.2d 592, 593-94 (Wyo. 1973) (reversing conviction where victim had an actual fear of the defendant on the grounds that "it would place the determination solely in the judgment of the prosecutrix and omit the necessary element of a reasonable apprehension and a reasonable ground for such fear; and the reasonableness must rest with the fact finder").

54. See *People v. Hayne*, 341 N.E.2d 182, 189 (Ill. App. 1976) (ruling that defendant was not entitled to instruction that if the victim yielded reluctantly while still having power to resist, she consented).

55. See, e.g., *State v. Overman*, 153 S.E.2d 44, 58 (N.C. 1967) (holding that "[c]ontributory negligence by the victim is no bar to prosecution by the State for the crime of rape"). Specifically, the court observed, "the fact that a woman goes, without proper escort, to a place where men of low morals might reasonably be expected to congregate does not establish her consent to have sexual relations with them." *Id.* Even then, the court was quick to point out that such evidence "is competent evidence to be considered by the jury on that question." *Id.* In *Keeton v. State*, the court firmly ruled that contributory negligence was not a defense to rape. The court opined:

Even if [the complainant] had gone to the cabin on this occasion with appellant with the express purpose and intention of engaging with him in sexual relationship, and even though she had remained for that purpose after the other couple had left the cabin, still she had a right to change her mind and to refuse to carry out such intention or any promise relative thereto.

Keeton v. State, 190 S.W.2d 820, 823 (Tex. Ct. App. 1945). See also *Bradley v. State*, 333 S.E.2d 578 (Ga. 1985) (upholding conviction for rape of co-worker); *People v. Quicke*, 390 P.2d 393 (Cal. 1964) (affirming conviction when victim voluntarily went to drive-in movie with defendant).

56. 26 So. 2d 419, 422 (Ala. App. 1946).

57. *Id.* at 421-22.

behavior, such as meeting at a bar,⁵⁸ entering the defendant's car,⁵⁹ or inviting the defendant for a drink.⁶⁰ The high profile Mike Tyson and William Kennedy Smith rape trials extensively involved the complainants' contributory behavior like dress, drinking, and going to the defendants' private residences.⁶¹ Some scholars even suggest that assumption of risk-type principles may have been involved in the Supreme Court's decision in *The Florida Star v. B.J.F.*⁶² to strike down a rape victim privacy statute.⁶³

Attitudes about victim precipitation also pervade the pre-trial stage of rape cases. Contributory behavior by the victim influences the decision of the police to investigate charges of rape. A 1985 national study of over two thousand police officers revealed that officers are "insensitive to rape victims and were suspicious of victims who had previous and willing sex with the assailant or who 'provoked' rape through their appearance or behavior."⁶⁴ Prosecutors also rely on assumption of risk principles in their decisions to prosecute rape cases.⁶⁵ Surprisingly, these principles often slip, perhaps subconsciously, into their arguments during trial. One prosecutor argued in closing: "You wouldn't let a burglar go free because the door was not locked. Don't let a rapist go free because

58. See *People v. Greer*, 374 N.Y.S.2d 224 (App. Div. 1975).

59. See *Commonwealth v. Sheridan*, 322 N.E.2d 787 (Mass. App. Ct. 1975).

60. See *Valez v. State*, 762 P.2d 1267 (Alaska Ct. App. 1988).

61. See Ingram, *supra* note 33, at 33, "I do not recognize any acceptable basis for placing any weight or relevance on a woman's appearance or demeanor. At the time of the William Kennedy Smith trial there was a great deal of discussion about the complainant's underwear allegedly being 'suggestive'"

62. 491 U.S. 524 (1989).

63. Villa-McDowell, *supra* note 22, at 328 (footnotes omitted). She states:

Such reckless behavior as walking at night, crossing a park at a certain hour, or talking to a strange man, may be enough to turn a victim into a co-conspirator in the eyes of the judge. This may well have been operating in *B.J.F.* In the record, the news item reporting her rape noted that she was "crossing Brentwood Park" at an undisclosed time, enroute to her bus stop.

Id.

64. BOURQUE, *supra* note 34, at 46-47 (citing John C. LeDoux & Robert R. Hazelwood, *Police Attitudes and Beliefs Toward Rape*, 13 J. POLICE SCI. & ADMIN. 211 (1985)); see also Carol S. Goldstein, *The Dilemma of the Rape Victim: A Descriptive Analysis*, 7 CRIM. JUST. MONOGRAPH 1, 15 (1976) (describing how police officers differentiate between rape victims):

The psychologist . . . ask[ed] what [the police officers] thought the punishment should be for rape. The . . . answer . . . was castration or death. . . . The [police officers] . . . were thinking of their own wives, mothers, sisters and daughters [as victims]. The psychologist asked [the police officers] to discuss rape cases they handled. . . . [T]he officers discussed the mode of dress and the 'low moral character' of the victims with whom they had come in contact. . . . [T]he women they had dealt with could hardly complain about rape since . . . they were not virgins

65. See BOURQUE, *supra* note 34, at 100.

[a woman] is too dumb not to make herself an easy mark."⁶⁶ The defendants in this case were acquitted of all charges.⁶⁷ It is no secret that defense attorneys incorporate assumption of risk arguments into their cases. Mike Tyson's lawyer argued that because it was widely known that Tyson had a propensity for violence, "to date him was to consent to sex."⁶⁸

Once inside the trial, judges, and especially juries, rely upon tort defenses.⁶⁹ The idea that the negligent victim "asked for it" can affect many judicial decisions, from the admission of evidence to jury instructions.⁷⁰ It is the jury, however, whose invocation of tort principles most undermines justice in the criminal rape trial. This invocation of tort principles is similar to jury nullification. Although the material fact to be decided is whether or not there was consent, the jury sets aside this inquiry and instead decides whether or not the complainant is "responsible" for or "deserves" the ensuing rape:

In 1989, a circuit court jury in Florida acquitted [a] 26-year-old [defendant] of abducting a 22-year-old woman at knife point and repeatedly raping her. The jury based its finding partly on the fact that she was wearing a lace miniskirt without underwear. In explaining the decision of the three-man, three-woman jury, foreman Roy Diamond said: "We felt she asked for it for the way she was dressed."⁷¹

66. LAFREE, *supra* note 32, at 175 (quoting prosecutor in an actual rape case).

67. *See id.* at 176.

68. Remick, *supra* note 3, at 1127 n.95 (citing *Tyson Takes the Count*, NATION, Mar. 2, 1992, at 253).

69. *See* Weisburd & Levin, *supra* note 6, at 31 (quoting DEBORAH L. RHODE, JUSTICE AND GENDER 248 (1989)):

Unlike virtually every other crime victim, rape victims face a type of institutional skepticism. Victims are often the ones put on trial in rape cases, with juries focusing on extraneous factors like the victim's clothing, lifestyle and demeanor. Studies of jury behavior and attitudes reveal poorly disguised hostility toward rape victims whom juries view as assuming the risk of rape "by conduct such as drinking, wearing 'seductive' clothing, or accepting a ride with the assailant."

70. *See* Villa-McDowell, *supra* note 22, at 329 n.220:

A 1974 study of judges reports that jurists are far less impartial than supposed. The judges interviewed were of three viewpoints about rape victims' credibility. The first was the genuine victim, the woman attacked in a dark alley by a stranger. She was credible. The second was the woman who had met a man in a bar and allowed him to drive her home. The third was the woman victim who was vindictive, who was crying rape because of male rejection or slights. This last category of female had absolutely no credibility.

71. Remick, *supra* note 3, at 1123 (citing Mary Nemeth et al., *Chilling the Sexes: Women's Growing Militancy About Harassment and Date Rape Alarms Many Men*, MACLEAN'S, Feb. 17, 1992, at 42, 43).

When juries incorporate rape myths in their deliberations,⁷² they are deciding cases based not on the law of rape but rather on society's laws about the "proper" role of women. In their well-known study of American Juries, Harry Kalven, Jr. and Hans Zeisel observed the pervasiveness of victim precipitation considerations in jury deliberations.⁷³ They discovered that focus on the victim's contributory behavior as grounds for acquittal was the biggest source of jury-judge disagreement. They observed:

The law recognizes only one issue in rape cases other than the fact of intercourse: whether there was consent at the moment of intercourse. The jury, as we come to see it, does not limit itself to this one issue; it goes on to weigh the woman's conduct in the prior history of the affair. It closely, and often harshly, scrutinizes the female complainant and is moved to be lenient with the defendant whenever there are suggestions of contributory behavior on her part.⁷⁴

Interestingly, the authors noted that jury deliberations focused more on victim contributory behavior than victim spite or vindictiveness.⁷⁵ The study identified situations in which the jury absolutely favored acquittal, for example, when defendant and complainant were divorced but continued to spend time together. In this case, the jury "was of the opinion that if [sex] was in a course of conduct which she had accepted, she was in no position to complain"⁷⁶ In three other identified cases, juries favored first lessening the charge, but if that was not possible, acquitting rather than convicting. The fact scenarios were as follows: (1) complainant had been drinking and alleged rape by several men; (2) defendant met complainant at a nightclub and later drove her to a deserted road and raped her; (3) defendant met complainant at a nightclub and later drove her to a wooded area and raped her.⁷⁷ Juries also preferred acquittal in cases where the complainant had engaged in intercourse with the defendant on prior occasions. In a particularly disturbing case, a jury acquitted three men who had kidnapped a woman at 1:30 a.m. and raped her in an extremely brutal manner. "It developed that the young unmarried girl had

72. See Warren, *supra* note 38.

73. HARRY KALVEN, JR. & HANS ZEISEL, *THE AMERICAN JURY* 248-57 (1966).

74. *Id.* at 249 (footnote omitted).

75. See *id.* at 249 n.10.

76. *Id.* at 250.

77. *Id.* at 250-51.

two illegitimate children; also defendant claimed she was a prostitute."⁷⁸ No other evidence of prostitution, however, was introduced. Even the judge characterized the verdict as "a travesty of justice."⁷⁹ This case emphasizes that the importation of tort defenses into rape law is a deeply-rooted and pervasive problem which has remained largely untouched by current rape reforms.

III. RAPE SHIELD REFORM: STRUCTURES, PURPOSES, INADEQUACIES

A. *Structure of Shield Laws*

Rape shield laws basically prohibit introducing into evidence the complainant's prior sexual conduct. Statutes range from highly restrictive to more lenient. The Michigan rape shield statute, for example, absolutely prohibits the introduction of prior sexual conduct in any form, with specific enumerated exceptions.⁸⁰ All Michigan-type statutes permit introduction of evidence of sexual conduct between the complainant and the accused.⁸¹ The reason is the "high probative value and minimal prejudicial effect of this evidence. . . . Rather than relying on the invidious inference that consent with one implies consent with others, this evidence is probative of the complainant's state of mind toward the particular defendant."⁸²

Another exception is evidence of specific instances of sexual conduct tending to prove an alternative source of the physical

78. *Id.* at 251.

79. *Id.*

80. MICH. COMP. LAWS ANN. § 750.520j (West 1997). It provides in pertinent part:

(1) Evidence of specific instances of the victim's sexual conduct, opinion evidence of the victim's sexual conduct, and reputation evidence of the victim's sexual conduct shall not be admitted . . . unless and only to the extent that the judge finds that the following proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value:

(a) Evidence of the victim's past sexual conduct with the actor.

(b) Evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease.

81. *See id.* § 750.520j(2), providing in pertinent part:

If the defendant proposes to offer evidence described in subsection (1)(a) or (b), the defendant within 10 days after the arraignment on the information shall file a written motion and offer of proof. The court may order an in camera hearing to determine whether the proposed evidence is admissible under subsection (1)

82. Galvin, *supra* note 7, at 815.

consequences of the alleged rape.⁸³ This evidence is, of course, highly probative, but only in cases where the defendant denies engaging in the sexual intercourse. Some statutes allow evidence of sexual conduct tending to prove the complainant's motive to fabricate the charge.⁸⁴ The reasoning behind this exception is simple: "however compelling the state interest in protecting the privacy of the complainant, it is unlikely that such an interest could be relied upon to block impeachment of her credibility by means of evidence as probative as that of bias or motive to fabricate the charge."⁸⁵ Some statutes allow evidence of a pattern of sexual conduct similar to the charged sexual conduct to prove consent.⁸⁶ Although this seems an impermissible admission of bad acts evidence to prove conformity therewith,⁸⁷ proponents argue that such evidence is more analogous to admissible "habit" evidence.⁸⁸ The rationale behind the exception is as follows:

[W]hat if the accused were offering to show that the victim habitually goes to bars on Saturday nights, picks up strangers and takes them home to bed with her, and that over the past twelve months she has done so on more than twenty occasions? Now could one assert with assurance that this particular sexual record does not substantially reinforce the defendant's version of the night's events? And if it does, should he not be permitted as a matter of constitutional right to place this evidence before the jury?⁸⁹

A few of the statutes allow evidence of sexual conduct offered to prove a mistaken belief in consent.⁹⁰ Of course, this evidence is only relevant in jurisdictions that allow mistake of fact as to consent as

83. See, e.g., MASS. GEN. LAWS ch. 233, § 21B (1986) (stating that evidence is admissible to show conduct of the victim is "the cause of any physical feature, characteristic, or condition of the victim"); FLA. STAT. ANN. § 794.022(2) (West 1997) (stating that evidence is admissible to "prove that the defendant was not the source of semen, pregnancy, injury, or disease").

84. See OR. REV. STAT. § 40.210(2)(b)(A) (1996) (allowing evidence that "[r]elates to the motive or bias of the alleged victim").

85. Galvin, *supra* note 7, at 826.

86. See MINN. STAT. ANN. § 609.347(3)(a)(I) (West 1997) (allowing evidence tending "to establish a common scheme or plan of similar sexual conduct under circumstances similar to the case at issue").

87. See FED. R. EVID. 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith . . .").

88. See Galvin, *supra* note 7, at 832.

89. Vivian Berger, *Man's Trial, Women's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 59-60 (1977) (footnote omitted).

90. See, e.g., GA. CODE ANN. § 24-2-3(b) (1997) (permitting evidence that "supports an inference that the accused could have reasonably believed that the complaining witness consented to the conduct complained of in the prosecution").

a defense to rape. Many of the statutes allow the defendant to introduce the complainant's prior sexual conduct to rebut the prosecution's offer of proof. When the prosecution has "opened the door" by offering evidence that, for example, the complainant is a virgin, the defense can come back with evidence of that complainant's prior sexual conduct.⁹¹ Finally, many of the statutes allow the defense to present evidence of the complainant's prior false allegations of rape.⁹² Although exceptions abound in Michigan-style statutes, these exceptions are meant to be exhaustive. The statutes provide that courts may hold in camera hearings to determine if evidence fits an exception. Judges are, however, not permitted to determine admissibility of evidence on a case-by-case basis.⁹³

At the other end of the spectrum are statutes, like Idaho's rape shield law, which are procedural rather than substantive.⁹⁴ They contain no absolute prohibition against admitting the complainant's prior sexual conduct. Instead, they lay out detailed procedures for the determination of admissibility.⁹⁵ Once the judge has heard the proffered evidence pursuant to statutory procedures, she makes her determination based on the traditional probative value versus prejudicial effect analysis.⁹⁶ Thus, these statutes address social issues such as privacy more than particularized legal problems such as the improper admission of evidence. "Proponents of this approach contended that the in camera admissibility determination would strike the proper balance between the complainant's privacy interest and the accused's right to confront his accuser."⁹⁷

91. See Galvin, *supra* note 7, at 854.

92. See, e.g., VT. STAT. ANN. tit. 13, § 3255(a)(3)(C) (1996) (allowing "[e]vidence of specific instances of the complaining witness' past false allegations").

93. See Galvin, *supra* note 7, at 872.

94. See IDAHO CODE § 18-6105 (1977) providing in pertinent part:

In prosecutions for the crime of rape, evidence of the prosecuting witness' previous sexual conduct shall not be admitted nor reference made thereto in the presence of the jury, except as provided hereinafter. The defendant may make application to the court before or during the trial for the admission of evidence concerning the previous sexual conduct of the prosecuting witness. Upon such application the court shall conduct a hearing out of the presence of the jury as to the relevancy of such evidence of previous sexual conduct and shall limit the questioning and control the admission and exclusion of evidence upon trial. Nothing in this section shall limit the right of either the state or the accused to impeach credibility by the showing of prior felony convictions.

95. Idaho simply mandates a hearing "out of the presence of the jury." *Id.* Other states require in camera hearings. See e.g., TEX. R. CRIM. EVID. § 412(c) (West 1997).

96. See FED. R. EVID. 403 ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

97. Galvin, *supra* note 7, at 878.

Two other approaches lie somewhere between the Michigan approach and the Idaho approach. California's rape shield statute, for example, makes all prior sexual conduct offered to prove consent inadmissible, unless it is evidence of past sexual conduct with the defendant.⁹⁸ Past sexual conduct evidence offered to attack the complainant's credibility or to rebut the prosecution's evidence also is admissible,⁹⁹ subject to an *in camera* offer of proof. California courts were, however, among the first to determine that unchastity was not an inherently impeaching trait.¹⁰⁰ Thus, the statute has been interpreted to let in only particularized impeaching evidence of past sexual conduct, not generalized evidence of unchaste character.¹⁰¹

The second intermediate approach is the federal rape shield statute.¹⁰² This federal evidentiary rule absolutely prohibits introduction of the complainant's past sexual conduct when it is in the form of opinion or reputation evidence.¹⁰³ Other forms of evidence of past sexual behavior must be presented at an *in camera* hearing.¹⁰⁴ If the probative value of the evidence outweighs the prejudicial effect, the evidence is admissible in two specific

98. CAL. EVID. CODE § 1103(c) (West 1996) provides in pertinent part:

(1) [E]vidence of specific instances of the complaining witness' sexual conduct, or any of that evidence, is not admissible by the defendant in order to prove consent by the complaining witness.

99. *See id.* § 1103(c)(3), (4).

100. *See Galvin, supra* note 7, at 895.

101. *See id.* at 894.

102. *See* FED. R. EVID. 412, providing in pertinent part:

(a) Evidence generally inadmissible. The following evidence is not admissible

....

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) Exceptions.

(1) In a criminal case . . .

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct . . .

(C) evidence the exclusion of which would violate the constitutional rights of the defendant.

....

(c) Procedure to determine admissibility.

....

(2) Before admitting evidence under this rule the court must conduct a hearing *in camera* and afford the victim and parties a right to attend and be heard . . .

103. *See id.* at 412(a).

104. *See id.* at 412(c)(2).

situations. The first is when the evidence is of sexual conduct between the complainant and the defendant.¹⁰⁵ The second is when the evidence is probative of whether or not the defendant caused the physical consequences of the rape.¹⁰⁶ Finally, the rule provides a catch-all provision, under which any evidence of past sexual behavior is admissible if the court determines that the exclusion of the evidence would violate the constitutional rights of the defendant.¹⁰⁷ Critics state that the catch-all provision is "[a]t best . . . unnecessary, and at worst it is unclear. First, no explicit statutory language is needed to compel trial judges to admit evidence that is 'constitutionally required to be admitted.' Even in the absence of such a provision, rape-shield legislation could not take precedence over the Constitution."¹⁰⁸

B. Purposes Behind Rape Shield Laws

Rape shield reforms targeted both social and legal problems. Reformers observed:

For many women, [the] trial before the jury is often the most traumatic and horrifying episode of the rape experience. The victim must face the rapist and a room full of strangers and provide another graphic description of the rape. She must also answer many irrelevant and personally humiliating questions about her past sexual experience and her relationship to the defendant. The defense will try to prove the victim invited the rape or that she was so loose or promiscuous that she never would have resisted the man's advances.¹⁰⁹

Shield laws were aimed to correct the social problems contributing to gross underreporting, underprosecution, and low conviction rates. They also sought to address evidentiary errors within the trial. I will examine these two goals in turn.

First, the shield laws responded to social and institutional skepticism to rape claims,¹¹⁰ most notably the extreme under-

105. *See id.* at 412(b)(1)(B).

106. *See id.* at 412(b)(1)(A).

107. *See id.* at 412(b)(1)(C).

108. Galvin, *supra* note 7, at 886 (quoting STEPHEN SALTZBURG & KENNETH REDDEN, FEDERAL RULES OF EVIDENCE MANUAL 224 (1982)).

109. Goldstein, *supra* note 64, at 19.

110. *See* Weisburd & Levin, *supra* note 6, at 26. "[Women feel] trauma resulting from availing themselves of an often unsupportive, uncaring or unsympathetic legal system. The victim faces the uphill battle of an intense personal examination in court and the ill effects of having personal status characteristics magnified by publicity."

reporting of the crime.¹¹¹ According to experts, "[f]orty-four percent of women in the United States have been or will be victims of rape or attempted rape at least once in their lives."¹¹² Studies have revealed that as few as sixteen percent of all rapes are ever reported.¹¹³ Others have estimated the reporting rate to be as low as ten percent.¹¹⁴ Researchers have discovered a variety of reasons for the lack of reporting. One study of women who did not report rapes revealed that: twenty-nine percent thought it was a "private or personal matter," twenty-four percent thought "nothing could be done," sixteen percent were "afraid of reprisal," and nine percent thought the "police would not want to be bothered."¹¹⁵ Thus, the most notable factors contributing to underreporting were lack of response by police and prosecutors, little chance of success at trial, and embarrassment.

Prosecutors and police added to the trauma suffered by rape victims. Susan Estrich has observed that "[w]ithout question, rape victims, particularly in the nonstranger context, initially confront substantial skepticism from police and prosecutors."¹¹⁶ Women faced ill treatment by other institutional actors. According to Professor MacKinnon:

Women also feel fear and despair of police, hospitals, and the legal system. Women believe that not only will we not be believed by the police, not only will the doctors treat us in degrading ways, but when we go to court, the incident will not be seen from our point of view. It is unfortunate that these fears have, on the whole, proved accurate. The fear of being

111. See SEDELLE KATZ & MARY ANN MAZUR, UNDERSTANDING THE RAPE VICTIM: A SYNTHESIS OF RESEARCH FINDINGS 16 (1979) ("[R]ape is probably the most underreported crime"); Carrie J. Scarneas, Note, *Rape Victim — Rape Crisis Counselor Communications: A New Testimonial Privilege*, 86 DICK. L. REV. 539, 542 n.27 (1982) ("The FBI notes that rape is one of the most under-reported crimes in the United States.").

112. Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1301 (1991).

113. See NATIONAL VICTIM CENTER, *supra* note 5.

114. See Galvin, *supra* note 7, at 764 n.2 (citing 124 CONG. REC. 34,913 (1978) (statement of Rep. Holtzman)).

115. BOURQUE, *supra* note 34, at 45 (citing BUREAU OF JUSTICE STATISTICS, U. S. DEPT. OF JUSTICE BULLETIN I: THE CRIME OF RAPE (1985)). Other reasons included: "Reported to someone else" (12%); "didn't think it was important" (7%); "didn't want to get involved" (6%); "didn't want to take the time" (2%); and other (36%). *Id.*

116. ESTRICH, *supra* note 1, at 21; see also Warren, *supra* note 38, at 143 n.10 ("It is because women are not believed when they cry rape that the rate of underreporting is so high.").

treated poorly is not an invention of women's imaginations. It is the result of the way we have been treated.¹¹⁷

Women were further discouraged from reporting and prosecuting rapes by the realization that, in addition to the institutional mistreatment, they had an extremely slim shot at a conviction. Chances of success at trial were often very low. Studies revealed:

The rights of rape victims are rarely vindicated, in either the criminal or civil courts. Most estimate that only two to five percent of all rapists are ever convicted, and only about one percent of women succeed in bringing civil actions against their rapists. Moreover, Department of Justice statistics reveal that [thirteen percent] of convicted rapists are never sentenced to serve any time in prison or jail. For those sentenced to prison terms, the median time served before release is [forty-seven] months.¹¹⁸

Finally, even if they could succeed at trial, women were reluctant to face the embarrassment of reporting and prosecuting the rape.¹¹⁹ They faced not only the court, defendant and jury, but also the community and possibly the media. Given the taboo nature of the subject of sex in our society, even if a victim vindicated her rights through a conviction, she still would have to endure the embarrassment of public knowledge of her sexual encounter. These social considerations underlay rape shield reform.

Rape shield laws have also targeted a variety of perceived evidentiary errors within the rape trial. First, the laws aimed at correcting the problem of admitting evidence whose low probative value was outweighed by its prejudicial effect.¹²⁰ Rape reformers contended that jurors were making logical "mistakes" by inferring consent to the disputed sexual intercourse at issue from past instances of sexual conduct. They asserted, "[T]here may be slight

117. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* 82 (1987); see also Taslitz, *supra* note 2, at 391 ("The behavior of police, prosecutors, mental health personnel, families, and friends toward victims departing from the ideal also may discourage the woman from enduring prosecution.").

118. Weisburd & Levin, *supra* note 6, at 31-32 (citing BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, DRUGS, CRIME, AND THE JUSTICE SYSTEM 188 (1992)).

119. See KATZ & MAZUR, *supra* note 111, at 203 (footnotes omitted) ("For some rape victims, the process of reporting the crime may be more traumatic than the rape itself. The victim is often acutely embarrassed and ashamed. She is further traumatized by the procedures of the law enforcement investigation and the hospital medical examination.").

120. See Galvin, *supra* note 7, at 767 ("[A] growing body of feminist literature questioned the traditional rationale that a woman's unchastity has probative value on the question of whether or not she was raped.").

or no correlation between actual consent and behavior from which a jury deduces consent. In fact, studies corroborate that '[s]uch deductive strategies [in determining consent to sexual activity] are bound to produce frequent errors'.¹²¹

Reformers described the problem as one of the jury making "unjust inferences."¹²² They contended that "[o]nce the notion of a character flaw is removed from the inferential process, the mere fact that the complainant has previously engaged in consensual sexual activity affords no basis for inferring consent on a later occasion."¹²³ Others argued that such evidence has no probative value because it leads to inconsistent conclusions.¹²⁴ On the one hand, someone who has consented to sex in the past may be more likely to have consented to the sex at issue. On the other hand, such evidence shows that the complainant does not cry rape every time she has sex.¹²⁵ Reformers concluded that even if such evidence had some probative value, it was often far outweighed by its prejudicial effect.¹²⁶

Rape shield advocates also identified the error that judges were admitting past sexual conduct as character evidence to show conformity therewith. Admission of character evidence for that purpose is generally proscribed by evidentiary norms.¹²⁷ Although generally inadmissible, character evidence about complainants in criminal cases may be admitted for limited purposes. First, character evidence about the victim's propensity for violence is admissible in murder cases where the defendant claims she acted in self-defense.¹²⁸ Judges applied a similar exception in rape cases in which the defendant claimed consent resulting in the routine

121. Remick, *supra* note 3, at 1125-26 (quoting Antonia Abbey, *Misperception as an Antecedent of Acquaintance Rape: A Consequence of Ambiguity in Communication Between Women and Men*, in *ACQUAINTANCE RAPE: THE HIDDEN CRIME* 96, 97 (Andrea Parrot & Laurie Bechhofer eds., 1991)).

122. *See id.* at 1121.

123. Galvin, *supra* note 7, at 799.

124. *See* Roger C. Park, *The Crime Bill of 1994 and the Law of Character Evidence: Congress Was Right About Consent Defense Cases*, 22 *FORDHAM URB. L.J.* 271, 277-78 (1995):

If the victim frequently consented to casual sex, that fact tends to show, however slightly, that she is more likely to have consented to casual sex on a particular occasion than another woman who never consents. It also tends, however, to show that she does not readily make accusations of rape.

125. *See id.*

126. *See* FED. R. EVID. 403.

127. *See* FED. R. EVID. 404(a) ("Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith . . .").

128. *See id.* at 404(a)(2) (providing an exception for "[e]vidence of a pertinent trait of character of the victim of the crime offered by an accused").

admission of character evidence showing the victim's propensity to be unchaste. Soon the exception began to swallow up the rule.¹²⁹

The idiosyncratic way in which character evidence was allowed to be used becomes even clearer when one considers that similar sexual information about men was never used to establish character and that a woman's sexual history could not be used as evidence of her character in any other kind of case¹³⁰

One important difference between the self-defense exception and the rape exception is that many courts required independent evidence that the victim was the aggressor before admitting character for violence. They did not, however, require independent evidence of consent before admitting unchaste character evidence.¹³¹ Second, character evidence is admissible to show a witness' propensity to lie.¹³² Generally, character for truthfulness or untruthfulness is admitted as part of this inquiry. In the rape trial context, however, courts routinely admitted character for unchastity to prove propensity to lie. Recall Dean Wigmore's admonition that courts be aware of complainants' "diseased derangements or abnormal instincts."¹³³ Chastity was admissible for credibility purposes not so much as a specific instance of untruthfulness or even for motive to lie, but more for the reason that an unchaste woman was tarnished in all respects, including her ability to be truthful.¹³⁴ Rape reformers rallied against such archaic thinking, pointing out that "the purported link between promiscuity and veracity was not made with regard to male witnesses in those states, nor was it made with respect to female witnesses in other than sexual offense prosecutions."¹³⁵

Finally, rape shield laws aimed to correct the evidentiary problem of admission of sexual conduct which amounts to the admission of bad act evidence.¹³⁶ Of course, even the evidentiary

129. See BOURQUE, *supra* note 34, at 104 ("Over the years, sexual history became the *only* evidence used to establish the character of the victim in a rape trial.").

130. *Id.* at 104-05.

131. See Galvin, *supra* note 7, at 784.

132. See FED. R. EVID. 608(a) ("The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness").

133. Wigmore, *supra* note 40 and accompanying text.

134. See *State v. Coella*, 28 P. 28, 29 (Wash. 1891) (describing chastity as "that quality upon which most other good qualities are dependent, and for which, above all others, a woman is revered and respected . . .").

135. Galvin, *supra* note 7, at 787.

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

prohibition against prior bad acts does not prevent admission of such evidence when used to show "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."¹³⁷ One might say that prior sexual conduct evidence is admissible under the *modus operandi* exception. It would be unreasonable, however, to conclude that when one has had consensual sex in the past she has a "*modus operandi*" of having consensual sex in general. This may not be so clear where the complainant has had a pattern of engaging in sex in a certain manner and then accusing her partner of rape.

C. *Inadequacies of Rape Shield Reform*

Although rape shield reform has done much to "humanize" the rape trial process, it often has come at the expense of a defendant's constitutional rights. Rape shield reform has also inadequately addressed the foremost legal problem plaguing the rape trial — the illegal importation of tort defenses. At once, rape shield laws do too much and too little.¹³⁸ Addressing the former problem first, rape shield laws' broad enactments create constitutional and evidentiary problems resulting in unfairness to the defendant:

The basic problem with existing rape-shield legislation is its failure to distinguish between benign and invidious uses of sexual conduct evidence. This failure stems from a misperception by the drafters of the precise wrong to be redressed by reform legislation. The result is not merely bad evidence law; in many instances, the result is constitutional problems that stem from unnecessarily broad enactments.¹³⁹

Rape shield laws were meant to combat both social and legal problems. To the extent that shield laws merely address social problems, they do not justify any infringement upon the rights of

137. *Id.*

138. See Ann Althouse, *The Lying Woman, the Devious Prostitute, and Other Stories from the Evidence Casebook*, 88 NW. U. L. REV. 914, 988-89 (1994) (footnotes omitted):

[T]he text of the rape shield rule . . . "raises a number of issues." First is the flat ban on reputation and opinion evidence. Since the drafters must have known that a rule cannot overcome the Constitution, they must have been unable to imagine a situation in which the Constitution would require those specific forms of proof, according to the editors Second, what is the scope of "past sexual behavior": "Does it encompass nude dancing? Dressing in a 'sexy' manner? Verbal solicitation of sex?" Third, does the rule exclude too much, creating too many constitutional issues?

139. Galvin, *supra* note 7, at 812.

the accused at all. The criminal trial is not the place to wage war against social prejudice and institutional insensitivity. This is not to say that if a new evidentiary rule were both fair and addressed social problems, it should not be implemented. Rather, courts and legislatures should not be weighing social goals against the rights of the accused. It is again like the example where the legislature mandates every fourth rape trial to result in conviction. This would undoubtedly address the social problem of underreporting. It would, however, also impermissibly violate every fourth defendant's constitutional rights. In the same way, rape shield laws may serve to exclude truly irrelevant and prejudicial evidence three out of four times or even every thirty-nine out of forty times. But because rape shield laws are, for the most part, per se exclusions, that fortieth defendant is denied his right to present relevant evidence.¹⁴⁰

While I appreciate the magnitude of the social and institutional problems surrounding the rape trial, these problems must be given social and institutional solutions. Society must be informed about gender equality. Women must fight the urge to say "no" when they mean "yes." Men must fight the urge to believe that women mean "yes" when they say "no" or say nothing at all. Police, prosecutors, and hospital workers must receive training on treating rape victims sensitively. People must learn not to stigmatize rape victims. The answer, however, is not to secure rape convictions by any means possible.

One could draw an analogy to the social problem that the wealthy receive better representation than the poor. A way to address this perceived inequality is to make a different standard of proof for wealthy defendants. One could make the state prove its case against a wealthy defendant by, say, clear and convincing evidence only. This would probably balance out the benefit the wealthy get from their more skilled attorneys. Again, no one would agree this is the correct solution to that social problem. The problem of inequality of wealth generally should be solved through

140. See Park, *supra* note 124, at 278 (footnote omitted):

While I think that the rape shield evidence is distinguishable, I do not mean to say that victim history can never be worthwhile evidence. There are some situations in which I would admit it even though it does not fall into any of the narrow categories specifically set forth in Rule 412. Suppose that a rape prosecution arises from sexual intercourse that occurred on the pavement of a parking lot on a cold rainy night. The jury is likely to think that the complainant would not have consented because of the circumstances. Evidence that she had consensual intercourse with another man on the same pavement earlier in the evening, however, leads to inferences that help the defense more than the prosecution, even if she did not claim rape on the earlier occasion.

welfare economics. Within the particular context of criminal law, the problem can be addressed by encouraging skilled attorneys to become public defenders.

The Supreme Court recognized the danger of rape shield laws in *Olden v. Kentucky*.¹⁴¹ In this case, the defense hoped to present evidence of the complainant's cohabitation with a man who was not the defendant to show motive to fabricate the rape. This evidence was also impeaching because the complainant had stated that she lived with her mother. Pursuant to Kentucky's rape shield law, the trial court excluded the evidence of cohabitation.¹⁴² The Supreme Court ruled that this exclusion of evidence violated the Sixth Amendment Confrontation Clause.¹⁴³ Rape shield advocates responded that excluding irrelevant, prejudicial, and character evidence ensures rather than destroys a fair trial. They reasoned that no constitutional problem exists with keeping out evidence that should not be admitted in the first place.¹⁴⁴ Proponents of shield laws emphasize that past sexual activity is generally irrelevant to consent.¹⁴⁵

I disagree with the blanket contention that past sexual behavior is irrelevant to present consent. Even rape shield proponents admit that such evidence is highly probative in certain circumstances.¹⁴⁶ I would go even further and say that where the probative value of the sexual conduct evidence is not as high, a blanket exclusion cannot be justified on the grounds that the jury will make "unjust inferences."¹⁴⁷ This is a problematic reading of the evidentiary rules regarding relevancy and prejudice. Evidence

141. 488 U.S. 227 (1988).

142. *Id.* at 230.

143. *Id.* at 231-32.

144. See *supra* note 19 and accompanying text.

145. Lani Anne Remick gives several reasons why the consent inquiry is flawed: The question the factfinder in a rape trial purports to answer is this: did the complainant consent to a particular sexual activity, with a particular man, on a particular occasion? As even a cursory examination will show, the above laundry list of behaviors includes many that provide scant, if any, assistance in answering this question. . . . Each of these behaviors is related to sexual activity with one specific man, yet any man who introduced such information in court might receive the benefit of jury misperception of such behaviors as indicia of consent. . . . [B]ehaviors which are meant to indicate consent to sexual activity on one particular occasion may not be meant to indicate consent on another.

Remick, *supra* note 3, at 1125.

146. See Galvin, *supra* note 7, at 811-12 (footnotes omitted) ("[E]vidence of the complainant's previous sexual conduct with someone other than the accused may be relevant to show her motive for fabricating the charge or to specifically rebut elements of her testimony.").

147. Remick, *supra* note 3, at 1121.

is relevant if it has any effect on the probabilities in a trial.¹⁴⁸ The jury, as the ultimate fact-finder, gives probative weight to the evidence. Evidence is excludable, however, if it will unduly prejudice the jury. While some differences over the meaning of "prejudicial" exist, prejudicial evidence basically means evidence that prevents the jury from fairly deciding the case. Either the evidence invokes too much emotion,¹⁴⁹ leads the jury to make "inferential errors,"¹⁵⁰ or causes the jury to do something illegal.¹⁵¹

Rape shield advocates justify rape shield laws on the grounds that they eliminate "inferential error" prejudice. They seek to prevent the jury from making "unjust inferences" from evidence of past sexual conduct.¹⁵² The identified inferential problems generally involve the jury giving too much weight to past behavior as probative of consent. A host of problems surround this type of evidentiary analysis. A major problem is that this analysis assumes its conclusion. The claim that juries are giving the "wrong" weight to any piece of evidence assumes some external measure of what the "right" weight is. The jury, however, has the role of determining the weight of facts in a trial:

[W]e can see the problems of asking . . . whether and can the jury get it right. The only way we can answer that question is by seeing whether the criteria in the trial have been followed: to use any other criteria would be judging it by reference to another truth-certifying procedure. This is why jury verdicts

148. See FED. R. EVID. 401 ("Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.).

149. See FED. R. EVID. 403 advisory committee's note ("The case law recognizes that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances entail . . . inducing decision on a purely emotional basis . . .").

150. See Victor J. Gold, *Federal Rule of Evidence 403: Observations on the Nature of Unfairly Prejudicial Evidence*, 58 WASH. L. REV. 497, 506 (1983):

Application of Rule 403 should be focused on a more subtle, common and dangerous problem: the introduction of evidence that has a tendency to lead the jury to unintentionally commit an inferential error. Inferential error occurs when the jury incorrectly decides that evidence is probative of an alleged fact or event.

151. See FED. R. EVID. 403 advisory committee's note ("Unfair prejudice" within its context means an undue tendency to suggest decision on an improper basis . . ."). I am suggesting that the rule means to exclude evidence that leads the jury to decide on a *legally*, not socially, improper basis. This has been termed "nullification prejudice." See Roger C. Park, *Character Evidence Issues in the O.J. Simpson Case*, 67 U. COLO. L. REV. 747, 770 (1996) ("Nullification prejudice occurs where the trier draws factually accurate inferences from the evidentiary facts, but uses them to make a decision on grounds not permitted by the substantive law.").

152. Remick, *supra* note 3, at 1121.

are so difficult to overturn except if the jury perversely does not decide according to the evidence. It is not a question of whether the jury, in some absolute way, get it right but whether they fulfill their allotted role in the system.¹⁵³

Proponent's of rape shield laws also advocate the exclusion of past sexual conduct evidence on the grounds that such evidence creates two opposing inferences. It is problematic, however, to argue that evidence which leads to different inferences is *a priori* irrelevant or prejudicial. For example, if a defendant is on trial for murder by means of an explosive, the prosecution may try to present evidence that the defendant had spent his life studying plastic explosives. That evidence certainly seems relevant. The defense may point out, however, that this particular crime did not involve a plastic explosive and therefore the evidence actually made it less likely that the defendant committed the crime. Certainly, two different inferences can be drawn from such evidence. It does not make the evidence irrelevant. The jury will hear the evidence and arguments and decide what weight to give the evidence and which inferences to draw from it. Now, there may come a point when drawing out the competing inferences of such evidence becomes a waste of the court's time. At that point, and not before, the evidence is excludable under rule 403's prohibition against evidence that waste's the court's time.¹⁵⁴

Some observe that the concern over judicial economy is really at the heart of "inferential error" prejudice. Rule 403 does not prevent the jury from getting it "wrong" so much as it prevents the jury from getting an incomplete picture. Due to time constraints, the jury is not presented with all the evidence in a case. Inevitably, there will be certain pieces of evidence whose inferential meanings depend on the admission of ancillary evidence. If such ancillary evidence has not been or cannot be admitted, the judge should exclude the correlating evidence as prejudicial.¹⁵⁵ This does not,

153. Zenon Bankowski, *The Value of Truth: Fact Scepticism Revisited*, 1 LEGAL STUD. 257, 266 (1981).

154. See FED. R. EVID 403 (excluding evidence that wastes the court's time).

155. Craig R. Callen, *Simpson, Fuhrman, Grice, and Character Evidence*, 67 U. COLO. L. REV. 777, 783 (1996) (footnote omitted):

The sort of inferential error we should worry about is not one that arises from a snobbish perception that jurors cannot evaluate evidence such as Fuhrman's approval of officers who lie for their partners. Instead, the real dangers relate to the handicaps that the trial process places on jurors. Jurors cannot acquire additional information without help from the court and, in all likelihood, from the parties. This dependency creates the implication that the court would provide them with all necessary information. The jurors might take admission

however, appear to be the analysis of prejudice employed by rape shield reforms. The laws make no reference to ancillary evidence. They do not refer to the type or amount of evidence that could be proffered in conjunction with sexual conduct evidence to present a complete picture to the jury. Rather, the laws articulate *per se* exclusions of past sexual conduct.

Another problem with inferential error analysis is that juries may be in a better position than judges, legislatures, and feminist reformers to determine the weight of any particular piece of evidence. The American legal system is an adversarial system in which the jury receives as much evidence as possible and ultimately decides which inferences to make. Juries have the force of community experience on their side. Ideally, juries encompass the background knowledge of the people within the jurisdiction. They embody a cross-section of inferential dispositions. This is an important reason why they are given the role of factfinder:

In general, juries should have the authority to decide questions of fact in criminal cases. Group fact-finding by a body relatively untainted by self-interest is likely to be more accurate, under the peculiar conditions of a criminal trial, than fact-finding by a single judge. . . . [I]t is generally a mistake to ask judges to screen evidence *solely* to prevent factual mistakes by juries, because that process would ask the weaker fact-finder to guide the stronger one.¹⁵⁶

Moreover, judges do not have the benefit of their own rulings on the prejudicial effect of other pieces of evidence. Before making their determinations regarding the "correct" inferences from a given piece of evidence, judges are exposed to character evidence, prejudicial evidence, and the other legally impermissible pieces of evidence. Additionally, judges may be influenced by more biases than juries. "Judges are more susceptible to political pressure, fears of losing an election, corruption, and ties to repeat players in the system."¹⁵⁷

Feminist reformers and legislatures are perhaps in even worse positions to determine the "correctness" of evidentiary inferences. Not only are they influenced by political agendas for which they have selectively picked and analyzed information, reformers and

of the evidence as an implicit assurance of relevance, or to put it another way, the jurors might understand the admission of the evidence about Fuhrman's attitude to imply a significant possibility that Fuhrman planted evidence — without such a possibility the evidence would not be worth the trouble.

156. Park, *supra* note 151, at 770 (footnote omitted).

157. *Id.*

legislatures also have no connection to any particular rape trial. Rape shield reforms:

legislatively predetermine the relevancy of an entire category of evidence without regard to the factual setting of the case or the purpose for which the evidence is offered. Relevancy, after all, "is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case." Not until the issues are framed in an adversarial setting can a court determine the relevancy of a specific piece of evidence. The same may be said of the balancing of probative value against prejudicial effect.¹⁵⁸

Proponents of rape shield laws miss the mark. The prejudicial effect of evidence in rape trials is not that juries will analyze the evidence "wrong," or give the "incorrect" amount of weight to the evidence. The problem is that some evidence leads the jury to nullify. It is not so much that the jury is thinking that because a certain complainant has a loose reputation, had sex in the past, or wears provocative clothing, she therefore consented to the intercourse at issue. Rather, the jury is saying, "despite the lack of consent and the 'technical' rape law, we think she placed herself in a position where she deserved what she got." This is exactly the kind of "prejudice" that lawmakers should prevent:

There is no mystery or contradiction in postulating that the jury has primacy in fact-finding while at the same time allowing judges to exclude evidence in order to prevent or discourage jury nullification of substantive law. It makes sense that legislators would seek to prevent nullification and that judges, as representatives of the legal establishment, would be the gatekeepers.¹⁵⁹

It is also true that what seems like an "inferential error" may really be a jury's veiled attempt at nullification. Kalven and Zeisel discovered that jurors are often at odds with the law. Instead of admitting nullification, they resolve the facts in a manner to avoid following a law with which they do not agree:

158. Galvin, *supra* note 7, at 872-73 (quoting FED. R. EVID. 401 advisory committee's note); see also Park, *supra* note 151, at 769 ("Rules designed to prevent [inferential error prejudice] are vulnerable to the classic Benthamite critique that it is difficult to make judgments beforehand about the probative value of evidence because so much depends on the circumstances of the individual case.").

159. Park, *supra* note 151, at 771.

[T]he jury does not often consciously and explicitly yield to sentiment in the teeth of the law. Rather it yields to sentiment in the apparent process of resolving doubts as to evidence. The jury, therefore, is able to conduct its revolt from the law within the etiquette of resolving issues of fact.¹⁶⁰

Thus juries might be finding "consent," when what they really mean is that they felt the complainant "asked for it."

Rape shield laws fall short by failing to take into account the multitude of victim precipitation evidence that is not past sexual conduct. They allow in non-sexual conduct evidence like behavior, clothing, interaction with the defendant, drinking, etc., which can lead the jury to conclude that the victim asked for it.¹⁶¹ In this sense, rape shield laws do too little. Preventing the particular brand of jury nullification that results from the illegal importation of tort defenses is within the provinces of judges and legislatures. Policing the jury as to which inferences are permissible and which are "unjust" is not.

This is not to say that all of the evidentiary reasoning behind rape shield reform is wrong. Certainly, it is correct that not all past sexual conduct evidence is relevant. It is also correct that sexual conduct evidence, even if relevant, can be confusing to the jury, cumulative, and unduly prejudicial. Similarly, it is right that character for chastity should not be admitted under the exception for admitting evidence that relates to truthfulness or untruthfulness. The problem is that the rules do too much by excluding relevant evidence, not because it leads the jury to act illegally, but because the jury "unjustly" may make different inferences than feminists would make. Again, the rules do too little by letting in unrestricted evidence that tends to make the jury act illegally. They allow all kinds of evidence of victim contributory behavior that

160. KALVEN & ZEISEL, *supra* note 73, at 165. See also Remick, *supra* note 3, at 1126-27 (footnotes omitted):

[F]actfinders' ability to consider an overbroad range of female behaviors in support of the consent defenses means that women must restrict their behavior lest failure to do so should leave them victims of unpunishable rapes. In this respect, current rape law comes unconscionably close to giving legal effect to victim precipitation theories, which posit that certain behaviors of women provoke or lead to rape. . . . [J]uries' application of the consent defenses is often indistinguishable from application of the victim precipitation theory.

161. See Park, *supra* note 124, at 275-76:

Even with the protection of rape shield laws, victims of rape must endure an unusual second ordeal when the accused presents a consent defense. . . . The defense will also try to show that the victim provoked the sexual event. It may try to portray her behavior just before the rape as brazen, or her clothing and manner as provocative.

is not past sexual conduct. While some think that rape shield statutes were created to address nullification prejudice,¹⁶² the laws clearly fail to do so.

IV. THE IMPERMISSIBILITY OF TORT DEFENSES IN RAPE LAW

So far this paper has assumed that the importation of tort defenses into the criminal rape trial is impermissible.¹⁶³ The criminal law explicitly rejects contributory negligence and assumption of risk as defenses to criminal rape.¹⁶⁴ As articulated in Part I, however, such tort defenses pervade all aspects of the rape trial. Thus, many have the initial instinct to incorporate tort defenses into their assessment of rape law. They consider it fair to acquit a defendant because of the victim's contributory behavior. This section hopes to offer a reasoned response to those who feel that the "she asked for it" analysis belongs in the criminal rape trial.

Contributory negligence and assumption of risk defenses are deeply rooted,¹⁶⁵ though strongly debated, doctrines in American

162. See Callen, *supra* note 155, at 785 (footnotes omitted).

One example of a rule designed, at least in part, to avoid misinterpretation of substantive standards is Federal Rule 412, the rape-shield rule. Although earlier rape-shield laws were justified on relevance and undue prejudice grounds, it is doubtful that juries nowadays would think that prior incidents of nonmarital intercourse are significantly probative on the issue of consent. Rather, the evidence is excluded to avoid misinterpretation of underlying law. The admission of evidence that may seem to have no other bearing might well imply to the jury that the victim had foregone some legal protection by consenting to nonmarital intercourse with others.

163. I am careful to say *criminal* rape trial because this is not always true of civil trials stemming from rapes. In *McGill v. Duckworth*, 944 F.2d 344 (7th Cir. 1991), the court explicitly applied the assumption of risk principle to an inmate's civil action against a prison arising from a rape by another inmate. In denying the plaintiff's claim, Judge Easterbrook observed:

McGill [the plaintiff] left his cell, saw Ausley heading his way making threats, and made the decision to take a shower anyway. McGill could have stayed in his cell or arranged for individual shower and recreation periods — and as we have emphasized, he could have alerted the guards he passed on the way McGill's decision to accept the risk precludes blaming the guards and higher-ups in the prison system.

Id. at 353. The court, however, limited its ruling specifically to the facts of the case, noting that "[r]ape is an intentional tort, and defenses such as contributory negligence, assumption of risk, and incurred risk do not apply to intentional torts." *Id.* at 352.

164. See *supra* note 55 and accompanying text.

165. Contributory negligence and assumption of risk are victim centered defenses in tort law. They focus either on the victim's contribution to the injury or the victim's voluntary exposure to the risk. The doctrine of contributory negligence developed in English law and came to the United States in the 19th century. See *Butterfield v. Forrester*, 103 Eng. Rep. 926 (1809). "One person being in fault will not dispense with another's using ordinary care for himself. Two things must concur to support this action, an obstruction in the road by the

tort law.¹⁶⁶ To understand why such principles do not belong in the criminal law of rape, one need only highlight some of the differences between tort law and criminal law. First, tort law is private law.¹⁶⁷ The private plaintiff sues on behalf of himself (or a class like himself) to recover for a private wrong caused by the defendant. In a criminal case, the state or people of a jurisdiction bring action against the defendant for his criminally deviant behavior. This difference has very important ramifications. First, moral parity¹⁶⁸ is an issue present in tort law but not in criminal law. Because the plaintiff is attempting to recover from the defendant for the defendant's breach of a socially-determined standard of care, it is relevant whether the plaintiff's behavior comported with that standard of care. If the plaintiff's own negligence lead to the injury, the plaintiff has no right to recover.¹⁶⁹

Criminal law does not address moral parity. In criminal law, the issue is not whether one individual has the right to recover from another.¹⁷⁰ The issue is the defendant's criminally deviant behavior. That behavior is deviant whether the victim contributed to it or not. The victim's negligent acts or knowing exposure to risk do

fault of the defendant, and no want of ordinary care to avoid it on the part of the plaintiff." *Id.* at 927. Assumption of risk also has been a long standing part of American tort law. See *Buenos Aires West India Oil Co. v. Compania Transatlantica de Barcelona*, 5 F.2d 425, 432 (2d Cir. 1924) ("The want of a competent lookout properly stationed and vigilant is a fault in a vessel as a result of which she assumes the consequential risk of a collision."). For the purposes of this section, no substantive distinction between the two principles will be made. This section contends that the criminal law should not entertain victim centered defenses in any form.

166. See, e.g., *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1229 (Cal. 1975) ("The doctrine of comparative negligence is preferable to the 'all-or-nothing' doctrine of contributory negligence from the point of view of logic, practical experience, and fundamental justice . . ."). Indeed, assigning liability to plaintiff behavior in any form has been questioned. See *CASES AND MATERIALS ON TORTS* 282 (Richard A. Epstein ed., 5th ed. 1990) ("[T]here has been an extensive debate over whether any defense based upon plaintiff's misconduct is needed.").

167. Contributory negligence and assumption of risk defenses do not apply universally in tort law. They only apply when the underlying tort is unintentional. See *McGill*, 944 F.2d at 353. Victim centered defenses are also rejected in other contexts. See *Seay v. Chrysler Corp.*, 609 P.2d 1382 (Wash. 1980) (rejecting comparative negligence in strict product liability case); *Munoz v. Olin*, 76 Cal. App. 3d 85 (1977) (refusing to apply comparative negligence to wrongful death action).

168. This term refers to the extent to which the injurer acted within a standard of reasonable care versus the extent to which the injuree acted within a standard of reasonable care. See Simons, *supra* note 26, at 1722.

169. Under comparative negligence principles, it is not fair if the plaintiff fully recovers.

170. See Simons, *supra* note 26, at 1708 ("[The victim's] deficiency is only relevant in private law if the victim does bring a lawsuit, for a simple reason: the victim's moral duty does not otherwise affect any other private individual's interest to a sufficient degree to warrant legal intervention.").

not relieve the state of its duty to punish deviant behavior.¹⁷¹ The victim's deviant behavior can be punished separately. For example, when two people get in a fight, both have broken the criminal law proscribing assault and battery. One defendant's criminal act does not negate the other's. Rather, the two people become cross-complainants, and the state prosecutes each one. The state has no interest in the private balance of harm between the two individuals. The state only has an interest in the defendants' criminal behavior vis-à-vis society.

Another manifestation of the difference between tort law and criminal law is that causation is often an issue in tort law but rarely in criminal law. Contributory negligence is relevant in tort law because the plaintiff claims that the defendant caused her

171. One notable exception, however, is the law of provocation. The existence of provocation by a murder victim mitigates the punishment for murder. See *Mahe v. People*, 10 Mich. 212, 218-19 (1862):

But if the act of killing, though intentional, be committed under the influence of passion or in heat of blood, produced by an adequate or reasonable provocation, and before a reasonable time has elapsed for the blood to cool and reason to resume its habitual control, and is the result of the temporary excitement, by which the control of reason was disturbed, rather than of any wickedness of heart or cruelty or recklessness of disposition; then the law, out of indulgence to the frailty of human nature, or rather, in recognition of the laws upon which human nature is constituted, very properly regards the offense as of a less heinous character than murder, and gives it the designation of manslaughter.

This does take into account the contributory behavior of the victim, but not in a tort-type way. The defense is not centered around moral parity, or the "unfairness" of vindicating the victim when he, himself, is morally culpable. Rather, the defense is more like self-defense or temporary insanity. It mitigates the crime because it makes the defendant's behavior more understandable and less deviant. The defense is more a mens rea issue than a contributory fault issue. Whether or not the law should excuse those who act on the basis of passion, however, is a debatable issue. See Stephen J. Morse, *Undiminished Confusion in Diminished Capacity*, 75 J. CRIM. L. & CRIMINOLOGY 1, 33-34 (1984) ("I would abolish [the provocation defense] and convict all intentional killers of murder. Reasonable people do not kill no matter how much they are provoked . . .").

In the rape context, the legislature could decide, for example, that raping women who dress provocatively is somehow less deviant (more understandable) than raping women who dress conservatively. Society could recognize that behavior as not being criminal. This is different, however, from recognizing that such behavior is criminal, but justifying it because the victim "brought it on herself."

Some scholars, however, say this is exactly what the law of provocation does. They characterize it as a contributory negligence issue rather than a mens rea issue. See A. J. Ashworth, *The Doctrine of Provocation*, 35 CAMBRIDGE L.J. 292, 307 (1976):

Whereas the paradigmatic case of murder might be an attack on an innocent victim, the paradigm of provocation generally involves moral wrongs by both parties Ordinary language reflects this approach, with characteristic phrases such as "he brought it on himself," "she asked for it" and "it served him right" The complicity of the victim cannot and should not be ignored.

injuries.¹⁷² Under contributory negligence principles, if, in fact, the plaintiff caused the injuries, she cannot recover. In criminal law, causation often is not an issue. Many crimes are defined without reference to any result from the criminal conduct. They consist merely of *mens rea* and *actus reus* (for example, attempt, conspiracy, burglary, assault).¹⁷³ Rape is also a crime that does not reference a particular result (like specific injuries or death). Causation arises in criminal law only in limited circumstances, for example, where a defendant intended to kill a victim but an intervening event killed the victim first (the victim had a heart attack and died at the same time the defendant pulled the trigger to shoot). In most criminal cases, however, whether the victim's behavior was a contributing cause of the crime is wholly irrelevant. Certainly, no rape could be complete if the rape victim did not have sex with the perpetrator. Nonetheless, that contributing cause does not eliminate a required element of rape.

Finally, judges presiding over tort cases have put themselves in the business of fixing plaintiffs' economic incentives by preventing negligent plaintiffs from recovering. They hope to encourage people to exercise reasonable care. Perhaps judges do this because tort law is largely an economic affair. Most often, plaintiffs sue for monetary damage awards. The court has the responsibility of determining just compensation. This inevitably involves an economic calculus of the kind of compensation the plaintiff deserves. Criminal courts are generally not involved in such determinations.¹⁷⁴ For example, a defendant who robs someone who chose to walk alone at night in a high crime area is no less guilty than a defendant who robs someone in a safe area in the middle of the day. Encouraging the complainant to be cautious is not part of criminal law jurisprudence.¹⁷⁵ For all of these reasons, the general legal

172. See *Gyerman v. United States Lines Co.*, 498 P.2d 1043, 1053 (Cal. 1972) (citing RESTATEMENT (SECOND) OF TORTS § 465(1)) ("The fundamental question, then, is whether the plaintiff, as 'the negligent actor has so produced the harm to himself . . . for which he is sought to be held responsible . . . as to make the law regard his conduct as the cause of the harm").

173. See CRIMINAL LAW AND ITS PROCESSES, *supra* note 45, at 587.

174. There are, however, certain instances in which the criminal court will address economic compensation. For example, in certain jurisdictions the criminal court can approve an "accord and satisfaction," in which an assault defendant compensates the complainant in exchange for a dismissal. See MASS. GEN. LAWS ANN. ch. 276, § 55 (West 1997). In addition, courts will sometimes require payments of restitution. See *id.* at § 87A. But such restitution is usually payable to the court, not the complainant.

175. See R. A. Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, 20 CRIME & JUST. 1, 79-80 (1996):

Consider the role of "contributory negligence" in civil as contrasted with

consensus is that contributory negligence and assumption of risk have no place in criminal law. "The primary difference between torts and criminal law is that the assumption of risk can be a defense of varying impact in tort cases; whereas in criminal cases of violent aggression, the victim's knowing and voluntary exposure to the risk is no defense."¹⁷⁶

Some scholars have argued, however, that the criminal law should incorporate victim precipitation defenses. Professor Alon Harel makes the case for comparative fault in criminal law based on law and economics principles.¹⁷⁷ He regards his project as extending "Coasian insight from tort law to criminal law."¹⁷⁸ He argues that careless victims impose negative externalities on society by wasting state punishment resources on crime caused, at least in part, by their own careless behavior. If the state does not hold the victim responsible for his carelessness, the victim has no incentive to take optimal precautions.¹⁷⁹ Harel asserts that "[p]recautions taken by victims provide two types of positive externalities. The first directly benefits other potential victims by making crime less profitable; the second benefits the population at large by reducing the indirect costs of crime, in particular, the costs of the enforcement system."¹⁸⁰ Basically, Harel characterizes the victim as the cheapest cost avoider. He further argues that criminals will be more reluctant to commit crimes against cautious citizens and more likely to target careless victims. This, in turn, will provide a greater incentive for people to take care.¹⁸¹

criminal law. In a civil case, the defendant's liability is reduced if he can show that the plaintiff contributed to the harm she suffered by her own negligence. Now crime victims may also have made it more likely that they would become victims: householders who leave their houses insecure, car owners who fail to lock their cars, women who dress or behave in certain ways. We might criticize their behavior as imprudent, but do not think that it mitigates the liability of the criminal who takes advantage of it. This illustrates the sense in which the core of the criminal law should be a set of categorical prohibitions.

176. George P. Fletcher, *Domination in Wrongdoing*, 76 B.U. L. REV. 347, 358 (1996) (footnotes omitted).

177. Alon Harel, *Efficiency and Fairness in Criminal Law: The Case for a Criminal Law Principle of Comparative Fault*, 82 CAL. L. REV. 1181 *passim* (1994); see also Omri Ben-Shahar & Alon Harel, *Blaming the Victim: Optimal Incentives for Private Precautions Against Crime*, 11 J.L. ECON. & ORG. 434 (1995). For the purposes of this paper, I will condense these complex economic theories into a few main arguments. I hope not to give too short shrift to Professor Harel's theories.

178. Harel, *supra* note 176, at 1188.

179. See *id.* at 1194-95.

180. *Id.* at 1195-96 (footnotes omitted).

181. See *id.* at 1196-97.

There are, however, some apparent flaws to Professor Harel's theory. First, it seems to overstep the incentive-fixing role that courts give themselves even in tort cases. In tort cases, if the plaintiff is negligent, denying recovery is a way to encourage the victim to be cautious. It prevents the negligent plaintiff from being made "whole" by denying recovery or full recovery. This is not true of criminal cases. The victim of a crime is not "compensated" by a criminal conviction. The criminal is punished. In a robbery, for example, most victims never get the stolen goods back. They generally are not compensated for any pain and suffering by the outcome of the criminal trial. Victims are compensated only if they have insurance policies or prevail in concurrent civil trials. Thus, crime victims already have plenty of incentive to protect themselves — they need to avoid being victims of crime. Once someone has been robbed, most likely he will invest in a security system. If he does not, it is unlikely that mitigating the criminal's punishment will be much of an incentive, especially considering that many theft victims do not even appear at the criminal trial. It is also improbable that a comparative fault rule would affect the incentives of potential victims. If people do not have enough incentive to obtain security systems to avoid being violated in their homes, it is unlikely that mitigation of criminal punishment will provide much more incentive. A more efficient way to encourage precaution is through private contract law. When people contract with insurance companies, the companies can make reasonable precaution a prerequisite for recovery.

Moreover, a contributory negligence rule in criminal law may create incentives for criminals to commit crimes against careless people. Harel views this as a good thing, arguing that it will transfer crime from the careful to the careless.¹⁸² I do not believe this is the case. First, there is enough crime to go around. Smart criminals still have incentives to rob wealthy people with alarm systems. The deterrence effect of criminal penalties to the dumb criminal who would likely get caught and punished, however, is all but lost. Harel does not take into account the incentive effect such a rule would have on people who, otherwise, would have been too scared to rob at all. Also, with more crimes against careless people without security systems (who are probably, on average, poorer), criminals will get less compensation for each crime. This, in turn, may increase the number of crimes thieves commit in order to steal the same amount. Harel probably would argue that this would

182. *See id.*

have a general deterrent effect on crime. With the punishment being reduced, however, thieves have little reason not to "go for it."

In addition, Harel's joint-cost argument fails to take into account Professor Steven Shavell's activity level argument.¹⁸³ That is, characterizing criminals and victims as joint causers does not recognize the fact that the criminal should not have been engaging in the activity in the first place. The criminal "will not be motivated to consider the effect on [victims] of his choice of whether to engage in his activity."¹⁸⁴ Moreover, crime, like ultrahazardous activities or product defects, imposes disproportionate costs on society. The *Restatement (Second) of Torts* does not recognize contributory negligence as a defense to ultrahazardous activity because of the policy to give "full responsibility for preventing the harm resulting from [ultrahazardous activities] upon the person who has subjected others to the abnormal risk."¹⁸⁵ For this reason criminals' costs should not be mitigated by victims' contributory negligence or assumption of risk.¹⁸⁶

Professor Harel's view of criminal law has some disturbing societal ramifications. First, it may place a premium on the elite's ability to opt out of the average governmental protection. One could draw an analogy to the debate over school vouchers. The government provides a certain level of education to society, as it does police protection. Those with security systems have opted out of the minimal protection provided by the government. Contributory negligence, like private school vouchers, rewards those who opt out

183. See Steven Shavell, *Strict Liability Versus Negligence*, 9 J. LEGAL STUD. 1, 2-3 (1980). Shavell makes the activity level argument in the context of negligence versus strict liability. It is arguably even more applicable to contributory negligence:

By definition, under the negligence rule all that an injurer needs to do to avoid the possibility of liability is to make sure to exercise due care if he engages in his activity. Consequently *he will not be motivated to consider the effect on accident losses of his choice of whether to engage in his activity or, more generally, of the level at which to engage in his activity*; he will choose his level of activity in accordance only with the personal benefits so derived. . . . Thus he will be led to choose too high a level of activity; the negligence rule is not "efficient."

However, under a rule of strict liability, the situation is different. Because an injurer must pay for losses whenever he is involved in an accident, he will be induced to consider the effect on accident losses of both his level of care *and* his level of activity.

184. *Id.* at 2.

185. RESTATEMENT (SECOND) OF TORTS § 524 cmt. a (1965).

186. See George P. Fletcher, Book Review, 106 HARV. L. REV. 1658, 1675 (1993) ("The same principle [that criminal law does not recognize the contributory negligence defense] informs the pockets of strict liability in which we dispense with both the fault requirement and the relevance of the victim's contributory fault.").

of the governmental scheme. Contributory negligence principles are more problematic, however, because they do not just compensate those who opt out of the basic governmental scheme. They actually hurt those who simply rely on the government for their protection. Such a regime would inevitably disparately impact those who cannot afford security.

Moreover, this legal regime may negatively impact society in general. Negligence is premised on the idea that there is a minimum societal standard of care from which the negligent party deviates. This societal standard lays out presumptively what members of the society "ought" to do. It thus incorporates a view of the optimal, cost-free society. Harel advocates a society in which everyone is always obligated to lock their doors, have extensive alarm systems, secure their cars, etc. Although in this day and age it is certainly prudent to take certain precautions, the more we incorporate those precautions into the criminal law, the smaller the range of acceptable behaviors becomes. The ideal society becomes less a society where you do not have to buy an alarm system or always lock your doors and more a society where people are prisoners in their own homes. The freedom of the victim is at the heart of criminal law:

The criminal law shields victims against their own imprudence. They are entitled to move in the world at large with as much freedom as they enjoy behind locked doors. They can walk in the park when they want, sit where they want in the subway, and wear skimpy clothes without fearing that they will be faulted for precipitating rape. This is what it means to be a free person, and the criminal law protects this freedom by not censuring those who expose themselves, perhaps with less than due care, to risks of criminal aggression. The blame properly attaches to the mugger, thief, and rapist, regardless of the victim's role in the interaction leading to the crime.¹⁸⁷

Besides the general criticisms of victim precipitation defenses in criminal law, there are criticisms specific to the context of rape. Even Professor Harel does not advocate the extension of contributory negligence principles to rape:

Women are more vulnerable to some crimes than men, since they are more likely to become victims of sexual offenses. Minorities are more vulnerable to racially based crimes than

187. Fletcher, *supra* note 176, at 356.

whites. The equal protection model should govern the distribution of protection to women and minorities because their vulnerability is involuntary.¹⁸⁸

While this argument does not seem to address the specific voluntary victim behavior targeted by contributory negligence defenses as opposed to the general assumption of risk of rape by women,¹⁸⁹ it merits further discussion. Critics note that the specific problem of precipitation defenses in rape is that rape statutes are meant to protect the very vulnerability that such defenses make a liability. This criticism also has arisen in the context of domestic abuse¹⁹⁰ and sexual harassment.¹⁹¹ When women choose to exercise their (legitimate) freedom to drink, dress sexy, go to nightclubs or fraternity parties, or go on casual dates, they place themselves in particular positions of danger by virtue of their legitimate behavior.¹⁹² When jurors utilize contributory negligence principles, "[p]rotection is removed where it is most needed, in the cases of women who exercise some of the freedom that rape laws ought to provide for them."¹⁹³

Some would characterize a rape victim's contributory behavior as evidence of the victim's propensity to take risks or defy stereo-

188. Harel, *supra* note 177, at 1204.

189. This will be addressed below. See *infra* text accompanying notes 208-12.

190. See James T. R. Jones, *Battered Spouses' State Law Damage Actions Against the Unresponsive Police*, 23 RUTGERS L.J. 1, 42-43 (1991) (footnotes omitted):

[A]llowing a contributory negligence defense in cases where law enforcement officers disregard their obligation to protect victims of spouse abuse would be abhorrent. Obviously believing that victims of spouse abuse are unable to defend themselves, legislators pass special laws to mandate that the *police* protect them. Allowing the authorities to raise negligence defenses in such cases would run counter to the very rationale underlying protection decree laws.

191. See EEOC COMPLIANCE MANUAL, Number N-915-050(C)(3) (1990):

In general, a woman does not forfeit her right to work in an atmosphere free from sexual harassment by choosing to work in an atmosphere that has traditionally included vulgar, anti-female language. . . . [A] woman does not assume the risk of harassment by voluntarily entering an abusive, anti-female environment.

192. See SUE BESSMER, *THE LAWS OF RAPE* 280 (1976):

The notion of contributory negligence seriously undercuts both of the potentially protective influences of law. Should a woman choose to exercise her freedom of movement and go into a place where she might be in danger, she particularly needs the protection of the law. Yet the notion of contributory negligence suggests that her act of free will should be interpreted as a willingness to receive the advances of any man. Thus, should she be raped, the courts are likely to argue that she actually consented, as evidenced by the fact that she placed herself in the position of needing legal protection.

193. *Id.*

types rather than evidence of vulnerability.¹⁹⁴ Some suggest that part of the appeal of contributory behavior to women is the risk of sexual domination,¹⁹⁵ while others say such a suggestion dangerously misconstrues women's actual psychology.¹⁹⁶ Although many feel that risky sexual behavior on the part of victims ought to subject them to a certain amount of liability (imposed through decreasing sanctions against their abusers),¹⁹⁷ the criminal law generally does not sanction risky behavior. Even if it is true that precipitation behavior is risky, the law does not recognize risky behavior as absolving the state of its responsibility to protect the risk-taker. For example, the Supreme Court has interpreted the first amendment to protect those whose speech may be highly inflammatory to hostile audiences.¹⁹⁸ The court recognized the law's specific obligation to those whose exercise of free speech is

194. See Duncan Kennedy, *Sexual Abuse, Sexy Dressing and the Eroticization of Domination*, 26 NEW ENG. L. REV. 1309, 1384 (1992). Kennedy says, in making the observation in the context of sexy dressing,:

The woman whose dress defies patriarchy conveys the comforting message that women are more like men in their sexuality than either patriarchy or feminism have much acknowledged. No woman will be true in the way the culture promises that the madonna type will be true. But neither are women the aliens they would be if they *could* be like that.

Id.

195. See *id.* at 1390:

Abuse, tangled into the cultural images through which we produce and interpret our own and other people's sexuality, seems to me to weigh heavily on this tricky, risky enterprise [of sexy dressing]. . . . [O]ur culture inculcates erotic pleasure in male domination of women in every aspect of life.

See also *id.* at 1392 (observing the woman's "experience of overwhelming, ego-obliterating pleasure when she surrenders to the will of the male abuser").

196. See Torrey, *supra* note 36 (observing that it is a myth that "women derive pleasure from victimization"); See BESSMER, *supra* note 191, at 285 (citation omitted):

[I]t might be argued by those who accept the view that negligent women really want to have intercourse with anyone who comes down the pike that the women didn't really refuse. Again Amir's data directly contradict this imputation. He discovers that there is greater resistance among victims in victim precipitated rapes than in non-victim precipitated cases

197. See, e.g., Note, *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, 62 YALE L.J. 55, 67 (1952) (footnotes omitted) ("[A] woman's need for sexual satisfaction may lead to the unconscious desire for forcible penetration, the coercion serving neatly to avoid the guilt feelings which might arise after willing participation.").

198. *Terminello v. Chicago*, 337 U.S. 1 (1949), reprinted in CONSTITUTIONAL LAW: CASES - COMMENTS - QUESTIONS 725 (Lockhart et al. eds., 8th ed. 1996):

[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction . . . with conditions as they are, or even stirs people to anger. [That] is why freedom of speech, though not absolute, . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of serious substantive evil

particularly risky.¹⁹⁹ Thus, so long as the underlying behavior of the victim is legitimate, the law protects the victim from the negative social outcomes of that behavior.

Some contend, however, that the underlying behavior is, in fact, not legitimate. People articulate vocally, or believe subconsciously, that women should not have the right to go to certain places, dress certain ways, or engage in certain kinds of relationships.²⁰⁰ There are, however, both procedural and substantive problems with incorporating such thinking into the law of rape. On the procedural level, if people believe that women should not have the same rights as men, then they should exercise their democratic rights, vote, and have the legislature pass laws codifying these sexist beliefs. Law enforcement officers, judges, and juries should not be permitted to voice their patriarchal beliefs by importing into the rape trial defenses not recognized by the law. Those who have such beliefs probably are aware, however, that if they did try to use their legitimate democratic powers to affect their sexist beliefs, the Constitution would thwart their efforts. For the most part, equal protection does not allow the law to prevent women from going where they please and dressing how they please.²⁰¹ Knowing this, those who support patriarchy use other means to discourage women from using the freedom the law recognizes.²⁰² For example, the law

199. See Harel, *supra* note 177, at 1205:

Sometimes the legal system grants special protection to vulnerable victims despite the voluntary nature of the victim's vulnerability. Victims are protected if their vulnerability is attributed to a voluntary act which possesses an important social value. We insist on granting full protection to individuals who use their First Amendment rights in a way which provokes a hostile reaction, even if by doing so they voluntarily expose themselves to severe risks.

200. See BESSMER, *supra* note 192, at 280-81:

The problem ultimately lies in the fact that most judges do not believe that women ought to have the right to go about with the same freedom as males. For some this position is actually prohibitive. Those who take a prohibitive view do not argue that women who violate these norms ought to be raped. At the same time, they do nothing to further the notion that part of what is wrong with rape is that it limits the ability of women to move freely and that a woman's taking freedom of movement as a right does not presuppose sexual promiscuity.

201. See *e.g.*, *United States v. Virginia*, 116 S. Ct. 2264 (1996) (mandating that women gain admission to the traditionally all male Virginia Military Institute).

202. Duncan Kennedy argues that sexual abuse, itself, is such a means:

[T]he pathological abuser is a kind of vigilante. The woman victim has violated a customary rule about how women are supposed to behave. Most people would agree that rape or murder triggered by the woman's misconduct is a totally inappropriate response. But we also agree that fear of some kind of abusive reaction has in fact a strong deterrent effect on women contemplating violation of a whole range of patriarchal norms.

Kennedy, *supra* note 194, at 1329. See also Taslitz, *supra* note 2.

dictated that women be admitted to the Citadel, a traditionally all-male military college.²⁰³ Once admitted, however, the opponents of the law affected women's exclusion by other means. The school allowed male students to abuse the female cadets, exclude them from social activities, and even set them on fire.²⁰⁴ The result was that the women dropped out.²⁰⁵ In the end, the women were not allowed to enjoy the very freedom the law had explicitly granted to them. The same may be said of workplace harassment. It is the nonlegal response to antidiscrimination law's mandate that women gain access to the types of jobs traditionally denied to them.²⁰⁶

On the substantive level, it is just wrong to say that women should not be able to engage in the full range of activities in which men engage. Most simply, it is sexist to hold that women do not have the right to drink, go to bars, or have one night stands. Advocates of precipitation defenses contend that such behavior hurts society by precipitating crime. Many studies, however, report that rapists are predisposed to sexual assault, despite the behavior of the victim.²⁰⁷ Moreover, it is impossible to isolate the particular acts causing rape so as to eradicate them. Even if the law explicitly forbade women to engage in contributory behavior, women would have no clue how to act. The married woman assumes the risk of rape because she is married. The single woman assumes the risk of rape because she is single and on a date. The loose woman assumes the risk of rape because she is loose. The virgin is assumed to be fabricating rape charges to protect her virginity.

203. *Faulkner v. Jones*, 858 F. Supp. 552 (D.S.C. 1994).

204. See Sybil Fix, *Fourth-Class System Under Fire: Citadel Barracks: James Jones, President of the Citadel's Board of Visitors Said He Has Asked Citadel's Interim President to Assign Adults to the Barracks, but Not As Guards*, CHARLESTON POST & COURIER, Dec. 21, 1996, at B1 ("Female cadets Jeanie Mentavlos of Charlotte and Kim Messer of Clover say they were shoved, threatened, set afire . . .").

205. See *The Citadel Dismisses Cadet for Hazing Treatment Led to Two Women Quitting School*, ST. LOUIS POST-DISPATCH, Mar. 11, 1997, at 6A.

206. See Andrea Brenneke, *Civil Rights for Battered Women: Axiomatic & Ignored*, 11 LAW & INEQ. J. 1, 15-16 (1992) (footnote omitted) ("[D]omestic violence qua control can be seen as part of the enforcement of gender dominance at home, just as rape serves that function on the streets and sexual harassment serves it in the workplace.").

207. See Daphne Edwards, Comment, *Acquaintance Rape & the "Force" Element: When "No" Is Not Enough*, 26 GOLDEN GATE U. L. REV. 241, 268 n.133 (1996) ("Eighty-two percent of sexual assaults are planned or partly planned by the assailant before the rape occurs."); DIANA E. H. RUSSELL, *THE POLITICS OF RAPE: THE VICTIM'S PERSPECTIVE* 189 (1975) (citing THE FEDERAL COMMISSION ON CRIMES OF VIOLENCE REPORT) (noting that studies show that only "[four percent] of reported rapes involved any precipitate behavior on the part of the victim"); Tim Warren, *Alice Vachss: Public (and Published) Vengeance*, BALTIMORE SUN, July 19, 1993, at 1D (citation omitted) ("There are many motivations for rape and in some cases it's a question of whether the rapists are predisposed because of some preexisting psychiatric condition that could be treated.").

Arguably, assumption of risk of rape, in its most basic form, attaches not to any external behavior but to womanhood.²⁰⁸

But what if there are certain behaviors which have at least a demonstrable correlative, if not causal, relationship with rape?²⁰⁹ Should those behaviors be discouraged as a matter of public policy? The answer is no. In addition to the argument that preventing women from exercising the full array of freedoms men enjoy denies equal protection and codifies existing sexist views, there are other reasons why victim precipitate behavior should not be discouraged. First, punishing such behavior transfers negative external costs from the perpetrator to the victim. In the domestic abuse context:

[t]his leads to the simple law and economics hypothesis that increasing protection from sexual abuse should increase the bargaining power of women vis-à-vis men Reducing protection, on the other hand, should make women more dependent on men who don't abuse, by making leaving riskier, and thereby make them more willing to make concessions.²¹⁰

In the rape context, women must internalize the costs of preventing rape. They must bear the expenses of self-protection. They must restrict what they do and when they do it. Moreover, in the same way that comparative negligence principles unnecessarily provide too much incentive to prevent theft, contributory negligence in rape provides too much incentive to stop contributory behavior.²¹¹ The extra "incentive" is, in fact, merely punitive. It serves no purpose other than to give effect to society's disdain for women who engage in contributory behavior.

In addition, contributory behavior may possess social value as more than a mere expression of freedom. Not only should women be "free" to engage in behavior not everyone approves of, that behavior itself may serve social purposes. This is demonstrated in much of the arguments of opponents of rape reform. These opponents make both victim precipitation arguments and social

208. See Harel, *supra* note 177, at 1204 (advocating protecting women because they are "victims who are particularly vulnerable to crime due to factors that are beyond their control").

209. See Kennedy, *supra* note 194, at 1330 (observing the correlation between sexy dress and abuse as well as the resultant response of women to regulate their behavior).

210. *Id.* at 1328.

211. See *supra* text accompanying notes 188-197. In other words, the rape victim has plenty of incentive to prevent rape. It is unlikely that adding contributory negligence would effect that incentive, especially because women already know that rape is a crime for which they can expect little to no vindication.

preservation arguments. In terms of the former, opponents posit that rape shield reforms unfairly exclude inquiry into the victims' behavior and character. In terms of the latter, opponents criticize affirmative consent standards because they ruin preexisting modes of sexual communication between men and women — they prevent the “sexy silence” that occurs before intercourse.²¹² The interesting thing is the juxtaposition of these two arguments. Although, opponents of rape reform want to preserve sexual mystique, they create liability for that mystique through victim precipitation defenses, which does the exact opposite. Thus, contributory negligence defenses undermine the very sexual behavior that their proponents wish to preserve. Making women assume the risk of rape aims at discouraging them from remaining silent, dressing sexy, or going to bars, by decriminalizing the resultant sexual abuse. There is, however, an “argument for a male erotic interest in reducing the sexual abuse of women”:

Abuse screws women up sexually, and that's bad for men. It discourages women from risking, disciplines them not to risk the forms of pleasure/resistance through which we might eroticize autonomy And it burdens both men's and women's fantasy, play, experiment and innovation with questions, risks, fears, and guilt that trap us in the reproduction of patriarchal sex. Being against abuse is not, for men, just a matter of human rights, empathy, protecting “our” women, romantic paternalism or political correctness, however valid and important each of those may be.²¹³

Thus the criminal law should not permit the informal imposition of liability on victims, not just because women should have the freedom to do as they please, but also because the underlying acts themselves are not the kind that should be condemned by society.²¹⁴

212. See Remick, *supra* note 3, at 1148 (quoting Lois Pineau, *Date Rape: A Feminist Analysis*, 8 LAW & PHIL. 217, 229 (1989):

One possible objection to the idea of a mandatory verbal inquiry is that it threatens to destroy the intimacy of sexual relations — that seeking and acquiring verbal consent would “ruin the moment.” This objection assumes a sort of “silent is sexy” view of intimate physical relations, “a conception of sexual pleasure that springs from wordless interchanges, and of sexual success that occurs in a place of meaningful silence.”

213. Kennedy, *supra* note 194, at 1393.

214. This is an important distinction from the defense of provocation. I argued above, *see supra* note 171, that provocation is not really a precipitation defense so much as a lack of mens rea defense. Even if it were a precipitation defense, however, it is distinguishable from rape precipitation defenses because the provoking act is socially undesirable. Provocation, like self defense, usually involves the victim acting in a violent, provocative manner. *See*

V. PROPOSED SOLUTIONS TO THE PROBLEM OF TORT DEFENSES IN RAPE LAW

Thus far, this paper has been deconstructive.²¹⁵ It has merely described the problem of tort defenses in rape law and examined the failure of current rape shield legislation to address this problem. This portion of the paper hopes to be part of a reconstructive dialogue on rape law. It proposes some initial steps toward the elimination of tort-type defenses from the law of rape. It does not, however, propose a plan to eliminate patriarchal thinking in society for that is a socio-psychological undertaking beyond the scope of this paper.²¹⁶ The proposals for eliminating tort defenses will be internal to the law of rape and the rape trial process. Neither will this paper propose categorical exclusions of evidence relating to victim precipitation. One of the biggest problems with rape shield reform, as highlighted in the earlier discussion, is overbreadth.²¹⁷ Rape shield laws' per se exclusions of categories of evidence have a tendency to infringe upon fair trial guarantees.²¹⁸ Moreover, it is simply implausible to exclude all such evidence. Victim precipitation evidence encompasses such a wide range of background behavior²¹⁹ that it would be impossible for the jury to get a coherent picture of the events at issue without admitting some precipitation evidence.

State v. Guebara, 696 P.2d 381 (1985) (stating that words alone can never constitute sufficient provocation). With provocation, the victims' underlying acts are so bad that they make murder understandable. In rape precipitation cases, the underlying behaviors are bad only if one adopts a patriarchal view of the "proper" role of women.

I have also heard the argument that the battered women syndrome defense is essentially a victim precipitation defense. It invites the jury to judge the dead batterer instead of the guilt or innocence of the defendant. See generally Keith Lieberthal, *Conflicting Laws, Conflicted Sentiments* (Feb. 1, 1997) (unpublished manuscript, on file with Professor Parker, Harvard Law School). Even if this is true, battered women's syndrome defense is distinguishable from rape precipitation defenses in the same way as provocation: The underlying victim behavior (battering) is socially reprehensible. Although making risk of death an additional punishment for battering has the procedural problems discussed earlier, see *supra* p. 241, it does not have as many substantive problems as victim precipitation defenses in rape for the simple reason that the underlying act of battering is socially undesirable.

215. See Barbara Stark, *International Human Rights Law, Feminist Jurisprudence, and Nietzsche's "Eternal Return": Turning the Wheel*, 19 HARV. WOMEN'S L.J. 169, 169 n.1 ("[D]econstruction may be understood as a form of critical analysis with which to expose and question the underlying premises of a particular assumption.").

216. See *supra* note 18 and accompanying text.

217. See *supra* note 160.

218. See *supra* notes 138-43 and accompanying text.

219. See *supra* notes 27-32 and accompanying text.

The first way to combat the importation of tort defenses into the rape trial is to eliminate all forms of tort defenses from statutory law. It is time for Penal Codes finally to eliminate all vestiges of the marital exemption.²²⁰ The logic behind the marital exemption in its current form might be understandable in cases where the defendants' reasonable belief as to consent is an issue. The fact of marriage may explain why the defendant had a reasonable belief that the complainant consented to sex. The defendant's reasonable belief, however, is not always at issue. Many statutes define rape irrespective of the defendant's objective or even subjective belief, opting for a definition involving force or the victim's subjective belief as to consent.²²¹ The marital status of the victim is completely irrelevant to the issue of whether or not there was force. Although the fact of marriage may be germane to the issue of whether or not the victim actually consented, the law still should not employ a marital exemption. The marital exemption prevents the jury from deciding the significance of marriage to consent and, instead, mandates that a married woman does not have the capacity to not consent to sex with her husband. Relevant evidence of marital status should come in through the trial process. The weight of marital status should not be designated by statute. Once made part of the trial process, however, there is still the problem that juries will employ the same type of reasoning used by the legislature in creating the exemption. This problem is addressed below. For the same reasons, judges and legislatures should eliminate the voluntary social companion exception²²² and all remnants of the resistance requirement²²³ from statutory and case law.

Judges must also eliminate tort-type defenses from the common law.²²⁴ They must guard against incorporating the "she asked for it" type of analysis into their opinions. They cannot subtly premise liability on the contributory behavior of the victim. The problem is how to police judges and prevent them from purposefully, or even subconsciously, incorporating such defenses into their rulings. One way may be to add the admonition against tort defenses to rape statutes. Legislatures could amend rape statutes to explicate that

220. See *supra* notes 41-49 and accompanying text (discussing the marital exemption).

221. See, e.g., MD. CODE ANN. art. 27 § 463(a)(1)(1957) (defining rape as "force or threat of force against the will and without the consent of the other person").

222. See *supra* note 50 and accompanying text (discussing the voluntary social companion exception).

223. See *supra* notes 52-54 and accompanying text (discussing the resistance requirement).

224. See *supra* notes 55-63 and accompanying text (discussing tort-type defenses in common law).

contributory behavior of the victim is not a defense.²²⁵ This kind of amendment would help prevent precipitation defenses from slipping into the trial in the first place.²²⁶ It would also give prosecutors grounds to object to evidence that has no probative value outside its tendency to support a victim precipitation defense.

In addition to eliminating tort defenses from the statutory and common law, police and prosecutors must eliminate this type of thinking from their decisions to investigate and prosecute.²²⁷ Only a minority of rape cases ever reach the trial stage.²²⁸ Thus, some of the most damaging uses of victim precipitation defenses occurs at the pre-trial stage. Determining how to convince police and prosecutors to abandon this kind of thinking is difficult. One reason that police and prosecutors judge victims for their contributory behavior is that they rely on the same social myths on which the jury relies when it acquits defendants based on victim precipitation.²²⁹ There are, however, also legitimate reasons why police and prosecutors do not pursue cases in which there is evidence of victim precipitation: They do not want to waste valuable time and effort on cases that will never result in conviction. Thus, the battle to encourage police and prosecutors to abandon tort defenses must be waged on two fronts. First, police departments and prosecutors' offices must incorporate education against rape myths into their training programs. Just as police and prosecutors are trained to investigate rapes thoroughly, they should also be trained to abandon the stereotypical thinking which keeps them from adequately investigating and prosecuting rapes. "The few available studies suggest that police and prosecutors are more conservative than community members in attitudes about rape, but that attitudes among police who have been exposed to educational programs do change . . ."²³⁰ Second, prosecutors must be able to secure more convictions. If prosecutors begin to win trials in which

225. Judges generally give effect to the intent of legislative reforms. See BOURQUE, *supra* note 34, at 128 (citing Galvin, *supra* note 7); see also Jane Strickland, *The 1992 Court Reform Act: Its Role in the Development of the Massachusetts Juvenile Court*, 39 *Apr. B. B.J.* 9, 12 (1995) (commenting that legislative reform greatly affected the administration of justice within the courtroom).

226. See Paul H. Robinson, *Are Criminal Codes Irrelevant?*, 68 *S. CAL. L. REV.* 159, 194 (1994) ("The [criminal] code's liability rules serve as the judge's touchstone for determining what facts are legally relevant. In this way, the code determines what evidence the jury will see and hear.").

227. See *supra* notes 64-67 and accompanying text (discussing police and prosecutor employment of victim precipitation defenses).

228. See BOURQUE, *supra* note 34, at 100.

229. See *supra* note 36 and accompanying text (describing rape myths).

230. BOURQUE, *supra* note 34, at 129.

there is evidence of victim precipitation, they will be more likely to prosecute. In turn, the police will be more likely to investigate.

The problem is how to ensure there will be more convictions in cases involving victim precipitation. It is not appropriate to tinker with the trial process just to increase conviction rates. Such tinkering would be like mandating that every fourth rape trial result in conviction.²³¹ Reforms to the trial process that create a greater likelihood of conviction are justified only when they remedy legal errors within the trial. While it is true that acquitting a rapist based on the contributory negligence of the victim is improper, not all acquittals happen solely because of contributory behavior. There are cases in which the jury acquits based on contributory negligence, but they could have acquitted based on consent. The trick, therefore, is to find a way to preserve the jury's ability to acquit based on consent while removing the improper influence of tort defenses. Again, judges must take an active role in policing the admissibility of victim precipitation evidence.²³² Precipitation evidence often comes in to the trial as mere background evidence.²³³ Judges must remember that the importation of tort defenses into the law of rape is illegal, and statutory law's explicit rejection of tort defenses may remind judges of this fact.²³⁴

Once judges realize that acquittals based upon contributory negligence are illegal, they can incorporate this realization into their evidence rulings. Rule 403 of the Federal Rules of Evidence and similar state laws mandate that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice"²³⁵ Judges should implement the prohibition against tort defenses through their Rule 403 rulings. The particular danger of prejudice, presented by precipitation evidence, is the danger that juries will ignore the law of rape and acquit because the victim "deserved it." Rule 403 should prevent exactly this type of prejudice.²³⁶ Judges must weigh the probative value of any single piece of evidence against the likelihood that such evidence will lead the jury to acquit based on the contributory behavior of the victim. This will cause mere background evidence or cumulative evidence

231. See *supra* text accompanying notes 9-10.

232. See BOURQUE, *supra* note 34, at 128 ("[J]udges in particular retain enormous power in the courtroom and if so disposed can selectively apply criminal sanctions . . .").

233. For example, where the couple met, whether they were drinking, what she was wearing, whether they were on a date, where they went, etc.

234. See *supra* notes 225-26 and accompanying text.

235. FED. R. EVID. 403.

236. See *supra* note 159 and accompanying text.

to face a high hurdle before admittance,²³⁷ given the propensity of juries to acquit on contributory negligence grounds. Judges, therefore, must receive information about juror's propensity to acquit on such grounds. Again, legislative action may be the answer. The legislature could include in rape statutes observations of the high incidences of tort defense bootlegging.²³⁸ Judges would then be more aware that this form of "prejudice" is very pervasive and that the risk of undue prejudice from victim precipitation is always high. Exclusion of such evidence on the grounds of prejudice should profoundly decrease the chances the jury will employ tort defenses. "Available data indicate that jurors are clearly influenced by the amount and type of legally irrelevant information presented to them."²³⁹

If the judge decides to admit the precipitation evidence, then she should provide a limiting instruction to the jury.²⁴⁰ The judge must admonish the jury that the evidence is admissible for the limited purpose of the relevant inquiry and is not admissible to show that the victim "asked for it." The judge should also keep a careful eye on defense attorneys and prevent them from pursuing lines of questioning that have no other function than to expose the contributory behavior of the victim.²⁴¹ Judges must prevent attorneys from

237. See Park, *supra* note 151, at 771:

Considerations of nullification prejudice and waste of time usually have a combined effect. For example, when a defendant wishes to produce evidence showing a war to be unjust in the course of defending against a charge arising from a protest against that war, the two considerations point in the same direction.

238. For example, the preamble or explanatory notes might state, "Juries have been acquitting criminal defendant's of rape based on victim precipitation rather than the law." Rape shield statutes contain such statements. See e.g., FED. R. EVID. 412 advisory committee's notes ("The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact-finding process.").

239. Bourque, *supra* note 34, at 128. See also Robinson, *supra* note 226, at 195 ("Evidence screening at trial may well be the single most effective means by which the code's liability rules have influence.").

240. Again, this should only be in cases where a limiting instruction can be effective in removing the particular danger of prejudice. See FED. R. EVID. 403 advisory committee's notes ("In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction.").

241. See John H. Mansfield, *Evidential Use of Litigation Activity of the Parties*, 43 SYRACUSE L. REV. 695, 695 (1992) ("Sometimes the conduct of the parties or of their counsel in the course of litigation itself creates evidence relevant to a disputed issue in the case. The question is then presented whether this evidence should be available for use by the trier of fact or be excluded because its use may deter parties from engaging in activity that promotes some important objective of the litigation process.").

arguing victim precipitation in their closing statements just as they would prevent attorneys from arguing in favor of jury nullification.²⁴² Arguments urging the jury to take into account the contributory behavior of the accuser are essentially arguments for jury nullification.²⁴³

Courts have already ruled that contributory negligence does not formally bar prosecution for rape.²⁴⁴ Indeed, rape reformers have called for the elimination of precipitation defenses in evidence rules and jury instructions, observing that "[e]vidence rules and instructions which encourage the jury to indulge its notions of victim precipitation fail to protect a woman's freedom of sexual choice."²⁴⁵ To combat the pervasive bootlegging of tort defenses adequately, judges must go even further and instruct the jury not to acquit based upon the contributory behavior of the victim. The instruction in a consent jurisdiction might read as follows:

The fact that the complaining witness may have acted in a way that made her vulnerable to this crime should not affect your verdict. If you have found beyond a reasonable doubt that the defendant engaged in sexual intercourse with the complaining witness and that the complaining witness did not consent to the intercourse, you must convict the defendant. Any belief that the complaining witness asked for it, dressed inappropriately, behaved inappropriately, or otherwise contributed to the commission of the crime is not part of your decision as to the defendant's guilt or innocence. You must follow the law rather than your own belief about whether or not the complaining witness asked for it. If you enter a verdict of not guilty based on your beliefs about the victim's contributing behavior, you have not followed the law.

One may have a problem with this instruction on civil libertarian grounds because it invites the jury to convict. This same criticism arises, however, whenever judges instruct juries not to nullify. The

242. See BOURQUE, *supra* note 34, at 129 (citing E. Borgida & P. White, *Social Perception of Rape Victims: The Impact of Legal Reform*, 2 LAW AND HUM. BEHAV. 339 (1978); E. Borgida, *Legal Reform of Rape Laws*, 1981 APPLIED SOC. PSYCHOL. ANN. 211; and G.D. LaFree et al., *Jurors' Responses to Victims' Behavior and Legal Issues in Sexual Assault Trials*, 32 SOC. PROB. 389 (1985) ("Attorneys are clever manipulators of truth. It is not just the existence of evidence that influences a jury; often it is what the prosecuting attorney, defense attorney, and judge make of the evidence that makes it important to a juror.")).

243. See *supra* notes 159-62 and accompanying text.

244. See *supra* note 55 and accompanying text.

245. Lucy R. Harris, Comment, *Towards a Consent Standard in the Law of Rape*, 43 U. CHI. L. REV. 613, 625-26 (1976).

above instruction essentially instructs the jury to follow the law rather than their own ideas of justice. Such an instruction is proper and constitutional:

Jury nullification, like revolution, is a process about which Americans have profoundly mixed feelings. It is safeguarded to some extent, for example, by rules against directed verdicts in criminal cases. Yet it is clear that the legal system could not function for long if nullification became common. So judges do not instruct juries about the right to nullify, or allow it to be argued too blatantly, and the rules permit exclusion of evidence that would encourage nullification.²⁴⁶

Defense attorneys ask for instructions against nullification all the time. They ask judges to tell juries to presume the defendant innocent and convict only when they find guilt beyond a reasonable doubt, even if the jury feels that less probability of guilt warrants conviction.²⁴⁷

At the other end of the spectrum is the argument that jury instructions will be ineffective. This is the rape shield-type argument that only a per se exclusion of contributory evidence will suffice. The Supreme Court, however, has recognized the assumption that jury instructions work as an integral part of the American trial process. Justice Rehnquist stated in *Parker v. Randolph*:

A crucial assumption underlying [the jury] system is that juries will follow the instructions given them by the trial judge. Were this not so, it would be pointless for a trial court to instruct a

246. Park, *supra* note 151, at 771 (footnote omitted).

247. A jury instruction on presumption of innocence might read as follows:

The indictment or formal charge against a defendant is not evidence of guilt. Indeed, the defendant is presumed by the law to be innocent. The law does not require a defendant to prove his innocence or produce any evidence at all [and no inference whatever may be drawn from the election of a defendant not to testify]. The government has the burden of proving the defendant guilty beyond a reasonable doubt, and if it fails to do so, you must acquit the defendant.

While the government's burden of proof is a strict or heavy burden, it is not necessary that the defendant's guilt be proved beyond all possible doubt. It is only required that the government's proof exclude "any reasonable doubt" concerning the defendant's guilt.

A "reasonable doubt" is a doubt based upon reason and common sense after careful and impartial consideration of all the evidence in the case. Proof beyond a reasonable doubt, therefore, is proof of such a convincing character that you would be willing to rely and act upon it without hesitation in the most important of your own affairs.

FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS CRIMINAL §1.05 (District Judges Association ed., 1997).

jury, and even more pointless for an appellate court to reverse a criminal conviction because the jury was improperly instructed.²⁴⁸

Not all experts agree, however, that this assumption is justified. One study asked jurors to paraphrase instructions they had just heard from the judge. Jurors could restate only thirteen percent of the legally significant elements accurately.²⁴⁹ Another study revealed that instructed jurors had at most a six percent greater chance at understanding the law than uninstructed jurors.²⁵⁰ Another test showed only one out of eighteen jurors even remembered the judge's curative instruction.²⁵¹

Other experts have observed that jury instructions are not always ineffective. Experts draw a distinction between complex instructions on burdens and standards and simple instructions on disregarding evidence. Juries generally do not understand the first type of instruction, but they can follow the second type:

Jurors are often asked to use information given them for only a particular purpose. . . . Although some commentators have criticized the effectiveness of jury instructions and the degree to which juries understand and follow them, these criticisms focus primarily on the more complex instructions, such as instructions as to burden or standard of proof. . . . [I]nstructions to disregard certain types of testimony [are more easily understood]. Studies have shown that such instructions are generally followed.²⁵²

The instruction against victim precipitation defenses is simple. It does not involve complicated presumptions and burdens. The instruction simply tells the jury to disregard certain evidence for its

248. 442 U.S. 62, 73 (1979); see also *Francis v. Franklin*, 471 U.S. 307, 325 n.9 (1985) ("[W]e adhere to the crucial assumption underlying our constitutional system of trial by jury that jurors carefully follow instructions.").

249. Robinson, *supra* note 226, at 170 (citing Walter W. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C. L. REV. 91 n.101 (1988)).

250. *Id.* at 171 (citing Lawrence J. Severance et al., *Toward Criminal Jury Instructions That Jurors Can Understand*, 75 J. CRIM. L. & CRIMINOLOGY 198, 205-06 (1984)).

251. See Robert R. Calo, *Joint Trials, Spillover Prejudice, and the Ineffectiveness of a Bare Limiting Instruction*, 9 AM. J. TRIAL ADVOC. 21, 36 (1985) (citing Harold M. Hoffman & Joseph Bradley, *Jurors on Trial*, 17 MO. L. REV. 235, 245 (1952)).

252. Joseph P. Liu, *Federal Jury Instructions and the Consequences of a Successful Insanity Defense*, 93 COLUM. L. REV. 1223, 1247 (1993) (footnotes omitted).

tendency to show contributory negligence.²⁵³ For this reason, jury instructions may be more effective at reforming the rape trial than tinkering with the definition of rape. Affirmative consent standards²⁵⁴ require jurors to understand complex burden shifting, differing proof standards, and presumptions. Chances are jurors will not understand such laws, especially considering they run counter to the instincts of many jurors about what rape law should be.²⁵⁵ Jury instructions against tort defenses simply instruct juries that "she asked for it" is not a defense to rape.

Another possible explanation for the apparent ineffectiveness of jury instructions as to substantive law is that jurors nullify.²⁵⁶ As Kalven and Zeisel discovered, however, juries generally want to follow the law. They are aware of their obligations to follow the law over their own beliefs.²⁵⁷ One study revealed that eighty-seven percent of jurors discuss instructions with other jurors, and fifty-seven percent to sixty-five percent read them aloud.²⁵⁸ Perhaps this is why jurors feel compelled to fit their revolts against the law within the parameters of the fact-finding. For example, the jury will say that sexy clothes were evidence of consent when what they really mean is that the woman assumed the risk.²⁵⁹ The instruction against victim precipitation defenses directly combats the jury's desire to deviate from the law. Such an explicit instruction against nullification may be quite effective. "[S]tudies have shown that juries are more willing to nullify when judges tell them that they

253. It is quite analogous to Liu's example of a "simple" instruction telling the jury to disregard the illegal inferences from character evidence admitted to prove motive. Liu states:

[E]vidence that reflects badly on a defendant's character is generally inadmissible, since it may unfairly prejudice the jury against the defendant. Yet this same evidence is often admissible if used for another purpose, for example, to prove motive. Jurors are told (and trusted to) keep such evidence analytically separate.

Id. (footnotes omitted).

254. *See supra* note 14.

255. *See* Robinson, *supra* note 226, at 171 (footnotes omitted) ("The issues on which the instructed jurors did better than uninstructed jurors . . . included the simpler issues and, interestingly, issues on which the uninstructed jurors also did relatively well. This is presumably because the legal instructions matched the uninstructed jurors' prior notions of what the law was or should be.").

256. *Id.* at 173-76.

257. *See supra* note 160 and accompanying text.

258. Robinson, *supra* note 226, at 173 (citing Steele & Thornburg, *supra* note 249, at 98).

259. *See supra* text accompanying note 161; Robinson, *supra* note 226, at 173 ("While giving formal deference, a juror may allow extraneous facts to affect his or her judgment or may 'fudge' the application of a legal standard to reach a result more consistent with the juror's sense of a fair and just result.").

have such power and permit them to use it."²⁶⁰ This implies that an express instruction not to nullify will make juries less likely to engage in nullification.

In addition, implementing jury instructions is the most plausible way to combat tort defenses in the rape trial. A per se exclusion of evidence of contributory behavior would have the same problems of scope as that of rape shield laws. Given the scope of contributory behavior, such an exclusion would be nearly impossible to implement and highly unfair. Moreover, even if instructions are not extremely effective, they set the background for a trial. They send the message that the rape trial is not about the contributory behavior of the complainant. Juries are bound to be affected by this message:

It seems likely that jurors respond as much to the perceptions of the players directing the case as to the information provided. The process of voir dire, dismissal of juries for *in camera* hearings, the judge's instructions and interactions with the attorneys, and jurors' perceptions of the judge and attorneys can all influence a jury's later deliberations and the subsequent verdict.²⁶¹

Even if jurors do not follow all instructions, without instructions they have no idea that it is improper to bootleg tort defenses into the rape trial. In the absence of an instruction against bootlegging tort defenses into the rape trial, jurors actually think they are following the law when they do so.²⁶² Such an instruction at least informs, if not compels, jurors to follow the law rather than their own beliefs.

Others object to such an instruction on the grounds that it will have the opposite of its intended effect. One study concluded that jury instructions, "instead of forcing the jury to disregard the evidence, sensitize[] the jury to the evidence."²⁶³ One critic compared the instruction against tort defenses to an instruction stating, "you will not think about a pink elephant."²⁶⁴ She contended that

260. Robinson, *supra* note 226, at 175 (citing Irwin A. Horowitz, *The Effect of Jury Nullification Instructions on Verdicts and Jury Functioning in Criminal Trials*, 9 LAW & HUM. BEHAV. 25, 34 (1985)).

261. BOURQUE, *supra* note 34, at 129.

262. See *supra* text accompanying note 71.

263. Calo, *supra* note 251, at 36 (citing Dale W. Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744 (1959)).

264. Discussion with Jamie Gardner, Harvard Criminal Justice Institute clinical instructor and former public defender, at Harvard Law School (Mar. 20, 1997).

the instruction would draw jurors' attention to the victim precipitation defense way of thinking rather than preventing them from thinking in such a way. The problem with this criticism is that it is inapposite. The instruction, "you will not think about a pink elephant," is counterproductive because before the instruction is given, no pink elephants have tromped through the courtroom. Thus, the instruction itself plants the seed of that thought. In the case of victim precipitation, research reveals that the elephant is present from the moment jurors walk into the trial. Jurors already are predisposed to think that way because of the influence of patriarchy and social rape myths.²⁶⁵ A jury instruction would tell the jury how to deal with that pink elephant. A jury instruction would admonish jurors that precipitation evidence, although possibly probative of consent, is not grounds for acquittal. An instruction would advise jurors to follow the law of rape rather than their predispositions as to the "proper" role of women. In the end, it would tame the pink elephant.

VI. CONCLUSION

I will be a criminal defense attorney one day. I have no doubt that I will represent rapists. In representing them I will present as much evidence of their innocence as I can. Undoubtedly, some of this evidence will involve the contributory behavior of the victim. I may have to elicit testimony that the two met at a nightclub. I may have to prove that she was drinking. I may even have to present evidence of her clothing to the jury. When I present such evidence and zealously advocate on behalf of my client, I hope to do so without antecedent pangs of guilt. I hope to advocate the release of an accused rapist in a forum that is procedurally correct and free of invidious stereotype and myth. Yes, I will argue that my client did not commit the crime. But when the jury goes back to their room and deliberates, I want them to synthesize the evidence and come to a legal and just conclusion. I do not want the jury to acquit my client because they think the complainant "deserves what she got." I want them to acquit him because he is innocent or because the state has failed to prove that he is not. Hopefully, there will come a day when the legal framework of the rape trial relieves my conscience and ensures that verdicts reflect the law and not social myths.

265. See *supra* note 38.