

# RESISTING SIMPLE DICHOTOMIES: CRITIQUING NARRATIVES OF VICTIMS, PERPETRATORS, AND HARM IN FEMINIST THEORIES OF RAPE

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Liberal and radical feminist approaches to rape and rape law reform often display a victim/perpetrator framework. This framework presupposes perpetrator agency and empowerment, victim passivity and disempowerment, and that the harm of rape, which is always serious, flows only from the perpetrator to victim. Examining how this victim/perpetrator framework operates in two paradigmatic examples of acquaintance rape on college campuses, this Note contends that the victim/perpetrator framework may actually be damaging to the feminist rape reform project because it relies on an overly simplistic account of the operation of power in sexual violence that fails to consider the way that sex and gender are performative, denies the possibility of a multiplicity of experiences and perspectives within individual incidents of rape, and participates in the disempowerment and traumatization of rape victims. As feminists, we should seek to resist such simple dichotomies. This Note concludes by proposing one possibility: an intersectional model of rape. The emerging use of restorative justice in some rape cases offers one example of what an intersectional model of rape might look like in practice.

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#### INTRODUCTION

*“People who think that women are partly responsible for rape, are themselves responsible for abetting rapes. They are looking for a reason to avoid punishing rapists. And there by [sic] mak[e] it safer for rapists to commit such crimes.”<sup>1</sup>*

*“Victim blaming is incredibly complicated. . . . I do not know what the fine line is between victim blaming and helping women help themselves against patriarchal violence of all kinds. All I know is that we all must resist, combat victimhood, [help] victims, educate others, and help people help themselves—without condoning behavior but without judgment and blame.”<sup>2</sup>*

<sup>1</sup> Anand Srivastava, Comment to *An Account of Sexual Assault at Amherst College*, THE AMHERST STUDENT (Oct. 30, 2012, 2:06 AM), <http://amherststudent.amherst.edu/?q=comment/49556#comment-49556>.

<sup>2</sup> Maia, Comment to *An Account of Sexual Assault at Amherst College*, THE AMHERST STUDENT (Oct. 29, 2012, 8:05 AM), <http://amherststudent.amherst.edu/?q=comment/49556#comment-49556>.

A particular narrative about the harms of rape and the agency of perpetrators and victims pervades liberal and radical feminist approaches to rape.<sup>3</sup> This paradigm, which I call the *victim/perpetrator framework*, incorporates several key assumptions: first, that the rape perpetrator acts freely and deliberately to harm; second, that the rape victim is passive and in no way participates in or contributes to the actions of the perpetrator; and, third, that in every rape, the harm is always traumatizing and directed exclusively from the perpetrator to the victim.<sup>4</sup>

Within this victim/perpetrator framework, the roles of rape victims and perpetrators are simultaneously relational and fixed. Each must be present for an act to be recognized as rape. If one party is really a rape victim,<sup>5</sup> then the other party must be a perpetrator. At the same time, if a party is not recognizable as a perpetrator because he or she fails to conform to the behavior and motivations expected of that role, then there is no recognizable rape. This fixed relationship between perpetrator and victim, which stems from the positivist assumption that a single truth is possible and identifiable, is hostile to the notion that multiple and contradictory truths may exist within a single interaction.

Part I of this Note begins by outlining the law's traditional approach to rape in the United States and the way that liberal and radical feminist critiques of the law emerged in response. In the past, stereotypical views of sex and gender that tended to place responsibility for sexual violence on female survivors dominated social and legal responses to rape. The law did not recognize many forms of sexual harm as rape and sometimes explicitly denied protection to particular types of rape survivors. Even when an act of rape was subject to criminal sanction, the law contained enormous barriers to effective prosecution.

Over the last four decades, feminist reformers have challenged and exposed sexist assumptions inherent in the law's traditional approach to rape. Liberal feminists argued that rape law was discriminatory in that it treated rape differently than other forms of violent crime and failed to recognize

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<sup>3</sup> Like many legal terms, "rape" has multiple meanings: it may refer either to a specific crime as defined in individual jurisdictions or to a particular kind of violence. The discourse on how the law should define rape is rich and has been the subject of many law review articles. For purposes of this Note, I use the term "rape" to refer to both the crime as legally defined and as understood more broadly as forced or nonconsensual sex between adults.

<sup>4</sup> My critique of the victim/perpetrator framework in this Note focuses exclusively on adult victims and perpetrators. While many of the same assumptions pervade cases of statutory rape and/or child sexual abuse, the nature of agency and harm is very different when one or both of the parties is a child, and thus those cases are outside the scope of this Note.

<sup>5</sup> Throughout this article I use the term "victim" to describe that role in the context of the victim/perpetrator framework. Elsewhere, I use the term "survivor." Both terms are problematic in that each frames that role according to implicit assumptions about agency and harm. Of the two, I prefer "survivor" because it situates the person from a more empowered standpoint. However, I am very aware of the problematic nature of this term as buying into the notion that rape is always necessarily worse than death.

women's right to bodily autonomy. Radical feminists pointed out how sexual violence pervaded all aspects of gender relations and argued that rape operated as a mechanism of patriarchy. Both liberal and radical critiques had a profound effect on the reform of rape law in jurisdictions throughout the United States. Today, both continue to have a powerful influence on the discourse about rape and rape law reform.

Despite their critical standpoints, both liberal and radical feminist critiques of rape suffer from a fundamental weakness. Part I shows how each of the feminist critiques assume the victim/perpetrator framework's limiting construction of agency and harm. Both approaches tend to presume that rape perpetrators are misogynistic predators who act freely to harm victims; that rape victims are passive, disempowered objects of violence; and that victims alone experience the harm of rape, which is always serious. In this way, feminist theories of rape have largely failed to acknowledge that power can operate in multiple and complex ways, that gender is performative, and that multiple subjective truths might be possible.

Part II examines how the victim/perpetrator framework operates in a paradigmatic example of acquaintance rape on a college campus.<sup>6</sup> *Commonwealth v. Berkowitz*, on which substantial feminist commentary and critique have focused, reveals how courts may reverse juries' findings of rape when the facts fail to conform to the assumptions about agency and harm that underlie the victim/perpetrator framework.<sup>7</sup> While feminists have pointed to this case as an example of the need for further legal reforms, feminist critiques of *Berkowitz* fail to challenge these underlying assumptions.

Part III then examines how the victim/perpetrator framework pervades extralegal responses to allegations of acquaintance rape on college campuses. In particular, this Part analyzes how the framework affected student interpretations and responses to recent allegations of rape by students at Amherst College. The grip of the victim/perpetrator framework prevented the College and its students from developing more nuanced approaches to allegations of acquaintance rape and the harms of nonconsensual, unwanted, or confusing sex. Instead, both College administrators and students were limited by the framework's dichotomous approach, which makes any attempt to recognize the viewpoint of the perpetrator seem like victim-blaming. Femi-

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<sup>6</sup> "Acquaintance rape" is defined as rape occurring between persons who are socially linked. See Samuel Pillsbury, *Crimes Against the Heart: Recognizing the Wrongs of Forced Sex*, 35 LOY. L.A. L. REV. 845, 858-60 (2002) (referring to acquaintance rape as "sexual assaults that occur between persons with a preexisting social relationship"). Acquaintance rape is distinguished from "stranger rape," which Pillsbury defines as rape "where the victim and assaulter had little or no prior relationship." *Id.* at 858. Though individual assaults might have characteristics of both acquaintance rape and stranger rape, stranger rapes tend to conform more easily to traditional stereotypes about rape. Thus, jurors more easily recognize sexual assaults as rapes when they occur between people without a prior social relationship.

<sup>7</sup> *Commonwealth v. Berkowitz*, 609 A.2d 1338 (Pa. Super. 1992), *aff'd in part, vacated in part*, *Commonwealth v. Berkowitz*, 641 A.2d 1161 (Pa. 1994).

nist critiques that fail to grapple with the framework can inhibit the development of more effective institutional responses to campus rapes.

Part IV proposes an alternative feminist paradigm—an intersectional model of rape. This alternative model conceives of rape not simply as a deliberate violent act or a manifestation of patriarchy but, drawing on the work of Judith Butler, describes it as a failure in the mutual process of recognizing another person's humanness—a rupture in the fabric of human recognition. Exploring the way this model might be applied in practice through restorative justice, this Note argues that an intersectional model offers one way of theorizing rape while avoiding the pitfalls of the victim/perpetrator framework. In contrast to the adversarial process of the traditional criminal justice system, restorative justice attempts to use a discursive process to arrive at a just and victim-centered resolution wherein the survivor, the perpetrator, and the community work together to acknowledge and repair their bonds.

#### I. THE VICTIM/PERPETRATOR FRAMEWORK IN FEMINIST THEORIES OF RAPE

Historically, rape has occupied a contradictory place in both American culture and law. On one hand, rape has generally been understood as an abhorrent crime. However, on the other, sexual violence in many other forms has tended to be tolerated if not outright legally condoned.<sup>8</sup> Acts that we now understand as rape, such as sex forced upon enslaved women by their owners, historically went unrecognized and unpunished because of these women's race and status.<sup>9</sup> Hence, while American society has tended to demonize the rapist, it has also exhibited a tendency to resist describing many kinds of sexual coercion and violence as rape. Examining this history, we can see the roots of the victim/perpetrator framework.

The law of rape in the United States has long tended to assume an expansive view of consent to sex that tended to define many acts of sexual violence as consensual, and thus not as rape.<sup>10</sup> The law dictated that any true

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<sup>8</sup> See generally JOANNA BOURKE, *RAPE: SEX, VIOLENCE, HISTORY* (2007) (discussing the history of rape in the United States, the United Kingdom, and Australia from the early nineteenth century to the present); *SEX WITHOUT CONSENT: RAPE AND SEXUAL COERCION IN AMERICA* (Merril D. Smith ed., 2001) (analyzing the history of rape in North America from pre-colonial to modern times).

<sup>9</sup> See SUSAN BROWNMILLER, *AGAINST OUR WILL* 153–70 (1975) (describing the legal and systematic rape of slave women by their owners as a means of psychological and reproductive control).

<sup>10</sup> See PEGGY REEVES SANDAY, *FRATERNITY GANG RAPE: SEX, BROTHERHOOD, AND PRIVILEGE ON CAMPUS* 14 (2007). The view that sex within marriage was always morally good was reflected in part by the marital rape exception that historically existed in most states, which made it legally impossible for a man to rape his own wife. Such views have had an enduring impact on statutory definitions of rape in the United States. For example, the Model Penal Code, which was intended to be forward-looking when it was drafted in the 1950s, retained the marital rape exemption, on the grounds that the criminal harm of

rape victim would resist to the utmost; hence, any exercise of agency other than total resistance was interpreted as consenting.<sup>11</sup> Such views were bolstered by dichotomous views of female sexuality and morality. While private sex within marriage, even if forced, was always morally appropriate and thus never rape, any other sex was morally corrupt and equated with prostitution.<sup>12</sup> Within this framework, which has endured into the present day, only women who were sexually pure and thus chaste were capable of being raped. Once she had “fallen,” it was assumed that a woman was always ready, and looking, for sex.<sup>13</sup> By the twentieth century, even as non-marital sex became less taboo, such views were bolstered by Freudian theories of sexuality, which constructed all women, regardless of their chastity or marital status, as wanting male sexual domination (and even rape).<sup>14</sup>

However, while many if not most rapes went unrecognized as such, the punishment for rape, at least in theory, tended to be severe. This severity has deep roots in the history of the common law. For example, in thirteenth century England, a man who raped a virgin was subject to the castration of his own body and those of all his animals followed by his execution.<sup>15</sup> Under reforms instituted by William the Conqueror, the punishment meted out for raping a virgin was reduced to “mere” castration and the loss of both eyes.<sup>16</sup> While such extreme forms of punishment were no longer in practice by the founding of early America, convicted rapists still often faced a mandatory death penalty.<sup>17</sup> In the nineteenth and twentieth centuries, many states continued to apply the death penalty in rape cases. Indeed, the U.S. Supreme

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forced sex was less serious when the parties were married. See Beverly Ross, *Does Diversity in Legal Scholarship Make a Difference?: A Look At the Law of Rape*, 100 DICK. L. REV. 795, 851 (1996).

<sup>11</sup> See Thomas A. Mitchell, *We're Only Fooling Ourselves: A Critical Analysis of the Biases Inherent in the Legal System's Treatment of Rape Victims*, 18 BUFF. J. GENDER L. & SOC. POL'Y 73, 98–100 (2010). The case of *Brown v. State* is paradigmatic of this rule. In *Brown*, the victim, a sixteen-year old virgin, was found not to have been raped because she had not been violent enough in her resistance, even though she testified that she had “tried as hard as [she] could to get away” and “screamed as hard as [she] could,” on the bases that no one heard her cries and that she was not left with any physical injuries. *Brown v. State*, 106 N.W. 536, 538 (1906). The court stated that “medical writers insist that the[ ] obstacles [of the hands, limbs and pelvic muscles] are practically insuperable in absence of more than the usual relative disproportion of age and strength between man and woman, though no such impossibility is recognized as a rule of law.” *Id.*

<sup>12</sup> SANDAY, *supra* note 10, at 13.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 14–15.

<sup>15</sup> BROWNMILLER, *supra* note 9, at 24–25.

<sup>16</sup> *Id.* at 25.

<sup>17</sup> See Barbara S. Lindemann, “*To Ravish and Carnally Know*”: *Rape in Eighteenth-Century Massachusetts*, 10 SIGNS 63, 64 (1984) (describing punishments and evidentiary requirements for the crime of rape in seventeenth- and eighteenth-century Massachusetts). Not all of the colonies and later states applied the death penalty to rape cases in early America. For example, the Pennsylvania penal code, which was generally more lenient toward crime, punished rape by whipping and hard labor for the first conviction and life imprisonment for the second. See Jack Marietta and G. S. Rowe, *Rape, Law, Courts, and Custom in Pennsylvania, 1682-1800*, in *SEX WITHOUT CONSENT*, *supra* note 8, at 82–83.

Court only ended the death penalty for rape in *Coker v. Georgia* in 1977.<sup>18</sup> However, then as today, the likelihood that an alleged rape perpetrator would be convicted and severely punished was closely linked to the races of the parties involved. Men of color who were accused and convicted of rape were far more likely to receive the harshest punishment, a reality reflected in the extra-legal context by the lynch mob.<sup>19</sup>

Due, in part, to the possibility of harsh punishment, jurists worried that innocent, “good” men might be accused and convicted of rape. For, while popular conceptions of rape have long been implicitly underpinned by the belief that all men are propelled by powerful sexual desires and prone to violence, in modern times, most people tended to see rape as something apart from normal sexuality.<sup>20</sup> Rape perpetrators were understood not as ordinary men, but as deranged creatures. By the twentieth century, such perceptions became encoded in the terminology of “sexual psychopathy”—which carried associations not only of mental and moral degeneracy, but also of poverty and non-whiteness.<sup>21</sup>

Since “real” rapists were understood to be rare and aberrant, most people tended to view rape victims with great skepticism. Such notions emerged from a long common-law tradition of distrusting those who charged rape. As Lord Hale cautioned in the seventeenth century, “[Rape] is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.”<sup>22</sup> Hence, while the penalties for rape were potentially severe, evidentiary rules and procedural requirements favored the accused. In order for a rape prosecution to succeed, the victim had to bring suit within strict time limits and show that the perpetrator had used overwhelming force, that she had resisted her attacker for the duration of the attack, and that corroborating evidence was available.<sup>23</sup> Even still, juries re-

<sup>18</sup> 433 U.S. 584, 592–93 (1977) (overturning the death penalty for rape as being disproportionate in relation to the crime in violation of the Eighth Amendment of the U.S. Constitution).

<sup>19</sup> See BOURKE, *supra* note 8, at 89–127 (discussing the legal and social construction of rape perpetrators as non-white) and 101 (noting that even though a relatively small percentage of men who were lynched were actually accused of rape, it was the most common excuse for lynching).

<sup>20</sup> *Id.* at 89–127 (describing the popular conception of poor men, men of color, and immigrants as being degenerate and prone to rape in twentieth-century America) and 280–84 (describing the emergence of the popular discourse on rape in the United States between 1930 and 1970, which typified rapists as degenerate “sexual psychopaths”). The extreme and medicalized approaches of sterilizing, castrating, or lobotomizing rapists that were adopted by many states in the twentieth century are indicative of this view of rapists as being congenitally perverse. *Id.* at 149–72.

<sup>21</sup> *Id.* at 89–127.

<sup>22</sup> SIR MATTHEW HALE, 1 THE HISTORY OF THE PLEAS OF THE CROWN 634 (W.A. Stokes & E. Ingersoll eds., 1847), *cited in* Mitchell, *supra* note 11, at 87.

<sup>23</sup> See Ross, *supra* note 10, at 812–44 (describing the law’s treatment of rape in the common law traditions of the United States, Canada, and Britain up into the 1970s, including statutory definitions of the crime and the evidentiary requirements imposed on complainants); see also David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1196–97 (1997) (providing overview of

ceived special instructions about the danger of false rape accusations.<sup>24</sup> In many jurisdictions, even well into the twentieth century, Lord Hale's cautionary instruction was read verbatim to jurors.<sup>25</sup>

These legal requirements placed an enormous burden on rape victims to demonstrate the veracity of their complaint. Implicit was the notion that women who had illicit sex might make a claim of rape in order to cover up their own indiscretions.<sup>26</sup> Such assumptions became even more pronounced in the twentieth century. Drawing on the Freudian trope of the female hysteric, one influential jurist argued that women were prone to being pathological liars when it came to sex and that psychologists should examine all rape complainants for signs of such proclivities.<sup>27</sup>

The intense distrust of those women who alleged rape reflected notions of female sexuality that placed the responsibility for controlling sexual behavior on women<sup>28</sup> and only considered women with certain characteristics to be worthy of the law's protection.<sup>29</sup> This view stemmed in part from the notion that rape was a violation not of the victim's body but of her virtue.<sup>30</sup> Thus, while the law tended to treat men who raped as degenerates and psychopaths, it tended to recognize only certain kinds of morally pure women as rape victims. If a woman was not "respectable," it was assumed that she had no virtue to be taken and thus could assert no injury for the law to remedy.<sup>31</sup>

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historical rape law in the United States); Mitchell, *supra* note 11, at 79–100 (providing an overview of the law of rape in the Anglo-American system from the twelfth century to 1970).

<sup>24</sup> Bryden & Lengnick, *supra* note 23, at 1197; *see also* Mitchell, *supra* note 11, at 86, 100–03.

<sup>25</sup> Hale's warning shaped judicial responses to rape well into the twentieth century. For example, the instruction was only removed from California's Code of Criminal Procedure in 1975. SANDAY, *supra* note 10, at 20.

<sup>26</sup> For example, Blackstone commented that if a rape victim did not have corroborating witnesses, complain promptly, and show injuries, "these and the like circumstances carry a strong but not conclusive presumption that her testimony is false or feigned." BROWNMILLER, *supra* note 9, at 30. *See also* Mitchell, *supra* note 11, at 97–98 (analyzing *Mares v. Territory*, 65 P. 165 (N.M. 1901), in which the court described the victim's testimony as demonstrating "such a degree of familiarity with the depraved parlance of the street and brothel that the conclusion is imperative that she had an experience of the world not limited to the single alleged incident").

<sup>27</sup> *See* SANDAY, *supra* note 10, at 14 (citing arguments of John Henry Wigmore).

<sup>28</sup> *See* Mitchell, *supra* note 11, at 98–100.

<sup>29</sup> For example, because black women were constructed as hyper-sexualized, they were largely treated by the law as unrapeable. *See* Angela Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 599 (1990) ("[A]s a legal matter, the experience of rape did not even exist for black women. During slavery, the rape of a black woman by any man, white or black, was simply not a crime. Even after the Civil War, rape laws were seldom used to protect black women against either white or black men, since black women were considered promiscuous by nature. . . . 'Rape,' in this sense, was something that only happened to white women; what happened to black women was simply life." (footnotes omitted)).

<sup>30</sup> *Id.* at 77 (arguing against the "persistent lingering of the idea of rape as an affront to chastity, as opposed to rape as an affront to autonomy").

<sup>31</sup> *See* LORENNE M.G. CLARK & DEBRA J. LEWIS, *RAPE: THE PRICE OF COERCIVE SEXUALITY* 91–94 (1977) (arguing that the law's response to rape has tended to turn largely on the characteristics of the victim and that victims who were seen as not "re-



Beginning in the 1970s, the feminist movement took on many of the assumptions about sex, gender, and power that the law of rape had encoded. Through consciousness-raising, scholarly work, and public activism, feminists sought to raise awareness of rape—not only by pointing out its prevalence but also by drawing attention to the vast inconsistencies in the way that acts of sexual violence were or were not labeled “rape.”<sup>32</sup> By drawing attention to these experiences as “rapes,” feminists sought to situate sexual violence within the broader contexts of sex discrimination and gendered oppression.<sup>33</sup>

Though some feminists are skeptical of the law’s potential to resist patriarchy,<sup>34</sup> a significant focus of the feminist movement’s response to rape was to work for the reform of criminal law’s treatment of the crime.<sup>35</sup> Through this work, feminists helped to redefine the law of rape throughout the United States.<sup>36</sup> Today, as a result of those efforts, “[s]tatutory changes have been achieved [in the rape law of] all 50 states and at the federal level,” including the abolition of the marital rape exception in most states, the expansion of gender-neutral rape laws and definitions of rape that in-

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spectable” were treated as though they “effectively abdicated [their] right to legal redress by transgressing established norms of ‘acceptable’ female behaviour.”)

<sup>32</sup> See, e.g., N.Y. RADICAL FEMINISTS, RAPE: THE FIRST SOURCEBOOK FOR WOMEN (Noreen Connell & Cassandra Wilson eds., 1974) (providing material from feminist conferences and consciousness-raising group discussions on the psychological and legal aspects of rape); see also VIOLENCE AGAINST WOMEN: CLASSIC PAPERS xi–xiii, 1–4 (Raquel Kennedy Bergen, Jeffrey L. Edleson, & Claire M. Renzetti eds., 2005) (describing key works in the evolution of the feminist discourse on rape and feminists’ aims with respect to redefining rape in the law and culture).

<sup>33</sup> For example, in her anthropological study of sexual violence throughout Western history, Susan Brownmiller argues that rape is a commonplace mechanism that men use to affirm their manhood and keep women in a state of fear, and that society has sanctioned rape as an implicit form of violence and conquest. BROWNMILLER, *supra* note 9, at 209 (“A world without rapists would be a world in which women moved freely without fear of men. That *some* men rape provides a sufficient threat to keep all women in a constant state of intimidation, forever conscious of the knowledge that the biological tool must be held in awe for it may turn to weapon with sudden swiftness borne of harmful intent.”).

<sup>34</sup> See Aya Gruber, A “Neo-Feminist” Assessment of Rape and Domestic Violence Law Reform, 15 J. GENDER RACE & JUST. 583, 584, 586–88 (2012) (critiquing the various approaches to rape law reform and arguing that “feminist criminal law reform ha[s] become less about critiquing the state and society’s treatment of women and more about allying with police power to find newer and better ways of putting men, who themselves often occupy subordinate statuses, in jail” and that “changing the systemic inclinations of criminal justice is not easily achieved, and rather than the criminal justice system adopting a feminist agenda, feminist reformers essentially adopted the criminal justice system’s agenda” (footnotes omitted)).

<sup>35</sup> *Id.* at 587; see generally SUSAN ESTRICH, REAL RAPE (1987) (arguing for changes to both the legal standard and cultural perceptions of rape in order to reflect the fact that most forced sex does not match up to the classic “stranger rape” paradigm).

<sup>36</sup> See Lynne Henderson, *Rape and Responsibility*, 11 L. & PHILOSOPHY 127, 128 (1992) (“It is the case that feminists have achieved a number of important reforms in the law of rape over the last two decades, including the enactment of rape shield laws that protect most victims from having to endure cross-examination about their sexual histories, statutory redefinitions of the offense, and abolition of the resistance requirement in many jurisdictions.”).

clude a broader array of acts, the elimination of some of the most onerous evidentiary requirements, the institution of rape shield laws to protect victims from having their sexual histories put on trial, and the creation of institutional social service supports for rape survivors.<sup>37</sup>

Despite these changes, feminists continue to argue that the law remains ineffective at responding to rape, particularly when the parties have some pre-existing social relationship. Such rapes, often called “acquaintance rapes,” are the most common type of rape and the least likely to result in criminal convictions.<sup>38</sup>

### A. *The Liberal and Radical Feminist Approaches to Rape Reform*

Despite their critical approach, feminists have not dismantled the roots of the victim/perpetrator framework in the law’s treatment of rape. According to the feminist narrative of rape, however, it is the alleged perpetrator who bears all responsibility and whose version of events is distrusted. For, in pushing back against a legal system that continues to disbelieve rape survivors, feminists tend to treat the survivor’s account as always true and the perpetrator’s account as inherently false. Accepting any aspect of the perpetrator’s version of events is often seen as denying the validity of the survivor’s experience of harm and participating in her re-victimization.

This view of rape appears in two dominant theoretical models: the liberal and radical feminist approaches to rape.<sup>39</sup> This Part examines each of these approaches before turning to a critique in Part I.B.

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<sup>37</sup> Mary P. Koss, *Restoring Rape Survivors: Justice, Advocacy, and a Call to Action*, 1087 ANNALS N.Y. ACAD. SCI. 206, 217 (2006) (describing widespread reforms resulting from the feminist rape reform movement); see also Deborah W. Denno, *Why the Model Penal Code’s Sexual Offense Provisions Should Be Pulled and Replaced*, 1 OHIO ST. J. CRIM. L. 207, 210–11 (2004) (same).

<sup>38</sup> Recent studies have found that up to eighty-six percent of rapes involve non-strangers. MICHELE C. BLACK ET AL., CTNS. FOR DISEASE CONTROL AND PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 22 (2011) (reporting that 13.8% of female rape victims’ perpetrators are strangers). The inadequacy of the legal response to acquaintance rape has been the subject of much critical evaluation. See, e.g., David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 317–18 (2000) (“[S]cholars agree that the justice system often has performed poorly in cases involving rapes by unarmed acquaintances.”); Koss, *supra* note 37, at 210–14 (noting that the impact of reform on the law’s effectiveness in responding to acquaintance rape has been limited).

<sup>39</sup> By articulating that there are two dominant critical approaches, I do not mean to argue that these were always distinct or that all feminist critics of rape law have ascribed to either the liberal or the radical feminist camp. To the contrary, many critics draw from aspects of both as well as from other perspectives. Indeed, both approaches have been important in shaping rape law reform.

### 1. *The Liberal Feminist Critique*

At the beginning of the reform movement, liberal feminists contended that rape was a crime of violence rather than of sex. Liberal feminists argued that the legal treatment of rape should mirror that of other violent crimes.<sup>40</sup> Observing that the law's requirement that a rape victim resist her attacker to the utmost and otherwise strenuously demonstrate her non-consent was a burden not borne by victims of similar crimes, such as robberies, liberal feminists took issue with the law's preoccupation with the way rape victims dressed and acted.<sup>41</sup> Liberal feminists argued that this emphasis amounted to blaming the victim for actions only the perpetrator could control; it was not only illogical but also discriminatory.<sup>42</sup>

Liberal feminists also challenged the way that the law of rape valued the right to bodily autonomy differently for men and for women. Drawing on both the historical roots of rape law and evidence of the way it operated in practice, liberal feminists argued that rape law denied women an independent right to sexual freedom.<sup>43</sup> For example, they argued, the requirement that a rape victim assert her non-consent existed only "because we are willing to presume that men are entitled to access to women's bodies (as op-

<sup>40</sup> See Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1182 (1986) (arguing that any verbal indication should be sufficient to establish non-consent to sex and that obtaining assent by fraud, coercion, or extortion should be prohibited). Estrich stakes out a "moderate position" within the liberal-versus-radical feminist debate—although she wants to expand the definition of rape to include all forced sex, including instances involving fraud or misrepresentation, she argues that only the liberal "rape as violence" approach offers any workable solution. See Book Note, *Real Reform?*, 101 HARV. L. REV. 1978, 1982–83 (1988) (critiquing Estrich's *Real Rape*).

<sup>41</sup> *House of Delegates Redefines Death, Urges Redefinition of Rape, and Undoes the Houston Amendments*, 61 A.B.A. J. 463, 464 (1975) (detailing the now-infamous "Rape of Mr. Smith" dialogue, wherein Connie K. Borkenhagen play-acted a defense attorney seeking to imply that the male victim of a mugging invited the crime and subjecting the victim to a line of questioning regarding his habits, appearance, and behavior that echoed the questioning of a rape victim); see also Estrich, *supra* note 40, at 1106–17, 1122 (arguing that the force and non-consent requirements in rape law require female survivors to exhibit agency in the form of resistance and affirmative non-consent in order to be recognized as victims and that these doctrines equate passivity with consent).

<sup>42</sup> See, e.g., Lucy Reed Harris, Note, *Towards a Consent Standard in the Law of Rape*, 43 U. CHI. L. REV. 613, 626 (1976) (arguing that "[d]istrust of the complainant's credibility has led to an exaggerated insistence on evidence of resistance," thereby, in effect, putting the victim on trial).

<sup>43</sup> See Morrison Torrey, *Feminist Legal Scholarship on Rape: A Maturing Look at One Form of Violence Against Women*, 2 WM. & MARY J. WOMEN & L. 35, 38 (1995) ("Because liberal feminism was the dominant strain of the women's movement in the 1970s and 1980s, the classic liberal ideology of privacy, autonomy, and individual choice shaped emerging rape reform." (footnote omitted)); CLARK & LEWIS, *supra* note 31, at 159 ("Our legal system . . . treats rape as an offence against property, and not as an offence against the person. Rape laws were not designed to protect a woman's right to physical or sexual autonomy, but to preserve male rights of ownership in valuable property, including sexual and reproductive property."); see also Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 592 (2009) (describing the liberal feminist standpoint as "perceiving the problem [of rape] as the state's non-recognition of women's right to be free from coerced sex").

posed to their houses or their wallets), at least if they know them, and to accept male force in potentially 'consensual' sexual relations."<sup>44</sup> As a result, liberal feminists contended, rape law tended to treat the wrongness of the act as depending not on the harm that resulted but, rather, on whether a male perpetrator had a claim to sex with a female victim. Hence, the marital rape exemption under traditional law, which made it legally impossible for a man to rape his wife, existed not only because the law assumed permanent consent to sex within a marriage, but because the law conferred on husbands a right to control their wives' sexuality.<sup>45</sup> In this way, liberal feminists argued that rape law was not actually concerned with consent at all but rather with the status of a woman in relation to the man who imposed sex upon her.<sup>46</sup>

## 2. *The Radical Feminist Critique*

Like liberal feminists, radical feminists argued that rape was not simply about sex. But instead of analogizing rape to other crimes of violence, radical feminists viewed rape as a key component of the sexual subordination of all women by ordinary men.<sup>47</sup> Hence, the radical feminist approach situated the crime of rape within a broader theoretical framework that identified rape as a symptom and a tool of the patriarchy, which defines all gender relations.<sup>48</sup> As Catharine MacKinnon argued, "Rape is an act of dominance over women that works systematically to maintain a gender-stratified society in which women occupy a disadvantaged status as the appropriate victims and targets of sexual aggression."<sup>49</sup>

In this way, radical feminists viewed rape as the manifestation of the disparity of power between men and women and, in many cases, a deliberate

<sup>44</sup> Estrich, *supra* note 40, at 1126 (footnote omitted). Estrich observes, "That the law puts a special burden on the rape victim to prove through her actions her nonconsent (or at least to account for why her actions did not demonstrate 'nonconsent'), while imposing no similar burden on the victim of trespass, battery, or robbery, cannot be explained by the oft-observed fact that consensual sex is part of everyday life." *Id.*

<sup>45</sup> See CLARK & LEWIS, *supra* note 31, at 160 ("Men have defined rape as a sexual offence because it is an attack on their sexual property. . . . But when the victim does not belong to somebody else, or possess qualities which make her potentially valuable, then her rape cannot be perceived as wrong.").

<sup>46</sup> *Id.*

<sup>47</sup> One of the first feminist theorists to make this argument was Susan Brownmiller. See generally BROWNMILLER, *supra* note 9.

<sup>48</sup> According to radical feminists, the power of patriarchy is all-encompassing, and the oppression of women by men is a fundamental and defining feature of what it means to be a woman. See ALISON M. JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* 11–12 (1988) (arguing that there is no single radical feminist conception of oppression or human nature but that what unifies radical feminism is "a conviction that the oppression of women [is] fundamental: that is to say, . . . causally and conceptually irreducible to the oppression of any other group"); see also JANET HALLEY, *SPLIT DECISIONS* 329 (2008) (arguing that within the dominance feminism framework women are defined according to their subordination and injury).

<sup>49</sup> Catharine A. MacKinnon, *Reflections on Sex Equality Under the Law*, 100 *YALE L.J.* 1281, 1302 (1991) [hereinafter MacKinnon, *Sex Equality*].

tool of maintaining that power. In the words of Susan Brownmiller, “Rape . . . is nothing more or less than a conscious process of intimidation by which all men keep all women in a state of fear.”<sup>50</sup> Hence, according to the radical feminist view, rape is part of a whole system of gendered sexual subordination and exists on a continuum with all other forms of violence against women, from street harassment to pornography.<sup>51</sup>

Emphasizing that rape and the threat of rape was a widespread condition of existence for all women, radical feminists challenged the notions that rape was an aberration and that rapists were abnormal men.<sup>52</sup> Rather, they argued that sexual coercion is a pervasive and accepted aspect of gender roles.<sup>53</sup> As Catharine MacKinnon has said, “[s]exual aggression by men against women is normalized. In traditional gender roles, male sexuality embodies the role of aggressor, female sexuality the role of victim, and some degree of force is romanticized as acceptable.”<sup>54</sup> In other words, men use sex as a kind of terrorism to maintain women’s subordination, and women’s experiences of this terrorism defines, in part, what it means to exist in the world as a woman.<sup>55</sup>

Likewise, radical feminists sought to problematize the notion of consent in sexual relations.<sup>56</sup> They argued that a woman in a subordinated role could never truly be in a position to refuse sex.<sup>57</sup> As Alison Jaggar argued, “The social inequality between women and men is reflected inevitably in heterosexual relations, even if the man decides not to utilize his male privileges and so makes the most conscientious efforts to participate in an egalitarian relationship with a woman.”<sup>58</sup> Sharon Deevey put the same point more

<sup>50</sup> BROWNMILLER, *supra* note 9, at 14–15 (“[R]ape became not only a male prerogative, but man’s basic weapon of force against woman, the principal agent of his will and her fear. His forcible entry into her body, despite her physical protestations and struggle, became the vehicle of his victorious conquest over her being, the ultimate test of his superior strength, the triumph of his manhood. . . . It is nothing more or less than a conscious process of intimidation by which *all men keep all women* in a state of fear.”).

<sup>51</sup> See Rosalind Dixon, *Feminist Disagreement (Comparatively) Recast*, 31 HARV. J.L. & GENDER 277, 282 (2008) (comparing different schools of feminist thought and describing radical feminism as viewing “female identity and the feminine as we know it [to be] the pure products of a system of sexual subordination in which men defined themselves as subjects, and women as objects, via pornography and other systemic practices of male-to-female rape, prostitution, battering, and harassment.”).

<sup>52</sup> See, e.g., CLARK & LEWIS, *supra* note 31, at 136 (noting that “the research has shown the rapist to be remarkably similar to the average heterosexual male”).

<sup>53</sup> *Id.*

<sup>54</sup> MacKinnon, *Sex Equality*, *supra* note 49, at 1302.

<sup>55</sup> See CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 6 (1987) (“Gender emerges as the congealed form of the sexualization of inequality between men and women.”).

<sup>56</sup> See, e.g., ANDREA DWORKIN, INTERCOURSE 129 (1987) (“Consent in this world of fear is so passive that the woman consenting could be dead and sometimes is.”).

<sup>57</sup> See, e.g., MacKinnon, *Sex Equality*, *supra* note 49, at 1303.

<sup>58</sup> JAGGAR, *supra* note 48, at 266.

bluntly: “[E]very fuck is a rape even if it feels nice because every man has power and privilege over women, whether he uses it blatantly or subtly.”<sup>59</sup>

By pointing out that there was a power dynamic implicit in all interactions between men and women, particularly in the context of sex, radical feminists argued that the absence of gross physical force within a sexual interaction did not ensure free choice or lack of coercion. Rather, male power operated to demand and achieve sex against the will of women without the use of explicit physical violence.<sup>60</sup> Further, they argued, because the threat of rape and sexual coercion was a pervasive and powerful force in the construction of feminine sexuality in American culture, many women submitted to sex not out of an expression of autonomous sexual desire but because it was the best they could do to otherwise avoid violence.<sup>61</sup>

### *B. Critiquing the Victim/Perpetrator Framework in Feminist Theories of Rape*

The victim/perpetrator framework’s assumptions about agency and harm are evident in both liberal and radical feminist approaches to rape. Both theories tend to assume that the perpetrator is empowered and has agency, that the victim is a disempowered object of violence, and that the harm is serious and is experienced only by victims and never by perpetrators. Likewise, both assume that the statuses of each victim and perpetrator depend upon that of the other.

This fixed relationality stems from the view, shared by both liberal and radical feminists, that rape is fundamentally linked to men’s and women’s

<sup>59</sup> Sharon Deevey, *Such a Nice Girl*, in *LESBIANISM AND THE WOMEN’S MOVEMENT* 21, 24 (Nancy Myron & Charlotte Bunch eds., 1975).

<sup>60</sup> See Lois Pineau, *Date Rape: A Feminist Analysis*, 8 *L. & PHILOSOPHY* 217, 238–40 (1989). Many radical feminists have emphasized the transactional nature of sex. They have argued that so long as women are a form of private property all forms of sexual persuasion/seduction/coercion lie on a continuum of male purchasing of sex. See, e.g., CLARK & LEWIS, *supra* note 31, at 129–30 (“Woman’s alienation from her own sexuality, man’s resentment at having to purchase sexual fulfillment, the unequal bargaining that trades security for sex—all of these distortions of human sexuality make it inevitable that much sexual contact between men and women will necessarily be coercive in nature. . . . Physical force is simply the method used by men who lack other, subtler means of sexual coercion.”).

<sup>61</sup> See, e.g., CLARK & LEWIS, *supra* note 31, at 125–29 (arguing that rape is a form of sexual coercion that stems from the construction of female sexuality as a form of property to be sought and controlled by men and arguing that “even the ‘best’ bargain a woman can make is fundamentally coercive, since it entails the acceptance of herself as property, and is made from a position of inequality”); Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, in *FEMINIST LEGAL THEORY* 181, 189 (Katharine T. Bartlett & Rosanne Kennedy eds., 1991) [hereinafter MacKinnon, *Feminism, Marxism*] (“Women are socialized to passive receptivity; may have or perceive no alternative to acquiescence; may prefer it to the escalated risk of injury and the humiliation of a lost gift; submit to survive.”).

relative positions within the fixed sexual hierarchy of patriarchy.<sup>62</sup> By virtue of their location within the patriarchy, rape perpetrators are assumed to be in a position of relative power, while all rape victims are in a position of relative disempowerment; because patriarchy is normatively bad, all acts stemming from it are understood to constitute a form of female injury.

In some ways, the victim/perpetrator framework offers feminists a useful analytical tool. Though totalizing theories can pose difficulties when overlain on real circumstances, the victim/perpetrator framework does speak to the experiences of at least some rape victims. While positing that all rapists are misogynistic predators and that all victims are innocent and passive may be simplistic, there is a tangible political benefit to formulating the issue of rape in such dichotomous terms. Beyond the theoretical clarity of it, the victim/perpetrator framework offers a clear picture of who deserves our sympathy and then universalizes this picture to the patriarchy that all women experience. In doing so, it presents a simple narrative for galvanizing a movement. The power of the framework is demonstrated by the fact that virtually all feminist accounts and critiques of rape in the last thirty years have tended to ascribe to it in some form.<sup>63</sup>

Nonetheless, the victim/perpetrator framework contributes to a particular way of reading rape narratives that assumes an overly simplistic account of power, fails to account for the ways sex and gender are performative, obscures the multiplicity of experiences within incidents of sexual violence, and participates in the disempowerment and traumatization of rape victims. Hence, although feminists want to increase the law's recognition of violent sexual acts as crimes and to empower rape victims, the victim/perpetrator framework limits the capacity of feminist legal reform proposals to achieve these results.

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<sup>62</sup> In the liberal feminist tradition, rape is an expression of male power over women based on physical force; in the radical feminist tradition, rape is an expression of sexuality itself, which defines gender. See MacKinnon, *Feminism, Marxism, supra* note 61, at 187 (describing both feminist views of rape).

<sup>63</sup> Aspects of the liberal and radical feminist approaches to rape have been subject to significant criticism over the years. For example, sex-positive feminists have criticized the tendency of both approaches to define sex only as a site of danger and not pleasure. See *infra* note 85. Likewise, intersectional feminists have criticized the tendency of both approaches to fail to account for the experiences of rape victims of different classes and races. See *infra* note 116. Nonetheless, despite the broad feminist discourse on rape and rape law reform, an alternative feminist approach to rape, which explicitly rejects the basic tenets of the victim/perpetrator framework, has yet to emerge. Rather, most feminist critiques of rape and rape law have tended to focus instead on overcoming barriers to the more effective criminalization and prosecution of coercive sex without questioning their underlying assumptions about agency, power and harm. See Gruber, *supra* note 34, at 605–12 (describing and critiquing the dominant approaches to rape law reform).

### 1. *Perpetrators as Masculine Predators*

From the standpoint of both liberal and radical feminist theories, rape is a form of male (hetero)sexual coercion of females.<sup>64</sup> Accordingly, the liberal and radical feminist approaches tend to characterize the rape perpetrator as not only quintessentially masculine, but as a freely acting predator motivated by misogynist lust/hate.<sup>65</sup> At first glance, this characterization is reminiscent of the historical view of the rapist as morally deranged. But while, in the past, rapists were seen as perverse individuals extrinsic to the law and social order, liberal and radical feminists argue that rape, and the law's failure to adequately address it, constitutes a systemic form of gender discrimination.<sup>66</sup>

In constructing perpetrators as masculine misogynistic predators, liberal and radical feminist approaches to rape fail to examine how the performative aspects of gender complicate perpetrators' agency and motives.<sup>67</sup> According to both feminist theories of rape, a kind of brute desire for sex, domination, or both drives perpetrators. As one critical scholar describes it, this view paints "a picture of a world of pathological and uncontrolled male sexual athletes, armed with a weapon—the penis, or was it the phallus?—which we were now told gave them not only physical power [to rape] but the power to control [the] language and meaning [of sexuality]."<sup>68</sup> Ironically, the effect of such a view is to confirm "the very stereotypes of active and aggressive masculinity and passive and victimised femininity [that] one of the main projects of feminism [is] to unsettle."<sup>69</sup>

In adopting this picture of the masculine rape perpetrator, feminists fail to consider how the constraints of normative sexual desire as played out through gender identity and performance shapes the behavior of perpetra-

<sup>64</sup> Even when male rape victims are acknowledged, the dominant feminist narrative tends to treat this as simply an example of a man taking a woman's place. *See, e.g.*, MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 55, at 56 (arguing that "to suggest that because some men are raped rape is not an act of male dominance . . . only suggests that the status of women is not biological. Men can be feminized too, and they know that they are when they are raped.").

<sup>65</sup> This characterization of male rapists as predators derives from the stranger rape archetype. Criminology literature on rape offenders similarly characterizes men who rape as aberrant and motivated by anger, desire for power, or sadism. *See, e.g.*, KATHERINE RAMSLAND & PATRICK N. MCGRAIN, *INSIDE THE MINDS OF SEXUAL PREDATORS* 48 (2010).

<sup>66</sup> *See, e.g.*, BROWNMILLER, *supra* note 9, at 209 (discussing rape as a mechanism for maintaining male dominance); ESTRICH, *supra* note 41, at 59–60 (arguing that the criminal law reflects "male views and male standards" formulated to respond to violence between men but that "[i]n rape the male standard defines a crime that, traditionally by law and still predominantly in practice, is committed only by men against women").

<sup>67</sup> Judith Butler argues that gender is performative and gender performance is constitutive: "To the extent that gender norms are *reproduced*, they are invoked and cited by bodily practices that also have the capacity to alter norms in the course of their citation." JUDITH BUTLER, *UNDOING GENDER* 52 (2004).

<sup>68</sup> Nicola Lacey, *Unspeakable Subjects, Impossible Rights: Sexuality, Integrity and Criminal Law*, 11 *CAN. J.L. & JURISPRUDENCE* 47, 48–49 (1998).

<sup>69</sup> *Id.* at 48.



tors.<sup>70</sup> These gendered norms about sexuality have such a profound impact on perceptions that some perpetrators might not know that their behavior constitutes rape. As one study noted, “[A] gender gap in sexual communications exists. . . . Because both men and women are socialized to accept coercive sexuality as the norm in sexual behavior, men often see extreme forms of this aggressive behavior as seduction, rather than rape.”<sup>71</sup> Indeed, in contrast to the predator trope, which presumes that men rape to dominate, many men who admit to rape see their actions as primarily sexual, as opposed to violent, in nature.<sup>72</sup> Similarly, at least in some cases, perpetrators’ motivations have little to do with the victim at all but are driven by external pressures such as a perceived need to shore up masculinity or gain social acceptance from others.<sup>73</sup> Perpetrators who are youthful and sexually inexperienced may be especially susceptible to relying on stereotypes about the sexual roles of men and women to interpret situations, and as a result, end up participating in acts of sexual violence.<sup>74</sup> While the role of traditional sex

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<sup>70</sup> See IRINA ANDERSON & KATHY DOHERTY, ACCOUNTING FOR RAPE: PSYCHOLOGY, FEMINISM AND DISCOURSE ANALYSIS IN THE STUDY OF SEXUAL VIOLENCE 6 (2008) (“Normative heterosexuality is imbued with a dominance-submission dynamic leaving little room for notions of women’s active desire, pleasure or consent and little or no imperative for men to check that women are actively consenting to sex and/or finding the experience pleasurable.”).

<sup>71</sup> Robin D. Wiener, *Shifting the Communication Burden: A Meaningful Consent Standard in Rape*, 6 HARV. WOMEN’S L.J. 143, 147 (1983) (footnote omitted). By the same token, women in our society tend to accept such behavior as normal sexual relations. See Gruber, *supra* note 43, at 612 (“Sexual pleasure is in many ways socially constructed, and women often idealize the image of a relentless sexual pursuer singularly attuned to her secret driving passion for sex, despite her ardent protestations.”).

<sup>72</sup> While it is true that the desire for domination motivates some rapists, see Michelle J. Anderson, *All-American Rape*, 79 ST. JOHN’S L. REV. 625, 642–43 (2005) [hereinafter Anderson, *All-American Rape*], it is not the case that that desire, conscious or not, motivates all men. Taslitz has found that “most date rapists view their actions instrumentally, that is, as ways to obtain sex rather than express hostility or to degrade another human being.” Andrew E. Taslitz, *Willfully Blinded: On Date Rape and Self-Deception*, 28 HARV. J.L. & GENDER 381, 408 (2005). See also Bryden & Lengnick, *supra* note 23, at 1332 (arguing that “terror for the sake of terror” is rare in acquaintance rape and that the motivations of most acquaintance rapists are similar to ordinary sexual desire).

<sup>73</sup> Katherine Baker argues that many men who commit “date rape” do so to shore up their masculinity rather than to harm women. See Katherine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 670–77 (1999) (“One finding emerging from the research conducted on date rapist populations indicates that men with a willingness to rape are under a disproportionate amount of pressure to have sex. . . . [S]ex is often a means of gaining the esteem of their peers. ‘Scoring’ is seen as an individual accomplishment for which one earns prestige. Many young men are eager to have sex because they want to think of themselves and to have others think of them as men worthy of esteem.”). Peggy Sanday has similarly argued this to be the case with respect to gang rapes perpetrated by groups of young men: “The boys may not even consider the possibility that she may have been too drunk to consent. They assume that by drinking she signaled her desire for sex. The woman involved is a tool, an object, the centerfold around which boys both test and demonstrate their power and heterosexual desire by performing for one another. . . . The event operates to glue the male group as a unified entity.” SANDAY, *supra* note 10, at 7.

<sup>74</sup> See Joetta L. Carr & Karen M. VanDeusen, *Risk Factors for Male Sexual Aggression on College Campuses*, 19 J. FAM. VIOLENCE 279, 280–81 (2004) (describing the influence of gender norms and stereotypes on male college students’ tendency to rape).

and gender norms in contributing to acts of rape does not excuse such behavior, ignoring the way in which gender performativity shapes perpetrator behavior results in an overly simplistic account of the interaction between the perpetrator and victim; instead of being defined by their own subjectivity and behavior, perpetrators are defined only by their function within the interaction.

In ascribing to the victim/perpetrator framework's simplistic account of what drives a rapist, liberal and radical feminists resist distinguishing between different "kinds" of rape. However, even if we accept that all male rapists operate in a context of general male sexual privilege, this privilege may play out differently with different perpetrators. The reasons one perpetrator rapes a stranger may be fundamentally distinct from the reasons a perpetrator rapes in the commission of another crime, a batterer rapes his or her intimate partner, and a person rapes an acquaintance in a quasi-romantic setting. To treat all such perpetrators the same without examining the distinctions between them obscures and discourages inquiry into the root causes of their behavior. In doing so, it makes rape prevention problematic, not only from a practical standpoint due to a lack of critical analysis of what drives perpetrator behavior but also from a political standpoint by restricting discursive space for examining perpetrators' perspectives.

Likewise, adopting an exceedingly limited narrative of what drives perpetrators may actually be counter-productive for the recognition of certain acts as rape. Whereas the victim/perpetrator framework simplistically identifies perpetrators' motivations as gendered animus and the desire to dominate, real-life perpetrators will be more complex. When an accused rapist fails to fit the prescribed role—because he or she is, in some manner, disempowered relative to the victim; because he or she is motivated by impulses that appear benign or, at least, not obviously misogynistic; or because he or she seems sympathetic rather than predatory—many people find it hard to accept his or her blameworthiness.<sup>75</sup>

The dominant radical and liberal feminist approaches to rape law reform are also problematic in another way. Assuming that all power lies in the hands of the perpetrator obscures an uncomfortable reality: some survivors are ambivalent about whether or not an act was rape. This is particularly common when ambiguous sexual interactions happen among acquaintances.<sup>76</sup> One feminist explanation for such ambivalence is that rape myths

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<sup>75</sup> See Katharine K. Baker, *Text, Context, and the Problem with Rape*, 28 Sw. U. L. REV. 297, 299–300 (1999) (noting that some people, from jurors to rape victims, refuse to acknowledge instances of rape because they feel sorry for the perpetrators).

<sup>76</sup> See Zoë D. Peterson & Charlene L. Muehlenhard, *Was it Rape? The Function of Women's Rape Myth Acceptance and Definitions of Sex in Labeling Their Own Experiences*, 51 SEX ROLES 129, 140, 142–44 (2004) (discussing how many victims do not see their own experiences of sexual assault as rape and examining the role of "rape myths" in shaping such views); Arnold S. Kahn et al., *Calling It Rape: Differences in Experiences of Women Who Do or Do Not Label Their Sexual Assault as Rape*, 27 PSYCHOL. WOMEN Q. 233, 240 (2003) (same).

tend to shape survivors' perceptions of "normal" sex.<sup>77</sup> Some might not classify what happened to them as rape due to feelings of self-blame or because they cannot reconcile the sense of moral wrong that accompanies rape with the romantic or social relationship they have with their alleged rapists.<sup>78</sup>

Ambiguity can also arise from the nature of desire and consent, which are not always yes-or-no propositions. Katherine Franke has described the complex and contradictory nature of desire as follows:

Desire is not subject to cleaning up, to being purged of its nasty, messy, perilous dimensions, full of contradictions and the complexities of simultaneous longing and denial. It is precisely the proximity to danger, the lure of prohibition, the seamy side of shame that creates the heat that draws us toward our desires, and that makes desire and pleasure so resistant to rational explanation. It is also what makes pleasure, not a contradiction of or haven from danger, but rather a close relation.<sup>79</sup>

As Franke's account of desire and sexuality suggests, a person's subjective view of a sexual act can, and often will, change over time. What seemed to be one thing in the moment can gain a different meaning after the fact and upon reflection. This is certainly true in the case of some acquaintance rapes, where victims sometimes come to see the act as rape afterwards.<sup>80</sup> To this point, Janet Halley has argued that some rape allegations may arise as a result of "panic," when people engage in sexual acts that they later come to regret.<sup>81</sup> In any case, it is certainly true that desire and consent are subjective and complex.

Many feminists have responded to this problem by arguing that it is better for the law of rape to be over-inclusive rather than under-inclusive and that the more sexually aggressive party should bear the burden of obtaining unambiguous consent.<sup>82</sup> Such an approach, however, has real practical limi-

<sup>77</sup> See Peterson & Muehlenhard, *supra* note 76, at 140.

<sup>78</sup> Pillsbury, *supra* note 6, at 870–71 ("During the incident, the woman may fear for her life; she may feel violated, but often the recognition of serious, potentially criminal wrongdoing comes much later at the prompting of others. Women may not identify the event as a criminal wrong because they blame themselves, believing that their own sexual provocation caused the man to lose control and force himself on her. Victims often resist acknowledging that a trusted friend, colleague, or romantic partner is capable of such evil, and thus resist the criminal categorization of what occurred." (footnote omitted)).

<sup>79</sup> Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181, 207 (2001).

<sup>80</sup> See Pillsbury, *supra* note 6, at 869–70 (noting examples where rape victims did not recognize an act of forced sex as rape until later, sometimes years after the fact).

<sup>81</sup> See HALLEY, *supra* note 48, at 296–303.

<sup>82</sup> See, e.g., Pineau, *supra* note 60, at 233–37 (arguing for affirmative consent standards on the basis that it is irrational for women's partners to read consent into an absence of communication). See generally Nicholas J. Little, Note, *From No Means No to Only Yes Means Yes: The Rational Results of an Affirmative Consent Standard in Rape Law*, 58 VAND. L. REV. 1321 (2005) (discussing the benefits of an affirmative consent requirement).

tations given the fine line between sex that is “unwanted” but voluntary and that which is non-consensual.<sup>83</sup> Even those who advocate a more stringent legal response to coercive sex acknowledge that women often give mixed signals during sex.<sup>84</sup> Moreover, as sex-positive critics of the feminist response to rape have noted, by insisting that all sex where consent and desire are muddled is rape, we risk criminalizing a whole swath of sex that might be a source of power and pleasure.<sup>85</sup>

Finally, by adopting the view of the perpetrator as misogynist masculine predator who acts freely and purposefully, both liberal and radical feminist approaches to rape ascribe to a problematic, dichotomous view of power. Though it may be true that many men occupy a position of power relative to many women, the operation of identities and social structures limit men as well as women. As Sandra Harding says, “There are no gender relations per se but only gender relations as constructed by and between classes, races, and cultures.”<sup>86</sup> Perpetrators, whether male or female, are subject to a variety of constraints. Hence, while some male rapists might choose to harm women out of hatred, constructing the interplay between rape, power, and agency as always defined by male dominance is overly simplistic.

While power tends to operate in systemic ways, it is also context-specific and depends on a web of external social relationships.<sup>87</sup> Maxine Zinn and Bonnie Thornton Dill describe this intersectionality as follows:

Women and men are differently embedded in locations created by these cross-cutting hierarchies. As a result, women and men

<sup>83</sup> See Michelle J. Anderson, *Negotiating Sex*, 78 S. CAL. L. REV. 1401, 1423 (2005) [hereinafter Anderson, *Negotiating Sex*] (“The law cannot do anything about those who agree to unpleasant penetration from their husbands because they imagine it is their ‘wifely duty.’ Nor can the law help a seventeen-year-old boy who agrees to sexual penetration that he does not desire because he hopes it will prove he is a man. The law cannot do anything about a young woman who agrees to dangerous, unprotected penetration in order to impress her friends. It cannot do anything for persons who, having suffered chronic sexual abuse as children, come to think of themselves as their perpetrators thought of them, and so seek to engage in degrading sexual acts.” (footnote omitted)).

<sup>84</sup> See, e.g., STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 260 (1998) (“For most women, most of the time, ‘no’ does mean no. But sometimes it means maybe or ‘try harder to talk me into it.’ Sometimes, for some women, it means ‘get physical.’”).

<sup>85</sup> See Gruber, *supra* note 43, at 611–12 (“‘Sex-positive’ theorists assert that rape reformers’ emphatic insistence that women view sex nearly exclusively as a hazard emphasizes sexual passivity, decreases sexual autonomy, and has thwarted the development of theories of female sexuality. . . . Sex-positivists are rightly concerned that an over-criminalization of sexual ‘coercion’ is difficult to distinguish from repressive chastity norms and morality policing.”).

<sup>86</sup> SANDRA HARDING, WHOSE SCIENCE? WHOSE KNOWLEDGE?: THINKING FROM WOMEN’S LIVES 179 (1991).

<sup>87</sup> See Thomas E. Wartenberg, *Situated Social Power*, in RETHINKING POWER 79, 87–89 (Thomas E. Wartenberg ed., 1992) (discussing the importance of “social context,” which he describes as “constituting the power relationship between two agents” and shaped by the actions of “peripheral agents”).

throughout the social order experience different forms of privilege and subordination, depending on their race, class, gender, and sexuality. In other words, intersecting forms of domination produce both oppression and opportunity.<sup>88</sup>

Hence, within a single interaction, power may operate in multiple, intersecting, and sometimes competing ways.

The way in which race, especially, can disrupt gendered power hierarchies in the context of rape has been the subject of significant critical scholarship. Neither the victim/perpetrator framework nor the dominant feminist paradigms accounts for black men's and women's experiences of rape throughout American history. Angela Harris argues that while black women have historically been (and, to some extent, remain) impervious to rape by virtue of their presumed sexual availability and desire,<sup>89</sup> accusations of rape have been a means of exercising white power over black male bodies: "'[R]ape' signified the terrorism of black men by white men, aided and abetted, passively (by silence) or actively (by 'crying rape'), by white women."<sup>90</sup> Historically, while white women accusing white men of rape faced a tough evidentiary burden, rape accusations by white women against black men could result in conviction without the barest evidence of sexual contact.<sup>91</sup> The echoes of this history remain very real today.<sup>92</sup> As one black male scholar has commented, the experience of many men of color in the United States today is still to feel marked as "a rapist, or a potential rapist, or a rapist in waiting" regardless of one's actions or intentions.<sup>93</sup>

As the historical example of rape accusations by white women as a means of terrorizing black men illustrates, just as some women have been able to exercise power over some men, it is not necessarily the case that all would-be rape perpetrators are in a position of absolute power over all

<sup>88</sup> Maxine Baca Zinn & Bonnie Thornton Dill, *Theorizing Difference from Multiracial Feminism*, 22 FEMINIST STUD. 321, 327 (1996) (emphasis omitted).

<sup>89</sup> See Harris, *supra* note 29, at 598–601.

<sup>90</sup> *Id.* at 599.

<sup>91</sup> See I. Bennett Capers, *The Unintentional Rapist*, 87 WASH. U. L. REV. 1345, 1358–61 (2010) (describing the historical disparity in treatment of rape cases depending on the race of the alleged perpetrator and the victim).

<sup>92</sup> See BOURKE, *supra* note 8, at 416 (discussing how in modern times male minorities are stigmatized as especially prone to rape).

<sup>93</sup> Capers, *supra* note 91, at 1390. Some have challenged the feminist proposal that all non-consensual sex should be criminal rape under the law because this effort to equalize power between male perpetrators and female victims would worsen the historic power disparity between white accusers and black defendants. See *id.* at 1381 ("[G]iven our history of not crediting black witnesses, this 'he said/she said' contest is unlikely to be a level contest at all."). Capers argues that rape law in the United States concerns itself with policing stranger rapes, which are more likely to be interclass and interracial, while overlooking marital and acquaintance rapes, which tend to occur between persons of the same social status. *Id.* at 1386–88. See also Aviva Orenstein, *Special Issues Raised by Rape Trials*, 76 FORDHAM L. REV. 1585, 1589 (2008) [hereinafter Orenstein, *Special Issues Raised by Rape Trials*] (discussing the power of racist stereotypes about black men's sexuality to shape the outcomes in rape trials).

would-be rape victims. By failing to acknowledge the ways power may operate differently at an individual level, the liberal and radical feminist approaches to rape fail to theorize and respond to the way that rape victims have the capacity to engage in strategic behavior. Though false accusations of rape may indeed be rare<sup>94</sup> and underreporting a significant problem, particularly given the harsh treatment rape victims who do report face,<sup>95</sup> there are some contexts in which false rape accusations can and do happen.<sup>96</sup>

Feminists generally respond to the issue of false rape accusations by arguing that they are virtually non-existent and a “rape myth.”<sup>97</sup> However, even if most rape accusations are based on the victim’s genuine belief that she or he was raped, those few cases where the truth appears otherwise have an outsize effect on public perception and the tendency of many people to disbelieve rape victims.<sup>98</sup> By failing to acknowledge the real possibility of strategic behavior by victims and to theorize how and why it might occur, feminism fails to engage with the way power operates. Worse, we are unable to admit when there might be more to the story than the victim’s version of events.

## 2. *Rape Victims as Passive Objects of Male Violence*

While both liberal and radical feminist approaches tend to assume that the rape perpetrator is masculine and always the sexual aggressor, they also tend to assume that the victim is feminine and relatively disempowered.<sup>99</sup>

<sup>94</sup> Bryden & Lengnick, *supra* note 23, at 1295–1315 (critiquing various studies on incidents of false rape allegations).

<sup>95</sup> Kerry M. Hodak, *Court Sanctioned Mediation in Cases of Acquaintance Rape: A Beneficial Alternative to Traditional Prosecution*, 19 OHIO ST. J. ON DISP. RESOL. 1089, 1096–99 (2004) (discussing the tendency for rape victims to underreport the crime); *see also* Orenstein, *Special Issues Raised by Rape Trials*, *supra* note 93, at 1592 (noting that rape victims may be discouraged from reporting the crime when they are demonized as liars, especially when the accused is a person of high public stature; for example, the media often pillories women who come forward as victims of rapes by famous athletes or other celebrities as self-serving, greedy, and power-hungry “sluts”).

<sup>96</sup> Bryden & Lengnick, *supra* note 23, at 1299–1302 (arguing that in at least some cases it is clear that individuals have more to gain than lose by making false rape allegations).

<sup>97</sup> *See* Aviva Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials*, 49 HASTINGS L.J. 663, 672–77 (1998) (discussing the way “rape myths” contribute to societal disbelief of rape victims).

<sup>98</sup> *See* Orenstein, *Special Issues Raised by Rape Trials*, *supra* note 93, at 1588–91 (describing the effect of cultural narratives on the tendency of many people to disbelieve rape victims).

<sup>99</sup> The extent to which liberal and radical feminists see women as being disempowered and lacking sexual agency more generally outside of the context of rape actually varies. Liberal feminists tend to emphasize women’s capacity for sexual agency and autonomy; they argue that the law should support women’s freedom to make choices about their sexual lives and that this freedom should not lead to a presumption of consent to sex but rather that women should be able to bargain in their sexual relationships. *See, e.g.,* Anderson, *Negotiating Sex*, *supra* note 83, at 1407 (arguing that “the law should define ‘rape’ as engaging in an act of sexual penetration with another person when the

Emphasizing that rape victims are passive objects of patriarchal violence, feminists of both approaches tend to argue that as long as the victim says she did not consent, only the perpetrator's behavior should matter in judging whether an act was rape.<sup>100</sup>

However, an effect of constructing the rape victim as being ultimately defined in relation to, and as a function of, the actions of the perpetrator,<sup>101</sup> is to fundamentally ignore the way that rape survivors are individual actors, capable of agency, who participate in the social context in which a rape occurs.

Just as constructing rape perpetrators as misogynistic predators obscures the way sexuality is shaped by gender norms, constructing rape victims as passive obscures the performativity of sex. Neither liberal nor radical feminist approaches to rape tend to acknowledge how rape operates and exists outside the victim/perpetrator framework's heteronormative model.<sup>102</sup> As

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actor fails to negotiate the penetration with the partner before it occurs"); Ann T. Spence, *A Contract Reading of Rape Law: Redefining Force to Include Coercion*, 37 COLUM. J.L. & SOC. PROBS. 57, 60–61 (2004) (arguing that dealing with consent in rape law according to principles of contract law would alleviate some of the problems of the force requirement). In contrast, radical feminists tend to view women's capacity for sexual agency as more tempered by the overwhelming dominance of patriarchy: since there is a vast inequality of power between the parties and sexual coercion is the norm, radical feminists challenge the notion that sex can ever be freely chosen. See, e.g., MacKinnon, *Feminism, Marxism, supra* note 61, at 189 ("The substantive reference point implicit in existing legal standards is the sexually normative level of force. Until this norm is confronted as such, no distinction between violence and sexuality will prohibit more instances of women's experienced violation than does the existing definition.").

<sup>100</sup> See, e.g., Estrich, *supra* note 40, at 1122–32 (arguing that the law's treatment of consent as a defense to rape, insofar as it looks to a woman's actions in addition to her words, serves "not to protect female autonomy and freedom of choice, but to assure men the broadest sexual access to women"). On this basis, feminists have obtained the passage of rape shield laws, which withhold information about a victim's prior behavior from evidence. See Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 54–55 (2002) (describing the development of rape shield laws).

<sup>101</sup> In this way, liberal and radical feminist approaches to rape actually mirror the criminal law. Most jurisdictions define the crime of rape as an exercise of overwhelming "compulsion" by one person over another. See SCHULHOFER, *supra* note 84, at 30–33 (summarizing reforms removing the resistance requirement and shifting from an emphasis on consent (a subjective state of mind) to "forcible compulsion" (an objective measure), but concluding that "even when reform statutes seemed to protect women from sex without their consent, force almost always reentered the picture"); see also Anderson, *All-American Rape, supra* note 72, at 628–33 (noting that most states still require force or compulsion for criminal rape and that jurisdictions that criminalize sexual contact absent such force treat it as a lesser—and sometimes very minor—offense). A majority of states require "forcible compulsion," which they define as overwhelming coercion. See, e.g., N.Y. Penal Law § 130.00 (McKinney 2010) (defining "forcible compulsion" as "to compel by either: a. use of physical force; or b. a threat, express or implied, which places a person in fear of immediate death or physical injury to himself, herself or another person, or in fear that he, she or another person will immediately be kidnapped").

<sup>102</sup> Heteronormativity describes the view of sexuality in which biological sex, gender identity, and sexual desire all align according to traditional gender roles. See Jane Ward & Beth Schneider, *The Reaches of Heteronormativity: An Introduction*, 23 GENDER & SOC'Y 433, 433–35 (2009) (describing the operation of heteronormativity as a "key organizing principle of the matrix of domination" (citation omitted) (internal quotation

a result, certain types of victims and perpetrators tend to be absent from feminist theories of rape.<sup>103</sup> Even worse, some feminists are hostile to attempts to draw attention to this absence. For example, some feminists strongly criticize proposals for gender-neutral rape laws and attempts to draw attention to male experiences of rape as being anti-feminist, mystifying the “real” story of rape as feminine domination, and undermining efforts at rape reform.<sup>104</sup>

By uncritically accepting heteronormative alignments of sex, gender, and sexuality, the liberal and radical feminist approaches to rape reinforce stereotypes that contribute to the failure of many people to recognize certain acts of sexualized violence as rape and certain victims and perpetrators as real. Indeed, many find the notion of either a female rapist or a male rape survivor hard to accept.<sup>105</sup> This contributes to the law of rape’s

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marks omitted)); Kristen Schilt & Laurel Westbrook, *Doing Gender, Doing Heteronormativity: “Gender Normals,” Transgender People, and the Social Maintenance of Heterosexuality*, 23 *GENDER & SOC’Y* 440, 441–44 (2009) (describing the theory of heteronormativity as the alignment of sex, gender, and sexuality and its operation as an enforcement mechanism).

<sup>103</sup> See Lori B. Girshick, *No Sugar, No Spice: Reflections on Research on Woman-to-Woman Sexual Violence*, 8 *VIOLENCE AGAINST WOMEN* 1500, 1501–05 (2002) (noting “that a woman might be a sexual predator is generally unthinkable in our society” and discussing the near dearth of research on sexual violence committed within lesbian/bisexual/transgender communities and the tendency within feminism to deny and dismiss the existence of such violence); Jeffrey Todahl et al., *Sexual Assault Support Services and Community Systems: Understanding Critical Issues and Needs in the LGBTQ Community*, 15 *VIOLENCE AGAINST WOMEN* 8, 952, 953 (2009) (noting that researchers on sexual violence usually assume heterosexuality and consequently very little is known about LGBTQ victims of sexual violence). The absence of theory and discourse on such victims is mirrored by the legal erasure of lesbian and transgender sexuality. See generally Sarah Lamble, *Unknowable Bodies, Unthinkable Sexualities: Lesbian and Transgender Legal Invisibility in the Toronto Women’s Bathhouse Raid*, 18 *SOC. LEGAL STUDS.* 111, 111–130 (2009) (discussing the legal invisibility of lesbian and transgender sexuality and analyzing one example of its judicial erasure in a case involving a bathhouse raid). One notable exception, however, is when persons are accused of rape in response to the fact of their sexual orientation or gender non-conformity. One such case involved Sean O’Neil, a transgender teenager in Colorado in the early 1990s, who was charged and prosecuted for the rape of several teenage girls whom he had dated after his biological sex was revealed to be female. See generally Jennifer L. Nye, *The Gender Box*, 13 *BERKELEY WOMEN’S L.J.* 226 (1998) (describing and discussing the Sean O’Neil case).

<sup>104</sup> While little critical work has focused on transgender and lesbian victims and perpetrators of rape, attempts to draw attention to the existence of male rape victims and advocate for gender-neutral rape laws have been heavily criticized in these ways. See Philip N.S. Rumney, *In Defence of Gender Neutrality Within Rape*, 6 *SEATTLE J. FOR SOC. JUST.* 481, 488–506 (2008) (discussing feminist criticisms of gender-neutral rape laws and discourse on male rape victimization).

<sup>105</sup> While a significant number of men are victims of sexual assault, most commonly at the hands of female perpetrators, scholars have shown that people fail to recognize such rapes because they do not expect women to rape men. Michelle Davies, *Male Sexual Assault Victims: A Selective Review of the Literature and Implications for Support Services*, 7 *AGGRESSION & VIOLENT BEHAV.* 203, 204–06 (2002) (discussing the effect of rape myths and gender stereotypes on the non-recognition of male rape victims). Heteronormative paradigms are similarly problematic for the recognition of intimate partner violence between gay men. See DAVID ISLAND & PATRICK LETELLIER, *MEN WHO BEAT THE MEN WHO LOVE THEM: BATTERED GAY MEN AND DOMESTIC VIOLENCE* 7–24 (1991)



tendency to marginalize male, queer, transgender, and intersex rape survivors.<sup>106</sup>

Such perceptions obscure forms of sexual victimization that may in fact be profoundly under-recognized. For example, while male-on-male rape within prisons is recognized as a serious problem,<sup>107</sup> and evidence exists that substantial numbers of men experience sexual violence in other contexts,<sup>108</sup> male rape survivors nonetheless tend not to be believed or to have their experiences of harm validated.<sup>109</sup> This is particularly true for gay men.<sup>110</sup> Indeed, whereas liberal and radical feminist accounts of rape contend that rape is a male-on-female form of oppression, there is some evidence to suggest that the opposite may be true more often than we tend to expect. For example, in one small study of college students, the researchers found that undergraduate males reported unwanted and coerced sexual activity at levels comparable to those of their female counterparts.<sup>111</sup> Though the male respon-

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(describing the problem of domestic violence among gay men as far more prevalent than commonly thought and discussing the ways in which heterosexist stereotypes and assumptions about domestic violence undermine efforts to recognize and respond to the problem).

<sup>106</sup> For example, in jurisdictions where rape is defined as the sexual penetration of a woman by a man, the rape of persons who are biologically male may not be legally possible. *See, e.g.*, Idaho Code Ann. § 18-6101 (West) (“Rape is defined as the penetration, however slight, of the oral, anal or vaginal opening with the perpetrator’s penis accomplished with a female.”). This can have peculiar consequences in the transgender community. For example, in one recent notable case in Sweden, a man was acquitted of raping a transwoman because the court found that her physiological sex (male) made it legally impossible for her to have been raped. *See Man Cleared of Rape Because the Victim was Transgender*, HUFFINGTON POST (July 6, 2012, 9:31 A.M.), [http://www.huffingtonpost.com/2012/07/05/man-cleared-of-rape-transgender\\_n\\_1652489.html](http://www.huffingtonpost.com/2012/07/05/man-cleared-of-rape-transgender_n_1652489.html) (describing case). *See also* Girshick, *supra* note 103, at 1506 (discussing the gendered language of many states’ rape laws and the way this leaves many queer and transgender persons without any legal recourse for certain acts of sexual violence).

<sup>107</sup> *See* Elizabeth J. Kramer, *When Men Are Victims: Applying Rape Shield Laws to Male Same-Sex Rape*, 73 N.Y.U. L. REV. 293, 296 (1998) (citing studies finding that as many as 290,000 men are sexually assaulted by other men in prison and jail each year); BOURKE, *supra* note 8, at 334–35 (describing the high incidence of male-on-male rape in United States prisons).

<sup>108</sup> *See* Kramer, *supra* note 107, at 293–97 (discussing the problem of male-on-male rape as being far more prevalent than typically thought).

<sup>109</sup> Davies, *supra* note 105, at 204–06; *see also* Michelle Davies & Paul Rogers, *Perceptions of Male Victims in Depicted Sexual Assaults: A Review of the Literature*, 11 AGGRESSION & VIOLENT BEHAV. 367, 369–71 (2006) (discussing studies showing the tendency of male sexual assault victims not to report the crime and the poor response they receive when they do).

<sup>110</sup> Davies & Rogers, *supra* note 109, at 371 (discussing studies showing that gay male victims of sexual assaults are perceived as getting more pleasure out of the attack and having suffered less trauma because of it); *see also* Michael Scarce, *Male-on-Male Rape*, in JUST SEX: STUDENTS REWRITE THE RULES ON SEX, VIOLENCE, ACTIVISM, AND EQUALITY 39–46 (Jodi Gold and Susan Villari eds., 2000) (discussing the way that homophobia contributes to the sexual victimization of gay men at the hands of both straight and gay men).

<sup>111</sup> Mary E. Larimer, Amy R. Lydum, Britt K. Anderson, & Aaron P. Turner, *Male and Female Recipients of Unwanted Sexual Contact in a College Student Sample: Prevalence Rates, Alcohol Use, and Depression Symptoms*, 40 SEX ROLES 295, 301–02, 305–06 (1999). Generally, it is estimated that five to ten percent of rape victims are

dents reported that the perpetrators, usually female, tended not to use brute physical force to obtain sex, the male students experienced other forms of coercion, such as being plied with drugs and alcohol or subjected to verbal threats. Such a finding seems surprising only because the victim/perpetrator framework simultaneously constructs male sexual desire as ever-present and aggressive, female sexual desire as absent or passive, and male/female sexual relations as defined by male dominance and female subordination.

Similarly, liberal and radical feminist approaches to rape tend to obscure queer and transgender rape survivors, even though such persons are victims of sexualized violence at a higher rate than the general population.<sup>112</sup> Transgender persons, especially, have a high risk of being raped.<sup>113</sup> This rendering of certain rape survivors as invisible is especially problematic because homophobic myths are linked to the incidence of such violence, the increased harm caused by it, and the failure of the legal system to respond. Transgender persons are often subject to such violence precisely because of their gender nonconformity.<sup>114</sup> Likewise, though studies on rapes perpetrated by women against other women are scant, evidence suggests that the widespread refusal—even within the feminist community—to recognize lesbian rapes as real profoundly contributes to the denial of legal recognition and community support for lesbian rape survivors.<sup>115</sup> The possibility that feminist theories of rape may contribute to the marginalization of such groups is deeply problematic and should give all feminists serious pause.

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males; however, it is also recognized that such estimates are likely far too low given the especially strong tendency of male rape victims not to report the crime. *See* Scarce, *supra* note 110, at 42.

<sup>112</sup> *See* Sari D. Gold, Benjamin D. Dickstein, Brian P. Marx, & Jennifer M. Lexington, *Psychological Outcomes Among Lesbian Sexual Assault Survivors: An Examination of the Roles of Internalized Homophobia and Experiential Avoidance*, 33 *PSYCHOL. WOMEN Q.* 54, 54–55 (2009) (noting that lesbians are victims of sexual assault at roughly the same rates that heterosexual women are); Davies, *supra* note 105, at 207, 209 (noting that studies have shown that between ten and thirty percent of gay men have been victims of unwanted sex and that transgendered persons are highly likely to be subject to discrimination and sexual assault).

<sup>113</sup> *See* Rebecca L. Stotzer, *Violence Against Transgender People: A Review of United States Data*, 14 *AGGRESSION & VIOLENT BEHAV.* 170, 177–78 (2009) (surveying data and concluding that transgender persons are at a high lifelong risk of multiple types and incidences of violence, particularly sexual violence).

<sup>114</sup> *See* Talia Mae Bettcher, *Evil Deceivers and Make-Believers: On Transphobic Violence and the Politics of Illusion*, 22 *HYPATIA* 43, 55–59 (2007) (discussing sexual violence against transpeople as a reaction against transpeople’s nonconformity). Defendants in cases involving violence against transgender persons sometimes raise as a defense “trans panic”—the panic generated by the discovery of a person’s gender nonconformity. *See* Morgan Tilleman, *(Trans)forming the Provocation Defense*, 100 *J. CRIM. L. & CRIMINOLOGY* 1659, 1668–84 (2010) (describing the “trans panic” defense and its application in a variety of cases of violence against transgender persons).

<sup>115</sup> *See* Girshick, *supra* note 103, at 1507–12 (noting that “while perpetrators generally deny they are sexual abusers . . . [f]emale perpetrators’ [rape] denial is supported by our society” and that for this reason lesbians who are raped by other women are especially prone to being silenced, disbelieved, and denied access to support).

### 3. *Constructing the Harm of Rape*

Finally, liberal and radical feminist approaches assume the harm of rape is always serious and affects the victim only, never the perpetrator.<sup>116</sup> For this reason, they argue, for the law to treat rape differently depending on the context is to treat some women as less deserving of the law's protection than others.<sup>117</sup> At the same time, to acknowledge the possibility that the perpetrator might have experienced harm within the interaction seems incongruous. Because the victim/perpetrator framework treats the harm of rape as fixed and relational to the roles of the perpetrator and victim, looking at the perpetrator in a more nuanced way seems to deny the victim's experience of harm.

The effect of framing harm in this way is that feminist approaches to rape tend to treat even the acknowledgement of a victim's capacity to harm like "victim-blaming." As Janet Halley has argued, "Attributing to [a rape victim] the agency, the will, the malice—even simply the capacity—to cause harm to others also sounds unfeminist and is (oddly) understood also to constitute a denial that *she* was injured."<sup>118</sup> By refusing to acknowledge that perpetrators may also suffer in some ways, the victim/perpetrator framework prevents an honest reckoning of the multiplicity of truths and subjective realities that may exist within a single incident of rape.

By constructing the harm of rape as always serious, liberal and radical feminist approaches to rape may actually contribute to the tendency of many people to find certain rape claims less believable. For, while many rape survivors do experience serious harm,<sup>119</sup> the framework creates a bias against

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<sup>116</sup> In many ways, feminist theory on the whole rests on this model of harm. Intersectional strands of feminist theory, particularly critical race theory, have sought to challenge this model—pointing out that oppression consists of interlocking matrices of identities and that within this structure all persons are capable of being both oppressors and oppressed. See, e.g., PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUSNESS, AND THE POLITICS OF EMPOWERMENT* 5–13, 146–48 (2000) (arguing that Western feminisms have tended to suppress Black women's ideas such that feminist theory has tended to exclude the experiences of Black women and describing sexual violence as one way that Black women experience intersecting oppressions); BELL HOOKS, *FEMINIST THEORY: FROM MARGIN TO CENTER* 14, 33 (1984) (critiquing the dominant feminist discourse as being "largely unable to speak to, with, and for diverse groups of women because they either do not understand fully the inter-relatedness of sex, race, and class oppression or refuse to take this inter-relatedness seriously" due in part to its singular and alienating focus on "male domination"); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 *STAN. L. REV.* 1241, 1266–71 (1991) (discussing the tensions between the identity politics of race and sex in responses to rape and the tendency of the feminist movement and anti-racism movements both to marginalize black women's experiences). Nonetheless, the dualistic model of male harm and female injury has remained the dominant paradigm for feminist theorizing of sexual violence.

<sup>117</sup> See ESTRICH, *supra* note 35, at 28–29 (arguing that the law's distinction between different types of rape is fundamentally discriminatory towards some women and evidence of the law's sexist distrust of women generally).

<sup>118</sup> HALLEY, *supra* note 48, at 320.

<sup>119</sup> See, e.g., Kathryn M. Davis, *Rape, Resurrection, and the Quest for Truth: The Law and Science of Rape Trauma Syndrome in Constitutional Balance with the Rights of*

victims whose injuries are not as serious or obvious.<sup>120</sup> When a victim does not conform to expectations of harm, jurors, police, and even friends might question his or her genuineness.<sup>121</sup> Susan Stefan argues that this tendency is precisely the problem with the use of rape trauma syndrome evidence as a means of bolstering the credibility of rape victims.<sup>122</sup> Where the use of such evidence has become widely accepted, the failure of a victim to behave in a traumatized manner can actually undermine her credibility.<sup>123</sup>

An over-emphasis on harm can create other kinds of unrealistic expectations regarding the violence of rape and its consequences. Corey Rayburn analogizes this problem to the “disaster pornography” effect, wherein pervasive media representations of horrific rapes lead juries to expect a particular narrative of harm to which victims must measure up:

A jury who hears about a run-of-the-mill simple rape where the accuser was intoxicated is likely to shrug at the details of the complainant’s story. The jurors have heard it all before, but with more shocking details, more horrifying tidbits, and, if through movie or television, with an accompanying audio/video record.<sup>124</sup>

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*the Accused*, 49 HASTINGS L.J. 1511, 1516–20 (1998) (describing the physical and behavioral experiences of rape victims and Rape Trauma Syndrome); see also Anderson, *All-American Rape*, *supra* note 72, at 642 (noting that aside from the intrinsic harm of sexual violation as dehumanization, victims of acquaintance rapes where there is no extrinsic violence “talk about their experiences much less, they endure greater feelings of self-blame and guilt, and the psychological damage they suffer is as severe or worse than stranger rape victims”).

<sup>120</sup> See Francis X. Shen, *How We Still Fail Rape Victims: Reflecting on Responsibility and Legal Reform*, 22 COLUM. J. GENDER & L. 1, 35–36 (2011) (finding that victims in rape litigation tended to be more successful and the rape considered more “real” when the victim suffered serious physical injuries).

<sup>121</sup> In one study, juries found most credible those victims who appeared most traumatized (by, for example, becoming emotional during testimony) so long as they also adhered to gender-appropriate behavior (for instance, by dressing modestly). See generally Regina A. Schuller, Blake M. McKimmie, Barbara M. Masser, & Marc A. Klippenstine, *Judgments of Sexual Assault: The Impact of Complainant Emotional Demeanor, Gender, and Victim Stereotypes*, 13 NEW CRIM. L. REV. 759 (2010).

<sup>122</sup> See Susan Stefan, *The Protection Racket: Rape Trauma Syndrome, Psychiatric Labeling, and Law*, 88 NW. U. L. REV. 1271, 1328 (1994) (“[When] testimony from scientific experts that every woman who is raped becomes crazy [is] absorbed and repeated in published case law[,] rape trauma syndrome becomes more than a description of how some women behave after being raped—it becomes a prescription for how all women who have been raped must behave.”).

<sup>123</sup> *Id.* at 1329 (citing *Henson v. State*, 535 N.E.2d 1189 (Ind. 1989), as an example).

<sup>124</sup> Corey Rayburn, *To Catch a Sex Thief: The Burden of Performance in Rape and Sexual Assault Trials*, 15 COLUM. J. GENDER & L. 437, 472 (2006) (arguing that “[t]he images of the especially graphic and shocking rapes in mass media create a standard that is too high for most accusers to meet in front of a jury already confronted with conflicting accounts of an alleged rape event”).

Because of such expectations, it may be harder for law enforcement, the courts, and everyone else to accept that an act of sexual violence is really rape when the violence is not particularly explicit.<sup>125</sup>

Ultimately, by reinforcing notions of victimhood as defined by feminine sexual passivity and profound injury, liberal and radical feminist approaches to rape may be harmful to rape victims. It has long been argued that the portrayal of rape victims as purely passive objects of male violence can be damaging from a political standpoint. For example, some feminists have argued that such portrayals invite backlash against rape reform and undermine the project of promoting women's empowerment.<sup>126</sup> Indeed, some point out that treating rape survivors in this way might actually harm them further; characterizing all rapes as necessarily serious and harmful to the survivor might actually generate distress for rape victims.<sup>127</sup>

By equating rape victimhood with serious harm, the victim/perpetrator framework forces rape victims to identify as traumatized, regardless of whether this label actually reflects their own experience. Though many rape survivors suffer lasting harms to their ability to make intimate connections with others, many can and do heal. Similarly, liberal and radical feminist approaches to rape, by emphasizing victimization as disempowerment and constructing rape victims as fundamentally defined by the articulation of injury and pain, may actually be denying rape survivors the possibility of being otherwise. As Janet Halley argues, "So much feminist rape discourse insists on women's objectlike status in the rape situation: man fucks woman—subject verb object. Could feminism be contributing to, rather than resisting, the alienation of women from their own agency in narratives and events of sexual violence?"<sup>128</sup>

In adopting the victim/perpetrator framework's uncritical construction of the rape victim as feminized, passive, and profoundly injured, liberal and radical feminist theories of rape contribute to the broader problem within feminist theory of how to articulate alternative narratives of sex and violence that do not box women into the role of the perpetual victim. Since a central purpose of feminist theory is to empower women, the possibility that the

<sup>125</sup> See, e.g., *Commonwealth v. Berkowitz*, 641 A.2d 1161 (Pa. 1994), as discussed *infra* Part II.

<sup>126</sup> See Vivian Berger, *Rape Law Reform at the Millennium*, 3 *BUFF. CRIM. L. REV.* 513, 522 (2000) ("[A] global portrayal, reflected in rape law, of females as weak, subordinate creatures, incapable of withstanding pressure of any sort, invites nullification and backlash and . . . cheapens rather than celebrates the rights to self-determination, sexual autonomy, and self- and societal respect of women." (footnotes omitted) (internal quotation marks omitted)).

<sup>127</sup> See JEANNIE SUK, *THE TRAUMA SOCIETY* (forthcoming 2014) (arguing that rape is not necessarily trauma-inducing but that in some cases the trauma of rape is socially constructed, in the sense that social expectations about the harm of rape shape the trauma).

<sup>128</sup> See HALLEY, *supra* note 48, at 346.

feminist narrative of rape might actually traumatize rape victims and limit our capacity for theoretical creativity is troubling.

This Part has described the ways in which the victim/perpetrator framework operates within both liberal and radical feminist approaches to theorizing rape and rape reform. The next Part of this Note examines the implications of this framework as the law of rape operates through the judicial process.

## II. REFLECTIONS OF THE VICTIM/PERPETRATOR FRAMEWORK IN *COMMONWEALTH V. BERKOWITZ*

In *Commonwealth v. Berkowitz*,<sup>129</sup> a case involving two college students in Pennsylvania in the 1990s, the court overturned a rape conviction when the facts of the case failed to ascribe to the victim/perpetrator framework. While feminists read *Berkowitz* as an example of the need for further legal reforms, such readings fail to challenge the underlying assumptions about agency and harm implicit in the appellate courts' narrow reading of the law. Hence, while feminist reforms might have led to a different outcome in *Berkowitz*, such proposals leave undisturbed other critical shortcomings that contribute to the law's inadequate response to acquaintance rape.

*Berkowitz* involved a sexual encounter between two students, aged 19 and 20, in a college dorm room.<sup>130</sup> While the trial jury found Berkowitz guilty of rape and indecent assault, the Superior Court overturned the rape conviction;<sup>131</sup> the Pennsylvania Supreme Court affirmed that reversal on the basis of insufficient evidence of forcible compulsion, even though the jury had found the intercourse to be non-consensual.<sup>132</sup> The law of forcible rape in *Berkowitz* remains the majority rule today.<sup>133</sup> Indeed, the case often appears in law textbooks to illustrate the force requirement in rape law and the difficulty of demonstrating non-consent in cases of acquaintance rape.<sup>134</sup>

The case has been the subject of substantial feminist analysis and comment.<sup>135</sup> For the most part, feminist rape reformers treat *Berkowitz* as a clas-

<sup>129</sup> 609 A.2d 1338 (Pa. Super. Ct. 1992), *aff'd in part, vacated in part*, 641 A.2d 1161 (Pa. 1994).

<sup>130</sup> 641 A.2d at 1163.

<sup>131</sup> 609 A.2d at 1339.

<sup>132</sup> 641 A.2d at 1163.

<sup>133</sup> Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729, 745 (2010).

<sup>134</sup> *Id.*; see, e.g., KATE E. BLOCH & KEVIN C. McMUNIGAL, *CRIMINAL LAW: A CONTEMPORARY APPROACH* 593 (2005) (using an excerpt of *Berkowitz* as a hypothetical); JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* 423–32 (4th ed. 2007) (including *Berkowitz* in the discussion of rape); JAY M. FEINMAN, *LAW 101*, at 299 (3d ed. 2010) (same); MATTHEW LIPPMAN, *CONTEMPORARY CRIMINAL LAW: CONCEPTS, CASES, AND CONTROVERSIES* 331–33 (2d ed. 2010) (same); CYNTHIA GRANT BOWMAN, MARY BECKER, ET. AL., *FEMINIST JURISPRUDENCE: CASES AND MATERIALS* 294–307 (4th ed. 2011) (same).

<sup>135</sup> See Kahan, *supra* note 133, at 741.

sic example of the way that the law continues to fail to recognize rape in situations where there is no obvious and bloody assault.<sup>136</sup> Feminists point to *Berkowitz* as an example of how rape myths and a rape-supportive culture prevent the criminal justice system from protecting and vindicating rape victims.<sup>137</sup> One feminist described the court's decision as "one of the worst setbacks for the sexual assault movement in the last several years."<sup>138</sup> However, such criticisms, while acknowledging the downsides of restrictive narratives of what rape is, tend at the same time to buy into other assumptions about agency and harm that feed into those same narratives and contribute to the non-recognition of non-consensual sexual acts between acquaintances as rape.

What makes *Berkowitz* interesting is not that the court might have been wrong, or even that the court arrived at the seemingly strange conclusion that un-consenting sex may not be rape, but that the case reveals the way assumptions about agency and harm shape legal interpretations of dueling narratives in rape cases. The jury found Berkowitz guilty of rape. Two appellate courts, on the same facts, found that he was not. This conflict demonstrates the inherent challenge in resolving rape cases in which the subjective experiences of the parties involved are in dispute and where a single set of facts might be read very differently.<sup>139</sup>

#### A. *Reading Berkowitz in the First Instance*

At first glance, the facts of *Berkowitz* are relatively straightforward. The victim, a female student named Linda, was looking for her friend in his dorm room when she came upon his roommate Robert Berkowitz, a fellow student at the college, who was asleep in bed.<sup>140</sup> Robert woke up and asked Linda to "hang out for a while," and she agreed because she had "time to kill" and

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<sup>136</sup> See, e.g., Anderson, *Negotiating Sex*, *supra* note 83, at 1428–29 (discussing *Berkowitz* and arguing that if the law adopted a different model of rape that treated sexual encounters as negotiations between parties the outcome might have been different); SCHULHOFER, *supra* note 84, at 60–71 (describing *Berkowitz* as an example of the overly narrow definition of "force" in many jurisdictions such that many acts are not rape, even when the absence of consent is clear).

<sup>137</sup> See, e.g., Cheryl Siskin, *Criminal Law—No. The "Resistance Not Required" Statute and "Rape Shield Law" May Not be Enough—Commonwealth v. Berkowitz*, 66 TEMP. L. REV. 531, 533 (1993) ("Both *Berkowitz* holdings reflect the historical bias against complaining witnesses.").

<sup>138</sup> Dale Russakoff, *Where Women Can't Just Say "No"*, WASH. POST, June 3, 1994, at A1 (quoting Cassandra Thomas, President, Nat'l Coal. Against Sexual Assault).

<sup>139</sup> Indeed, because the facts of this case can be interpreted in such divergent ways depending on the underlying values and assumptions of the evaluator, this case was actually used by researchers in a recent study on cultural cognition and the effect of gender norms on attribution of blame in rape cases. See Kahan, *supra* note 133, at 731–32.

<sup>140</sup> *Commonwealth v. Berkowitz*, 609 A.2d 1338, 1339–40 (Pa. Super. Ct. 1992). None of the court decisions refer to the victim by name. However, her name and identity appear in Stephen Schulhofer's discussion of the case. See SCHULHOFER, *supra* note 84, at 60–71.

wanted to give him “a fair chance.”<sup>141</sup> Robert made several motions to initiate physical intimacy, such as asking for a backrub and inviting Linda to sit on the bed with him; she declined.<sup>142</sup> He then moved to where Linda sat on the floor, straddled her, and began kissing her, to which she responded, “Look, I gotta go. I’m going to meet [my boyfriend].”<sup>143</sup> At this point, he lifted Linda’s shirt and began to fondle her, to which she said “no.”<sup>144</sup> Robert continued to kiss and fondle her, unfastened his pants, and unsuccessfully attempted to put his penis in her mouth, to which she continued to verbally protest, saying “no” in a “‘scolding’ manner.”<sup>145</sup> Next, he locked the door, pushed Linda onto the bed, removed some of her clothing, and began having intercourse with her, during which she continued to say “no, no to him softly in a moaning kind of way . . . because it was just so scary.”<sup>146</sup> After withdrawing and ejaculating on her stomach, he stated, “Wow, I guess we just got carried away,” to which she responded, “No, we didn’t get carried away, you got carried away.”<sup>147</sup> Linda quickly dressed, grabbed her things, and left to meet her boyfriend. When they met, she began crying. After he helped her clean Robert’s semen from her stomach, he called the police.<sup>148</sup>

Initially, the *Berkowitz* case appears to be a clear example of rape, as “rape” is commonly understood. It is undisputed that Linda repeatedly and unequivocally said no to sex,<sup>149</sup> that Robert heard Linda’s verbal indications of non-consent, and that he proceeded anyway.<sup>150</sup> Though the record tells us little of Linda’s subjective state of mind, we know that she involved the police and participated in the trial for several months.<sup>151</sup> The jury returned a guilty verdict.<sup>152</sup>

On appeal, however, both the Pennsylvania Superior Court and Pennsylvania Supreme Court concluded that Robert’s actions did not constitute rape. The Pennsylvania rape statute reads as follows:

A person commits a felony of the first degree when he engages in sexual intercourse with another person not one’s spouse: (1) by forcible compulsion; (2) by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution; (3)

<sup>141</sup> *Berkowitz*, 609 A.2d at 1340.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Berkowitz*, 609 A.2d at 1340.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> While the incident took place in 1988, the case continued until 1994, when the Supreme Court of Pennsylvania rendered its final decision. See *Berkowitz*, 609 A.2d 1338 at 1339; *Commonwealth v. Berkowitz*, 641 A.2d 1161, 1161 (Pa. 1994).

<sup>152</sup> *Berkowitz*, 641 A.2d at 1163.



who is unconscious; or (4) who is so mentally deranged or deficient that such person is incapable of consent.<sup>153</sup>

Reading the force requirement in the law to mean that there must have been some form of extrinsic violence or threat of violence, both appellate courts took the position that Robert could not be guilty of rape because he did not use blatant physical force or threaten Linda explicitly.<sup>154</sup>

Feminist responses to *Berkowitz* were overwhelmingly negative, with many highlighting the case as an example of rape law's obsolescence.<sup>155</sup> The liberal and radical feminist readings of *Berkowitz* are appealing in that each appears to describe certain sexist aspects of the case. According to a liberal feminist reading, *Berkowitz* came out wrong because the court read the force requirement so narrowly that it effectively required the victim's resistance—a requirement that feminists have worked to eliminate because it subjects victims to a kind of inquiry that does not exist for other violent crimes.<sup>156</sup> By focusing on Linda's behavior instead of her words, the court in *Berkowitz* repeated a failure that has long been endemic in the law—the failure to recognize and protect her right to sexual and bodily autonomy.<sup>157</sup>

In contrast, radical feminists argued that the *Berkowitz* court accepted a fundamentally patriarchal version of sexuality wherein it is a male prerogative to engage in coercive sex.<sup>158</sup> According to this view, by equating

<sup>153</sup> 18 PA. CONS. STAT. ANN. § 3121 (West 2003), *quoted in Berkowitz*, 641 A.2d at 1163.

<sup>154</sup> Noting the lack of evidence that Berkowitz had threatened the victim, the Superior Court found that the atmosphere and setting of the events were not inherently coercive. While the Superior Court reversed both the rape and indecent assault convictions, the Pennsylvania Supreme Court reinstated the conviction for indecent assault on the basis that non-consent, absent force, was sufficient for this separate, lesser crime. *See Commonwealth v. Berkowitz*, 609 A.2d 1338, 1344 (Pa. Super. Ct. 1992); *Berkowitz*, 641 A.2d at 1164–66.

<sup>155</sup> *See* James T. McHugh, *Interpreting the "Sexual Contract" in Pennsylvania: The Motivations and Legacy of Commonwealth of Pennsylvania v. Robert A. Berkowitz*, 60 ALB. L. REV. 1677, 1677 (1997) (noting criticism of *Berkowitz* and arguing that "this case offers an excellent example of the need to rethink the traditional legal and judicial understanding of rape as a crime that is determined primarily by proving the absence of 'consent' involving an incident of sexual intercourse.>").

<sup>156</sup> *See, e.g.,* Kathleen F. Cairney, *Addressing Acquaintance Rape: The New Direction of the Rape Law Reform Movement*, 69 ST. JOHN'S L. REV. 291, 300–04 (1995) (using the case to demonstrate the need for the reform of the force requirement); Crystal S. Deese, *Rape and the Requirement of Force: Is There Hope for Pennsylvania After Pennsylvania v. Berkowitz?*, 4 AM. U. J. GENDER & L. 167, 190 (1996) (arguing that the Superior Court ignored contemporary definitions of forcible compulsion and, in effect, read a resistance requirement into the law).

<sup>157</sup> *See, e.g.,* SCHULHOFER, *supra* note 84, at 60–71 (advocating for an approach to rape that better protects sexual autonomy and discussing *Berkowitz* as an example of a failure of the law to do so).

<sup>158</sup> *See* Mustafa T. Kasubhai, *Destabilizing Power in Rape: Why Consent Theory in Rape Law Is Turned on Its Head*, 11 WIS. WOMEN'S L.J. 37, 62–63 (1997) (criticizing both the court's and the Pennsylvania legislature's roles in defining what constitutes rape and arguing that "*Berkowitz* allows men, who as a group are predominantly responsible for perpetrating rape, to define the parameters within which they must behave sexually" and that "what men have called seduction for so long is in fact rape").

“force” with blatant physical violence or threats of violence, the court ignored the role of power in the interaction. By ruling that what Robert did was not rape, the court protected the sexual domination of women by men.<sup>159</sup>

In support of the conclusion that Robert’s actions constituted criminal rape, both the liberal and radical feminist readings of the case emphasize that he behaved in a threatening manner and that Linda did not actively participate in the sex.<sup>160</sup> For example, Robert locked the door, straddled Linda, and pushed her onto the bed.<sup>161</sup> Likewise, Linda refused to perform oral sex and exhibited a “blank look” on her face.<sup>162</sup> The Supreme Court’s insistence on physical violence would have required Linda to behave in an atypical way that would expose her to greater risk of injury.<sup>163</sup> Also, though the record lacks evidence as to how the rape affected Linda, the liberal and radical feminist readings emphasize the inherent violence and harm of all rape; thus, the outcome in *Berkowitz* contributes to the misconception that what many men call “seduction” is actually rape.<sup>164</sup> However, both feminist readings fail to account for the ambiguities present in both Robert’s and Linda’s own subjective experiences and ignore that some truth of what transpired might exist within each of their accounts.

#### B. Reading *Berkowitz* in Light of the Victim/Perpetrator Framework

Both feminist readings mold the facts into the narrative of the victim/perpetrator framework: that Robert acted deliberately and maliciously, that Linda was completely subject to his will, and that the harm resulting from the encounter was serious and experienced only by Linda. However, a closer examination of the case reveals a more complicated picture than either view admits. Looking at the appellate courts’ decisions in this case, we can see how the mismatch between the facts in *Berkowitz* and more general perceptions about the nature of rape perpetrators, victims, and the harm that results from rape might have contributed to their failure to see Robert’s actions as rape.

Robert does not fit the archetype of the perpetrator who acts freely and purposely to impose his desires for domination and/or sex to conform to masculine stereotypes of aggression. Despite the fact that he proceeded to have sex over the verbal objections of his partner, he did not act in a particularly forceful or overtly aggressive manner to achieve his ends. Robert testi-

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<sup>159</sup> *Id.*

<sup>160</sup> See, e.g., Deese, *supra* note 156, at 186.

<sup>161</sup> Commonwealth v. Berkowitz, 609 A.2d 1338, 1340 (Pa. Super. Ct. 1992).

<sup>162</sup> *Id.* at 1340–41.

<sup>163</sup> See Daphne Edwards, Comment, *Acquaintance Rape & the “Force” Element: When “No” is Not Enough*, 26 GOLDEN GATE U. L. REV. 241, 280–83 (1996) (describing the *Berkowitz* case and arguing that reading the resistance requirement into the force requirement “forces the victim to behave in an atypical manner and subjects her to greater physical brutality”).

<sup>164</sup> See Kasubhai, *supra* note 158, at 63.

fied that he withdrew as soon as he saw a “blank look on her face.”<sup>165</sup> He said that he asked, “[I]s anything wrong, is something the matter, is anything wrong,” and that he only ejaculated because he could no longer “control” himself.<sup>166</sup> While we can construe Robert as a sexual predator who utilized his male privilege to take what he wanted without regard for Linda’s autonomy or human dignity, we can also see him as a fumbling young man who seriously misunderstood the intentions and desires of another young person.

Citing facts that pointed to the possibility of miscommunication between Robert and Linda, both appellate courts seemed to find it difficult to characterize Robert as a willful perpetrator. Though neither court fully accepted Robert’s assertion that Linda was an enthusiastic partner, both the Superior Court and Supreme Court seemed to find probative that Robert’s behavior followed the standard script for male sexuality and seemed to believe that he might have been confused by her actions over time. Both decisions repeatedly cite evidence that Robert had interpreted both his and Linda’s behavior in terms of traditional gender roles. Several weeks before the incident, for example, Linda had attended a seminar on campus titled “Does ‘No’ Sometimes Mean ‘Yes’?” and had discussed it with several friends, including Robert. During that conversation, she had asked Robert the size of his penis, to which he had replied, “[C]ome over and find out.”<sup>167</sup> Around that time, Linda had visited Robert’s dorm room at least twice and had lain on his bed.<sup>168</sup> During the trial, he testified that he had believed Linda’s protests were “thinly veiled acts of encouragement.”<sup>169</sup> While Pennsylvania’s rape statute does not include *mens rea* as an element of the crime, both courts nonetheless seemed to be influenced by the notion that Robert might have simply been mistaken.

Given their doubts as to whether Robert actually intended to rape Linda, both appellate courts refused to characterize Robert’s behavior as violent. Instead, they repeatedly emphasized the absence of aggression and threats.<sup>170</sup> Because both courts equated the presence of physical violence or the threat of such violence with forcible compulsion, Robert’s failure to use violence or threats against Linda lead to the conclusion that her submission, even if unwilling, was not forced. Therefore, the sex act could not have been rape.

While both appellate courts’ refusal to characterize Robert as a misogynist predator shaped their conclusion that there was insufficient force, both

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<sup>165</sup> *Berkowitz*, 609 A.2d at 1341.

<sup>166</sup> *Id.*

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* The court notes the fact that, while Berkowitz stated that the victim had “[lain] down on his bed with her legs spread and again ask[ed] to see his penis” on occasions when she had visited Berkowitz’s room, the victim testified that she did not remember if she had said those things during the visits. *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Berkowitz*, 609 A.2d at 1344.

courts rulings were also implicitly shaped by their perception that Linda did not act like the paradigmatic rape victim. Both appellate courts supported their finding with statements suggesting that Linda did not behave as a rape victim should have done, not only by her failure to aggressively resist Robert's advances with physical acts but also by her acts of apparent sexual agency beforehand. Hence, while the Superior Court did not accept Robert's account that Linda was, at least initially, an active participant in the sex itself,<sup>171</sup> it emphasized other details that highlighted her exercise of agency. In its analysis of whether Robert exercised coercion, the court stated, "The victim walked freely into appellant's dorm room in the middle of the afternoon on a school day and stayed to talk of her own volition."<sup>172</sup> Similarly, the Supreme Court noted, "[T]he record clearly demonstrates that the door could be unlocked easily from the inside, that she was aware of this fact, but that she never attempted to go to the door or unlock it."<sup>173</sup> Likewise, the court points to Linda's actions leading up to the attack, noting that less than an hour before the events in question, she had consumed a martini "to loosen up a bit," and that Robert knew that she had been drinking.<sup>174</sup> Rather than finding that Linda's ability to consent to sex might have been impaired, the court implies that her consumption of alcohol indicated that she was looking for sex.<sup>175</sup> Implicitly, the Supreme Court seemed to find that because Linda had acted freely in interacting with Robert and going into his room, she should have been able to act freely in response to his sexual advances by either fighting back or leaving. Because she did neither, both appellate courts concluded she was not really raped.

From either a liberal or radical feminist standpoint, the appellate courts' reliance on sex stereotypes and refusal to characterize Robert as predatory might be seen as an example of the way rape myths interfere with legal responses to sexual violence. However, if one considers the nature of gender performance, both accounts of the incident are credible and in fact possible. Contemporaneous studies on college students' beliefs about sexuality suggest that Robert's belief that Linda was consenting would not have been entirely unreasonable. For example, in a survey of college students taken in 1991, one-third of respondents said that a woman who says "no" really

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<sup>171</sup> The court mentions but does not seem to credit Berkowitz's testimony regarding the victim's behavior, such as that "the victim warmly responded to his advances by passionately returning his kisses." *Id.* at 1341.

<sup>172</sup> *Id.* at 1344. Both courts' emphasis on the fact that the victim *chose not to resist* is interesting since the same facts indicate that she was helpless. The jury, having the advantage of seeing the parties' testimony first-hand, determined Berkowitz's actions were sufficiently coercive to convict him of rape.

<sup>173</sup> *Commonwealth v. Berkowitz*, 641 A.2d 1161, 1164 (Pa. 1994).

<sup>174</sup> *Berkowitz*, 609 A.2d at 1339; *Berkowitz*, 641 A.2d at 1163.

<sup>175</sup> *Berkowitz*, 609 A.2d at 1339. The Superior Court explicitly notes that when the victim had been to Berkowitz's dorm room previously and, allegedly, had come on to Berkowitz by lying on his bed, she had been intoxicated. *Id.* at 1341.

means “maybe” or “yes.”<sup>176</sup> At the same time, just as gender performance might explain Robert’s behavior if we take his testimony about his own motivations and perceptions as true, it can also explain how, within the same interaction, Linda might have experienced things differently.

From the feminist standpoint, Linda’s relative inaction during the rape fits the very image of the rape victim as the passive object of male violence. Drawing on the facts of the case, it is easy to see how she might still have felt “compelled” by Robert; her response to him was not inconsistent with the ways in which women are socialized to respond to men. Linda could rationally have viewed aspects of the interaction as threatening. She was alone with Robert in a closed space; he was straddling her and ignoring her verbal indications of non-consent.<sup>177</sup> If fear of sexual harm is pervasive and internalized for many women,<sup>178</sup> Robert might not have needed to say anything for Linda to have felt threatened and for that perceived threat to have shaped her response. Linda’s statements that she did not fight or scream because she felt physically dominated and “[i]t was like a dream was happening”<sup>179</sup> are consistent with the way that many women respond to sexual violence.<sup>180</sup>

The problem is that even if courts are willing to accept that rape victims are sometimes immobilized by fear and do not fight back in the way the law has traditionally required, the construction of the rape victim as being totally helpless nonetheless seems incongruous with the knowledge that that same person is in fact capable of acting freely, and even sexually aggressive, in other contexts. If Robert had walked into Linda’s room, woken her up and initiated the exchange, rather than the other way around, the appellate courts’ decisions in *Berkowitz* may have been entirely different.<sup>181</sup>

Moreover, neither the feminist nor the courts’ readings of the facts of the case acknowledge the third possibility—that Linda might have been ambiguous in her own mind as to what she wanted. It is entirely possible that she flirted with Robert and was in some way attracted to him, that she had even gone into his room wondering if he might be there and contemplating the possibility of a sexual exchange, but that at the same time she was not sure she really wanted to have sex with him. Under traditional legal

<sup>176</sup> Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN’S STUD. 387, 468 (1996).

<sup>177</sup> *Berkowitz*, 609 A.2d at 1340.

<sup>178</sup> See MARGARET T. GORDON & STEPHANIE RIGER, *THE FEMALE FEAR: THE SOCIAL COST OF RAPE 2* (1989) (“Most women experience fear of rape as a nagging, gnawing sense that something awful could happen, an angst that keeps them from doing things they want or need to do, or from doing them at the time or in the way they might otherwise do. Women’s fear of rape is a sense that one must always be on guard, vigilant and alert, a feeling that causes a woman to tighten with anxiety if someone is walking too closely behind her, especially at night.”).

<sup>179</sup> *Berkowitz*, 609 A.2d at 1340.

<sup>180</sup> See, e.g., *State v. Rusk*, 424 A.2d 720, 728 (Md. 1981).

<sup>181</sup> Indeed, in *State ex rel. M.T.S.*, this was precisely the case. See *infra*, notes 196–204 and accompanying text.

frameworks, complicated and ambiguous sex is not rape. And yet, the harm and violation Linda felt may have been entirely real.

The outcome in *Berkowitz* may have also been influenced by the nature of the sex act itself and lack of apparent serious harm. Both the feminist and the traditional legal approaches to rape tend to define it as always profoundly harmful. The dominant narrative of rape in the criminal law constructs sexual harm as physical in nature and linked to extrinsic violence.<sup>182</sup> For example, in the official comments to the Pennsylvania rape statute, the legislators stated, "Rape is restricted to 'classic' rape cases, i.e., where the woman is subdued by violence or threat of violence."<sup>183</sup> While liberal and radical feminists have long argued that forced sexual contact where there is no extrinsic violence should still be defined and recognized as rape,<sup>184</sup> they nonetheless have continued to reinforce the notion that rape is a form of violence and/or domination and that the harm of rape is always serious and profoundly damaging.<sup>185</sup>

Examining *Berkowitz* in light of the victim/perpetrator framework reveals how presumptions about the harm of rape can shape perceptions of whether an act was rape. In contrast to the dominant narrative of the harm of rape, just as Robert never explicitly threatened to harm Linda, the record in *Berkowitz* indicates that she was not physically injured.<sup>186</sup> While Linda may have been deeply traumatized by what happened,<sup>187</sup> neither appellate court mentions any evidence presented to the trial court of serious psychological harm. Indeed, from a distance, the events in *Berkowitz* appear to lack the explicit violence or sense of domination that the victim/perpetrator framework presents as typical for rape.<sup>188</sup> If the sex had been a bit more rowdy, would the court have seen it differently?

Though whether the sex is "conventional" or "deviant" is not typically an element of the crime of rape, it is relevant in the way it informs courts'

<sup>182</sup> *Id.* at 628, 636 ("Instead of criminalizing rape, [the law] has criminalized the extrinsic, violent assault: a bloody brawl with the goal of obtaining sex. . . . Without an extrinsic, violent assault, the law has often assumed there is no harm in rape.").

<sup>183</sup> 18 PA. CONS. STAT. ANN. § 3121 (West 2003).

<sup>184</sup> See discussion *supra* Part I.A.

<sup>185</sup> Though feminists tend to argue that the harm of rape is derived not from bodily injury but from the violation of bodily autonomy, they often emphasize the serious psychological and emotional harms that result even from rapes that are not "forcible" (that is, where there is no consent but where extrinsic violence is absent). See Anderson, *All-American Rape*, *supra* note 72, at 642. I would argue that this still tends to treat the harm of rape as being analogous to a physical injury and indeed, such discussions are generally described in terms of psychological and emotional harms as being equivalent to or worse than physical injuries. *Id.*

<sup>186</sup> *Berkowitz*, 609 A.2d at 1345.

<sup>187</sup> Though victims of acquaintance rapes tend to talk about their experiences less, they suffer the same, if not more severe, feelings of self-blame and guilt that affect victims of stranger rapes. See Anderson, *All-American Rape*, *supra* note 72, at 642.

<sup>188</sup> *Id.* at 1340.

reactions to evidence and shapes courts' perceptions of consent.<sup>189</sup> Because many people assume that "normal" people would not consent to "deviant" sex, the presence of such acts within a rape allegation renders the victim's claim of non-consent more credible.<sup>190</sup> *Commonwealth v. Fischer*, a case similar to *Berkowitz* involving two college students in a dorm room, illustrates this point.<sup>191</sup> In *Fischer*, the circumstantial evidence of possible consent was, in some ways, stronger than in *Berkowitz*. Though the *Fischer* victim also said "no" to the sex in question, the two had voluntarily engaged in "rough sex" earlier that same day.<sup>192</sup> But the *Fischer* court upheld a finding of rape, and the nature of the sex alleged to be nonconsensual appears to have been decisive. In *Fischer*, the sex was decidedly kinkier than in *Berkowitz*: it involved an attempt at anal sex, dirty talk, and the perpetrator ejaculating on the victim's face.<sup>193</sup> Though the victim in *Fischer* testified that she resisted the perpetrator's advances and kned him in the groin before leaving,<sup>194</sup> the parties' interactions may have looked a lot more like rape even before those actions.<sup>195</sup> The result in *Fischer* suggests that the court in *Berkowitz* might have interpreted Robert's and Linda's actions differently had the sexual acts in that case appeared more deviant.

Examining how assumptions about perpetrators, victims, and the harm of rape shape the outcome in cases like *Berkowitz*, it is evident that the dueling narratives that often exist in rape cases are not easily dealt with by the criminal law. Both liberal and radical feminists attempt to critique this inadequacy by pointing to facts ignored by prosecutors, juries, and judges to show how the law of rape tends to be under-inclusive. However, in doing so, feminists tend to fall into the same trap of relying on certain kinds of assumptions about each party's motivations and behavior and presuming that if one account is true than the other must be false. The next Part examines the effect of these assumptions on feminist proposals for reform.

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<sup>189</sup> The crime of "rape" in Pennsylvania uses the term "sexual intercourse" and does not include any reference to the deviance of the sex act. See 18 PA. CONS. STAT. ANN. § 3121 (2003).

<sup>190</sup> Perceived sexual deviance can have an impact on the presumption of consent or non-consent in a variety of ways. See generally Deborah Tuerkheimer, *Judging Sex*, 97 CORNELL L. REV. 1461 (2012) (discussing judgments about women's sexuality in the context of rape shield laws and relevance of past sexual "deviance" to courts' perceptions of increased likelihood of consent).

<sup>191</sup> *Commonwealth v. Fischer*, 721 A.2d 1111, 1112 (Pa. Super. Ct. 1998).

<sup>192</sup> *Id.*

<sup>193</sup> *Id.* at 1112–13.

<sup>194</sup> *Id.* at 1113.

<sup>195</sup> The court considered allowing *Fischer* to appeal his conviction because the judge did not instruct the jury as to a possible mistake-of-fact defense. The court found that *Fischer's* clear use of force undermined that defense. *Id.* at 1118.

### C. *Reforming Berkowitz?*

The feminist response to *Berkowitz* has been that what transpired really was rape and that the outcome in that case was thus fundamentally wrong. Given such a result, how might legal reforms lead to better outcomes? Pointing to *Berkowitz* and other similar cases, feminist reformers often argue that penetration itself should be sufficient to make rape “forcible.”<sup>196</sup> One example of the approach advocated by feminists is apparent in *State ex rel. M.T.S.*, an acquaintance rape case involving two minor teenagers.<sup>197</sup> Explicitly drawing on the history of rape law and feminist reforms thereof, the Supreme Court of New Jersey held that the force required to convict a person of “sexual assault”<sup>198</sup> need not be extrinsic to the act of sex itself and that the perpetrator bore the burden of obtaining affirmative permission.<sup>199</sup>

Though the facts in *M.T.S.* are distinguishable from those in *Berkowitz* in some respects—for example, whereas in *Berkowitz* the victim went into the perpetrator’s room, it was the perpetrator who entered the victim’s bedroom in *M.T.S.*—the cases are also highly similar. Like in *Berkowitz*, the facts in *M.T.S.* were ambiguous and the perpetrator somewhat sympathetic. Both the victim and the perpetrator were young.<sup>200</sup> The court found that there had been flirtation, consensual kissing, and heavy petting between them, and the evidence suggested that the perpetrator was not entirely unreasonable in thinking that the victim wanted to have sex with him.<sup>201</sup> Like it was claimed in *Berkowitz*, the perpetrator in *M.T.S.* stopped once he realized the victim did not want sex.<sup>202</sup>

In contrast to the appellate courts in *Berkowitz*, however, the court in *M.T.S.* defined “force” broadly, concluding that “any act of sexual penetration engaged in by the defendant without the affirmative and freely-given permission of the victim to the specific act of penetration constitutes the offense of sexual assault.”<sup>203</sup> Whereas the *Berkowitz* courts looked to the actions of both victim and perpetrator to determine the question of coercion, the court in *M.T.S.* saw sufficient evidence of coercion in that “the victim

<sup>196</sup> See, e.g., Kasubhai, *supra* note 158, at 63–64 (comparing *Berkowitz* to *State ex rel. M.T.S.*, 609 A.2d 1266 (N.J. 1992)); see also Angela Christene Artherton, “Raped, but Not by a Rapist:” *The Arkansas Rape Statute Provides No Legal Recourse to Some Victims*, 65 ARK. L. REV. 317, 318 (2012) (criticizing failure of state to prosecute student athletes accused of acquaintance rape on campus due to lack of physical force, which Arkansas rape law requires).

<sup>197</sup> *M.T.S.*, 609 A.2d at 1267.

<sup>198</sup> Under New Jersey law, there is no crime of “rape.” See *id.* at 1269 (“The New Jersey Code of Criminal Justice, *N.J.S.A. 2C:14–2c(1)*, defines ‘sexual assault’ as the commission ‘of sexual penetration’ ‘with another person’ with the use of ‘physical force or coercion.’”).

<sup>199</sup> *Id.* at 1270–79.

<sup>200</sup> *Id.* at 1267 (stating that *M.T.S.* was seventeen; his victim was fifteen).

<sup>201</sup> *Id.* at 1267–68.

<sup>202</sup> *Id.* at 1268.

<sup>203</sup> *Id.* at 1277.



had not expressed consent to the act of intercourse, either through her words or actions.”<sup>204</sup> Where the courts in *Berkowitz* assumed that the victim acted freely without obvious physical coercion, the court in *M.T.S.* held that any undesired physical contact was fundamentally coercive. Hence, under the rule of *M.T.S.*, Robert Berkowitz would have clearly been guilty of rape.

While the *M.T.S.* approach to force would have most likely led to a different outcome in *Berkowitz*, it does not challenge the assumptions inherent in the victim/perpetrator framework. For, in requiring affirmative expressions of consent, the *M.T.S.* approach still relies on a construction of the victim as a passive object of violence. While assuming non-consent (rather than consent) as the baseline in all sexual interactions may appear to better protect sexual autonomy, it renders any subtle act that falls short of enthusiastic consent non-existent. Moreover, it makes genuine expressions of sexual desire that may have occurred before or even after the fact legally irrelevant. The fundamental question in *M.T.S.* still turns on the issue of consent.<sup>205</sup> Rather, in a context of two competing versions of events where it is ambiguous whether affirmative consent was given, the rule in *M.T.S.* has the effect of privileging the victim’s account at the expense of the perpetrator’s.

Lending more weight to the side of the victim is an understandable response to the law’s history of disbelieving rape victims; indeed, the *M.T.S.* court described its rationale as such.<sup>206</sup> But while that approach might seem appropriate where the putative victim is subordinate to the alleged perpetrator, it might seem harsh where the balance of power is more ambiguous. The problem with a rape law that privileges the account of the victim at the expense of the perpetrator is that it runs against the intuitive sense in our legal culture that a person is innocent unless proven guilty and that it is worse to have one innocent person in jail than to let ten guilty persons go free.<sup>207</sup> Such inclinations are even more pronounced when the accused are persons whom we find sympathetic because of their high status in the community, because of their evident capacity for vulnerability and harm, or because we can relate to their points of view. Rather than countering such biases, demonizing rapists as misogynist predators only serves to reinforce the notion that good men never rape. For this reason, insisting that the legal standard for rape must always place more weight on survivors’ accounts of

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<sup>204</sup> *Id.* at 1279–80.

<sup>205</sup> See Michael Buchhandler-Raphael, *The Failure of Consent: Re-Conceptualizing Rape as Sexual Abuse of Power*, 18 MICH. J. GENDER L. 147, 163 (2011) (arguing that *M.T.S.* represents the “full swing of the pendulum” away from the force requirement in rape, but that it still turns on the issue of consent and for that reason does not actually shift the crucial underlying paradigm of rape).

<sup>206</sup> *M.T.S.*, 609 A.2d at 1273–74.

<sup>207</sup> Donald Dripps, *After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?*, 41 AKRON L. REV. 957, 963 (2008) (noting the criminal law’s presumption against strict liability and arguing that some jurisdictions’ treatment of rape as a crime that can be committed with a *mens rea* of ordinary negligence is an “extreme outlier” in the criminal law).

events is unlikely to ensure greater accuracy, accountability, and empowerment. Instead, prosecutors will continue to refuse to carry cases forward, and juries will refuse to convict.<sup>208</sup>

Indeed, while some feminists have lauded the holding in *M.T.S.* as forward-thinking and appropriate,<sup>209</sup> many commentators have criticized *M.T.S.* for turning rape into a strict liability crime regardless of the facts,<sup>210</sup> inviting jury nullification, and trivializing the concept of forcible rape.<sup>211</sup> Perhaps for these reasons, few jurisdictions have adopted the *M.T.S.* rules on force and affirmative consent in rape.<sup>212</sup> Although the Pennsylvania legislature did criminalize non-consensual sex absent physical force or threat of force as “sexual assault” in response to *Berkowitz*,<sup>213</sup> the crime of rape still retains the physical force requirement set out in that case.<sup>214</sup> Indeed, the *Berkowitz* rule, in which force is a separate element of the crime of rape, remains the majority rule.<sup>215</sup>

In this way, the examples of *Berkowitz* and *M.T.S.* reveal one of the fundamental problems with the victim/perpetrator framework—the presumption that the harm in rape only flows from top to bottom, from perpetrator to victim. If we believe his testimony, Robert Berkowitz realized partway through the interaction that something was amiss and grew con-

<sup>208</sup> See Bryden, *supra* note 38, at 318 (describing the many points at which the legal system fails to respond to rape: from law enforcement failing to investigate complaints, to prosecutors failing to pursue cases, to juries refusing to convict perpetrators).

<sup>209</sup> See, e.g., Peggy O’Crowley, *Date Rape Redefined: A New Jersey Supreme Court Ruling Will Change the Way Juries and Couples Look at Sexual Consent*, THE RECORD, Aug. 9, 1992, at A17 (noting that women’s groups, including the National Organization for Women, applauded the ruling in *M.T.S.*); SCHULHOFER, *supra* note 84, at 96 (praising *M.T.S.* as offering clear benefits for rape reform policy by making it clear to men that they have affirmative responsibility to obtain consent).

<sup>210</sup> See, e.g., Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981, 1004–11 (2008) (criticizing *M.T.S.* as being out of step with the fundamental requirement of *mens rea* in criminal law and noting that the case has generated “[o]utrage, shock, disbelief, and mockery”).

<sup>211</sup> See, e.g., Joshua Dressler, *Where We Have Been, and Where We Might Be Going: Some Cautionary Reflections on Rape Law Reform*, 46 CLEV. ST. L. REV. 409, 423 (1998) (criticizing *M.T.S.*).

<sup>212</sup> Bryden, *supra* note 38, at 396–97; Donald Dripps, *After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?*, 41 AKRON L. REV. 957, 967 (2008) (noting that the New Jersey Supreme Court’s rule in *M.T.S.* “still stands alone”).

<sup>213</sup> See 18 PA. CONS. STAT. ANN. § 3124.1 (West 2012) (defining “sexual assault” as when “a person commits a felony of the second degree when that person engages in sexual intercourse or deviate sexual intercourse with a complainant without the complainant’s consent”). See also McHugh, *supra* note 155, at 1686 (discussing the legislative response after *Berkowitz*).

<sup>214</sup> See 18 PA. CONS. STAT. ANN. § 3121 (2003).

<sup>215</sup> A minority of states criminalize non-consensual intercourse absent force, but, of those, most treat it as a lesser offense. See Anderson, *All-American Rape*, *supra* note 72, at 629–33 (finding that, in the absence of force, fourteen states punish nonconsensual sex as a felony and eight states as a misdemeanor; in the other states, such actions are not subject to criminal sanction).

cerned about Linda.<sup>216</sup> One can read a sense of awkwardness and shame into his narrative.<sup>217</sup> At trial, Robert sought to present evidence that Linda was pursuing the case because her boyfriend was jealous.<sup>218</sup> Though this evidence was excluded under the state's rape shield law, it nonetheless suggests that Robert felt, possibly realistically, that what occurred victimized him in some way.<sup>219</sup> In the end, the outcome in *Berkowitz* is unsatisfying—not simply because a rape might have gone unpunished but because the alternative is also troubling.

This Part has argued that the example of *Commonwealth v. Berkowitz* shows how the dichotomous assumptions of the victim/perpetrator framework can infect the law's response to rape. While many feminists have criticized this case as demonstrative of the need for reform, liberal and radical feminist approaches fall prey to the same presumptions of agency and harm; feminist proposals for reform tend to reinforce rather than challenge the victim/perpetrator framework. The next Part examines this problem in the extra-legal context of disciplinary procedures on a college campus.

### III. "IT HAPPENS HERE": NARRATIVES OF RAPE AT AMHERST COLLEGE

Recent allegations of rape at Amherst College illustrate the way that the victim/perpetrator framework shapes responses to rape on college campuses, often in the form of contributing to rape non-recognition. As the example of what happened at Amherst shows, assumptions of perpetrator agency, victim passivity, and serious harm shape students' and administrators' responses to rape allegations as well as the formal structures of school disciplinary processes, which frequently contain evidentiary requirements and adjudicatory procedures that reflect an even greater skepticism of rape victims than the regular criminal justice system does.<sup>220</sup> However, as the discourse that erupted at Amherst following the allegations demonstrates, the typical feminist response to such failures, which is also imbued with the victim/perpetrator framework, does not resolve these problems. Rather, by dramatically limiting the terms of the discussion, liberal and radical feminist approaches

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<sup>216</sup> See *Commonwealth v. Berkowitz*, 609 A.2d 1338, 1341 (Pa. Super. Ct. 1992).

<sup>217</sup> There is little in the record about Berkowitz's state of mind, but one statement in his testimony suggests that he might have thought she used him: "[T]he victim 'saw that it was over and then she made her move. She [got] right off the bed . . . she just [swung] her legs over and then she put [ ] her clothes back on.'" *Id.*

<sup>218</sup> *Id.* at 1348–52.

<sup>219</sup> *Id.* Though Berkowitz was ultimately found not guilty of rape, the Pennsylvania Supreme Court reinstated his sentence of six to twelve months for indecent assault. See *Commonwealth v. Berkowitz*, 641 A.2d 1161, 1166 (Pa. 1994).

<sup>220</sup> For example, while most jurisdictions no longer have prompt complaint requirements, corroboration requirements, and cautionary jury instructions on their books, such rules are still part of some colleges' sexual assault procedures. Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 950 (2004) [hereinafter Anderson, *Campus Sexual Assault*].

might actually prevent the development of new, more nuanced responses to rape.

While a majority of rape survivors never report the crime to the police, a substantial number do report it to a different authority figure, such as a school official.<sup>221</sup> Insofar as a majority of acquaintance rapes never reach the formal legal system, institutional responses to rape allegations provide a critical gap-filling function. Nonetheless, despite an increasing awareness of sexual violence among students and widespread attempts to formulate more effective institutional and legal responses, campus rape remains an enduring problem.<sup>222</sup> The failure of colleges and universities to adequately respond to such violence is, therefore, a cause for serious concern.

#### A. “An Account of Sexual Assault at Amherst”

The controversy at Amherst College first entered the national discourse on rape in October 2012, when the school’s newspaper, *The Amherst Student*, ran an opinion piece by Angie Epifano, a former student. Epifano detailed her rape by another student in a college dormitory and the college administration’s failure to recognize the rape and to support her. She eventually withdrew from the school as a result.<sup>223</sup>

Epifano’s experience was typical of acquaintance rapes on college campuses. She was assaulted during her freshman year by a fellow student, whom she knew. The rape occurred in a dorm room while her attacker’s roommates, oblivious, were right outside the door. Deeply ashamed, she did not tell others about what happened for months and did not report the rape to police.<sup>224</sup> Epifano describes her devastation as follows: “I had always fancied myself a strong, no-nonsense woman. . . . May 25th temporarily shattered that self-image and left me feeling like the broken victim that I had never wanted to be.”<sup>225</sup> When she returned to school the following year, she still had to interact with the perpetrator on campus:

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<sup>221</sup> See LYNN LANGTON, MARCUS BERZOFKY, CHRISTOPHER KREBS, AND HOPE SMILEY-McDONALD, U.S. DEP’T OF JUSTICE, NCJ 238536, VICTIMIZATIONS NOT REPORTED TO THE POLICE, 2006-2010 (2012), available at <http://www.bjs.gov/content/pub/pdf/vnrp0610.pdf> (finding that, of those rapes not reported to police, thirty-four percent were reported to another type of official).

<sup>222</sup> Federal mandate has provided a substantial impetus for change. Title IX requires colleges and universities that receive federal funds “to respond prompt[ly] and effective[ly] to student-on-student sexual harassment and assault to mitigate the effects of the hostile learning environment and to safeguard all students’ right to an education free from sex-based discrimination and violence.” Lavinia M. Weizel, *The Process That Is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints*, 53 B.C. L. REV. 1613, 1616 (2012) (internal quotation marks omitted).

<sup>223</sup> Angie Epifano, *An Account of Sexual Assault at Amherst College*, THE AMHERST STUDENT (Oct. 17, 2012, 12:07 AM), <http://amherststudent.amherst.edu/?q=article/2012/10/17/account-sexual-assault-amherst-college>.

<sup>224</sup> *Id.*

<sup>225</sup> *Id.*

I saw his face everywhere I went. I heard his voice mocking me in my own head. I imagined new rapists hiding behind every shower curtain and potted plant. . . . He was still out there. He could get to me again. If I told anyone he would find out and do it again.<sup>226</sup>

According to Epifano, the administrators at Amherst did not support her as a rape survivor even after she reached out for help. The reaction of the school's sexual assault counselor was anything but helpful:

[I]n my despondency, [I] began going to the campus' [sic] sexual assault counselor. In short I was told: No you can't change dorms, there are too many students right now. Pressing charges would be useless, he's about to graduate, there's not much we can do. Are you SURE it was rape? It might have just been a bad hookup. . . . You should forgive and forget.

How are you supposed to forget the worst night of your life?<sup>227</sup>

Likewise, the adversarial process that the College offered struck her as traumatizing:

They told me: We can report your rape as a statistic, you know for records, but I don't recommend that you go through a disciplinary hearing. It would be you, a faculty advisor of your choice, him, and a faculty advisor of his choice in a room where you would be trying to prove that he raped you. You have no physical evidence, it wouldn't get you very far to do this.

Hours locked in a room with him and being called a liar about being raped? No thank you, I could barely handle seeing him from the opposite end of campus.<sup>228</sup>

After telling a counselor that she felt suicidal, Epifano was sent to a hospital psychiatric ward.<sup>229</sup>

Following her release, Epifano came to feel doubly victimized by the college administration, which prevented her from studying abroad, limited the classes she could take, refused to let her write a senior thesis, and insisted that she meet with a counselor twice a week. Epifano experienced the college's treatment of her as profoundly disempowering: "[I]n the Administration's eyes I was the most base individual. . . . I was sullied, blameworthy, and possibly insane."<sup>230</sup> When she tried to challenge the administration, Epifano was told that she should be happy to attend such a good school.<sup>231</sup>

<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> Epifano, *supra* note 223.

<sup>230</sup> *Id.*

<sup>231</sup> *Id.*

In the end, Epifano decided that the only way to preserve her sanity was to withdraw from Amherst and speak out about her rape.<sup>232</sup> Epifano alleges that her treatment was not unusual. She claims that rapes were relatively common at Amherst, that students who committed sexual assaults experienced “less punishment than students caught stealing,” and that survivors were often forced to take time off while their attackers remained on campus.<sup>233</sup> Even after Epifano reported him to the administration, the student who raped her graduated from Amherst with honors.<sup>234</sup>

Almost as soon as Epifano posted her editorial, her allegations became the subject of vigorous online commentary and a fierce debate on campus. Other Amherst students began stepping forward with their own stories of sexual violence and the College’s failure to provide support. The story became the subject of national attention when, several days after Epifano’s editorial, the *New York Times* published an article on her.<sup>235</sup>

Actually, Epifano’s story was not the first to draw attention to the problem of rape on the Amherst campus. Earlier that year, a group of students had created an online magazine, “It Happens Here,” detailing accounts of such violence at the school. The magazine featured student rape stories and a photo essay of victims holding signs with the insensitive statements of students and college administrators.<sup>236</sup> Many of these statements reflected a tendency to deny that what had happened was rape. One student reported that an administrator said, “Are you sure it was rape? He seems to think it was a little more complicated.”<sup>237</sup> Another alleged that an Amherst dean told her, “You never took your case to trial, so you don’t actually count as a rape survivor.”<sup>238</sup> Consistent with Epifano’s account, statements attributed to administrators suggested that they were more preoccupied with protecting the perpetrators than with addressing the harm experienced by victims. One dean reportedly told a student, “Why don’t you take a year off, get a job at Starbucks, and come back after he’s graduated?”<sup>239</sup>

Like the counselor who wondered if Epifano’s rape was a “bad hookup,” students’ reactions reflected the belief that real rape victims are

<sup>232</sup> *Id.*

<sup>233</sup> *Id.* In response to Epifano’s allegations, Amherst has undergone a substantial review of its processes for responding to student sexual misconduct. It has publically stated that it is conducting a total investigation of Epifano’s claims with respect to the other student involved and the school’s poor response. See SEXUAL RESPECT AND TITLE IX, [https://www.amherst.edu/aboutamherst/sexual\\_respect](https://www.amherst.edu/aboutamherst/sexual_respect) (last visited Mar. 11, 2013); see also Richard Pérez-Peña, *Sexual Assaults Roil Amherst, and College President Welcomes the Controversy*, N.Y. TIMES, Nov. 12, 2012, at A19 (describing the controversy and the college’s response).

<sup>234</sup> Epifano, *supra* note 223.

<sup>235</sup> Richard Pérez-Peña, *Student’s Account Has Rape in Spotlight*, N.Y. TIMES, Oct. 27, 2012, at A15.

<sup>236</sup> *Surviving, at Amherst College*, IT HAPPENS HERE (Oct. 23, 2012), <http://ithappenshereamherst.wordpress.com/2012/10/23/survivingatamherstcollege/>.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

passive objects of violence. Any suggestion that the victim exercised sexual agency seemed incompatible with identifying what happened as rape. One student on the disciplinary committee reportedly told a victim, “If you didn’t want to have sex with him, why were you sitting on his bed two weeks before?”<sup>240</sup> Minutes after the attack and in the presence of other students, one assailant’s teammate asked the survivor, “Hey, why are you such a slut?”<sup>241</sup> Likewise, one victim’s freshman roommate told her, “C’mon, you go out every weekend. Stop telling people he raped you or my teammates won’t want to pregame in our room anymore.”<sup>242</sup>

Stories of sexual violence on the Amherst campus continued to surface for months after Epifano’s article. One story was of Trey Malone, a student at Amherst who committed suicide in June 2012 after withdrawing from the school following the College’s inadequate response to his sexual assault by another student.<sup>243</sup> In Malone’s case, Amherst determined that the other student was responsible for sexual misconduct, but Malone still felt that the process did not confer resolution.<sup>244</sup> As he stated in his note, “What began as an earnest effort to help on the part of Amherst, became an emotionless hand washing. In those places I should’ve received help, I saw none.”<sup>245</sup> Malone reported that he felt marginalized by school administrators, who, in response to his allegations, asked if he had “handled his drinking problem.”<sup>246</sup>

According to liberal and radical feminist perspectives, what happened at Amherst exemplifies institutions’ tendency to fail rape victims because of inadequate legal mechanisms,<sup>247</sup> schools’ general tendency to “bury their heads in the sand” with regard to campus sexual violence,<sup>248</sup> or the patriarchal nature of colleges and universities.<sup>249</sup> Implicit within these perspectives

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Surviving, at Amherst College, supra note 236.*

<sup>243</sup> See William McGuinness, *Amherst College Student’s Suicide Note Points Blame at School Administration for Mishandling Sexual Assault*, HUFFINGTON POST (last updated Nov. 14, 2012, 5:36 PM), [http://www.huffingtonpost.com/2012/11/08/amherst-college-student-suicide-note\\_n\\_2095386.html](http://www.huffingtonpost.com/2012/11/08/amherst-college-student-suicide-note_n_2095386.html) (recounting Malone’s story).

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> See, e.g., Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 210–24, 235–44 (2012) (discussing deficiencies in colleges’ and universities’ systems for responding to sexual violence and the way that inadequate enforcement of federal laws aimed at improving responses exacerbates the problem).

<sup>248</sup> See, e.g., *id.* at 205; Katie J.M. Baker, *Amherst Sweeps Sexual Assault Allegations Under the Rug*, JEZEBEL (Oct. 18, 2012, 11:40 AM), <http://jezebel.com/5952784/amherst-sweeps-sexual-assault-allegations-under-the-rug> (reporting Epifano’s story and describing the ways in which it indicated the campus’s culture of “stay[ing] silent, . . . deny[ing], [and] not com[ing] forth with dissent” to sexual violence).

<sup>249</sup> See, e.g., Virginia Choi, *Amherst Severely Mishandles Rape Charge. Amherst’s Female Students Are Not Surprised.*, SLATE (Oct. 25, 2012, 12:13 PM), [http://www.slate.com/blogs/xx\\_factor/2012/10/25/after\\_angie\\_epifano\\_amherst\\_rape\\_victims\\_speak\\_out\\_no\\_wonder\\_college\\_students.html](http://www.slate.com/blogs/xx_factor/2012/10/25/after_angie_epifano_amherst_rape_victims_speak_out_no_wonder_college_students.html) (“It is not difficult to see how an institution that ac-

are the assumptions that the perpetrators are utterly blameworthy, the victims are entirely innocent, and the harm experienced was very serious.<sup>250</sup> While these assertions might be true, those accounts fail to examine how assumptions about agency and harm shape the responses of colleges and how such assumptions can contribute to the inappropriateness of their responses.

*B. Reading Amherst in Light of the Victim/Perpetrator Framework*

The victim/perpetrator framework shaped perceptions of rape at Amherst in a variety of ways. Students and administrators at Amherst tended to construct rape perpetrators as masculine predators who acted with total agency; as a result, they found it difficult to accept that what transpired between students on that campus was actually rape.

For example, while we do not know much about either Epifano's assailant or the other perpetrators at Amherst, others at the school apparently found it difficult to equate those men with predators. Within the small community of a college campus, where many of those who are accused of rape are "good guys" who graduate with honors or succeed in athletics, it is hard to identify such persons as rapists. In a system where the only options are to demonize the perpetrator or to let him off entirely, many people will refuse to recognize the wrongness of the act in order to justify their sympathy for the perpetrator. In a rape trial involving university students where the jury refused to convict, one juror noted, "[The jury's] main concern . . . [was not] want[ing] to ruin these boys' lives."<sup>251</sup>

The link between rape on college campuses and the use of alcohol and drugs further problematizes the notion of perpetrators as acting with total agency. Studies have shown a strong correlation between the incidence of sexual violence on college campuses and the use of alcohol and drugs. Indeed, several studies of college students have found that a majority of acquaintance rape perpetrators are intoxicated at the time of the rape, with heavy alcohol use especially correlated with the incidence of sexual violence.<sup>252</sup>

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cepts misogyny as just another part of campus life might come to dismiss its own students' rape charges.").

<sup>250</sup> See Wendy Kaminer, *What to Make of the Rape Accusations at Amherst College?*, THE ATLANTIC (Nov. 21, 2012, 5:22 PM), <http://www.theatlantic.com/national/archive/2012/11/what-to-make-of-the-rape-accusations-at-amherst-college/265522/> (noting the tenor of coverage of the Amherst scandal and the assumptions inherent in the response).

<sup>251</sup> Joseph P. Fried, *St. John's Juror Tells of Doubts in Assault Case*, N.Y. TIMES, Sept. 14, 1991, at 24.

<sup>252</sup> See Antonia Abbey, *Alcohol-Related Sexual Assault: A Common Problem Among College Students*, J. STUD. ALCOHOL (Supp. 14) 118, 118–19 (2002) (summarizing studies and findings that at least half of college sexual assaults are associated with alcohol use, with seventy-four percent of college acquaintance rape perpetrators having consumed alcohol beforehand).



Because the victim/perpetrator framework links perpetrator culpability to agency, perpetrators who are impaired by the drugs or alcohol appear less blameworthy to some people. As one Amherst student commented after a friend's rape, "Was he drunk? Well, that's not as bad."<sup>253</sup> Though alcohol use does not lessen a perpetrator's criminal liability for rape,<sup>254</sup> such perceptions can make perpetrators appear less culpable, victims appear less sympathetic, and the attendant harm they suffer appear less serious.<sup>255</sup>

The fact that most rape victims on college campuses are also intoxicated amplifies this effect.<sup>256</sup> Though many states, including Massachusetts, treat intoxication as impairing one's capacity to give consent,<sup>257</sup> use of alcohol or drugs makes rape survivors appear unsympathetic in a quasi-legal context like a student disciplinary process. Many persons will interpret substance use as a sign of the survivor's poor decision-making, sexual agency, and shared culpability.<sup>258</sup> As a result of such perceptions, some will find rape survivors who use drugs or alcohol to be less credible and their claims less serious.<sup>259</sup> Trey Malone, who was apparently drunk at the time of his assault, felt that some at the school were more concerned with his "drinking problem" than with the harm he had suffered.<sup>260</sup>

While the victim/perpetrator framework contributes to a tendency for some perpetrators to appear less blameworthy, it also contributes to the disbelief of some rape survivors' claims of non-consent. Rape survivors who

<sup>253</sup> *Surviving, at Amherst College, supra* note 236.

<sup>254</sup> Under Massachusetts law, there is no requirement of specific intent for the crime of rape. As a result, intoxication is not a defense. *See Commonwealth v. Troy*, 540 N.E.2d 162, 166 (Mass. 1989).

<sup>255</sup> *See Abbey, supra* note 252, at 121 (discussing common stereotypes about women who consume alcohol, which paint them as sexually promiscuous and thus appropriate targets for sexual aggression).

<sup>256</sup> Meichun Mohler-Kuo, George W. Dowdall, Mary P. Koss, and Henry Wechsler, *Correlates of Rape While Intoxicated in a National Sample of College Women*, 65 J. STUD. ALCOHOL 37, 40 (2004) (finding that seventy-two percent of female rape victims at colleges were intoxicated at the time of their assaults).

<sup>257</sup> Under Massachusetts law, a person who is unable to give or refuse consent due to the consumption of drugs or alcohol is considered non-consenting for purposes of establishing the elements of the offense of rape. *See Commonwealth v. Blache*, 880 N.E.2d 736, 743 (Mass. 2008) (stating rule).

<sup>258</sup> In surveys of their attitudes toward rape, students consistently rate female victims of acquaintance rape as more culpable for the attack when they have been drinking. *See Carr & VanDeusen, supra* note 74, at 281.

<sup>259</sup> *See* Karen M. Kramer, *Rule By Myth: The Social and Legal Dynamics Governing Alcohol-Related Acquaintance Rapes*, 47 STAN. L. REV. 115, 119–124 (1994) (describing the effect of alcohol consumption on perceptions of culpability in rape and the double standard applied to men and women, where male perpetrators who drink are excused for their behavior, but female victims who consume alcohol are seen as sharing the blame for the rape).

<sup>260</sup> In his suicide note, Malone wrote, "[N]o, someone who is drunk cannot give consent, fuckers." He also said that the first question posed to him by the college president in response to his allegation was, "Have you handled your drinking problem?" *Lead a Good Life, Everyone: Trey Malone's Suicide Note*, THE GOOD MEN PROJECT (Nov. 5, 2012), <http://goodmenproject.com/ethics-values/lead-a-good-life-everyone-trey-malones-suicide-note/#ICFM7hoUxep8iath.99>.

are sexually active appear either unlikely to have been raped or, worse, partially responsible for the violence against them. This tendency is particularly problematic in a student culture of “hookups,” where students frequently engage in casual sex.<sup>261</sup> Regardless of the behavior of the individual student, the perception that all students are sexually active, if not sexually assertive, contradicts the image of the passive victim of sexual aggression.

Thus, while rape law in many jurisdictions increasingly reflects a more nuanced view of consent,<sup>262</sup> the practical effect of the victim/perpetrator framework at Amherst was to discredit survivors who exhibited agency by, for example, voluntarily accompanying their attackers into a private space in an environment where sexual activity might occur. While we do not know many details of Epifano’s rape, we know that it occurred on a night when she was alone with the perpetrator in his dorm room.<sup>263</sup> We do not know how she ended up there, but we might surmise that she entered the space voluntarily and that she consented to some level of physical intimacy with him previously, even if she did not consent to sex. This exercise of agency likely rendered her less believable, if not less sympathetic, in the eyes of those whose responses she found so damaging.

The incidents at Amherst are also indicative of the victim/perpetrator framework’s tendency to obscure male victims of rape and sexual assault so that they are deemed unbelievable or unharmed. A male rape survivor at Amherst recounted his experience as follows:

Let’s go back to my freshman year. . . . “[F]riends” from back home keep asking me whether or not I’ve slept with anyone yet. I keep saying no. They question my masculinity. . . . [I]t’s not easy as a guy to say that you were raped. I tried telling a guy friend of mine about it once. He laughed it off. I tried telling a female friend about it. She thought I was joking, since “men can’t be raped.”<sup>264</sup>

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<sup>261</sup> “Hookups” are defined as sexual encounters between brief acquaintances or strangers, usually for only a single night, without the expectation of a relationship. Elizabeth L. Paul & Kristen A. Hayes, *The Casualties of “Casual” Sex: A Qualitative Exploration of the Phenomenology of College Students’ Hookups*, 19 J. SOC. & PERS. RELATIONSHIPS 639 (2002) (discussing practices and attitudes regarding “hookups” on college campuses); see generally William F. Flack, Jr. et al., *Risk Factors and Consequences of Unwanted Sex Among University Students: Hooking Up, Alcohol, and Stress Response*, 22 J. INTERPERSONAL VIOLENCE 139 (2007) (same).

<sup>262</sup> Some jurisdictions may find rape where the victim willingly participated but then withdrew consent once sexual activity commenced or, alternatively, consented to some sexual acts but not others. See *In re John Z.*, 60 P.3d 183, 186–88 (Cal. 2003). In Massachusetts, the law’s treatment of consent is less nuanced. The elements of non-consent and force must be separately satisfied, and even obtaining consent by fraud does not constitute rape. See *Suliveres v. Commonwealth*, 865 N.E.2d 1086, 1088–91 (Mass. 2007) (articulating the rule on use of force and victim non-consent for the crime of rape and finding no rape where defendant obtained consent by impersonating victim’s boyfriend).

<sup>263</sup> Epifano, *supra* note 223.

<sup>264</sup> *Anyone Can Be Raped*, IT HAPPENS HERE (Oct. 18, 2012), <http://ithappenshere.amherst.wordpress.com/2012/10/18/anyone-can-be-raped/>.

Similarly, though we do not know the details of his case or the sex of his assailant, Trey Malone felt that Amherst administrators did not take his victimization seriously. We can surmise that such perceptions also influenced the response of students and administrators to Malone's assault.

Finally, as the examples at Amherst illustrate, the victim/perpetrator framework influences responses to rape by presupposing the seriousness of its harm. While survivors of acquaintance rapes suffer substantial psychological harm in many cases,<sup>265</sup> significant physical injuries are relatively rare.<sup>266</sup> Rather, most acquaintance rapes occur with the use of relatively modest force and only after other tactics, such as emotional pressure, verbal charm, or alcohol and drugs, have not succeeded.<sup>267</sup> Epifano's rape appears consistent with this trend. According to her brief account, it was not particularly violent beyond the coercive sex itself. Though she states that the perpetrator "held [her] down,"<sup>268</sup> it does not appear that he physically attacked or seriously injured her.

The assumption that rape is always physically violent creates problems because evidence of harm plays a crucial role in shaping perceptions of rape allegations' validity. Without witnesses or evidence of serious harm, administrators and students alike tend to see rapes like Epifano's as he-said-she-said swearing contests. Indeed, some colleges' student disciplinary processes require corroborating evidence for the adjudication of sexual misconduct claims,<sup>269</sup> even when the law in that jurisdiction does not do so.<sup>270</sup>

Despite recent changes in federal law aimed at ensuring fairer adjudication of student sexual misconduct claims at colleges,<sup>271</sup> the tendency of peo-

<sup>265</sup> Anderson, *All-American Rape*, *supra* note 72, at 641–642 (describing the serious psychological and emotional harms experienced by many acquaintance rape survivors).

<sup>266</sup> *Id.*

<sup>267</sup> Pillsbury, *supra* note 6, at 908.

<sup>268</sup> Epifano, *supra* note 223.

<sup>269</sup> Anderson, *Campus Sexual Assault*, *supra* note 220, at 990–93 (discussing a similar rule at Harvard College and its effect on sexual misconduct allegations). As a result of such practices, the Department of Education Office for Civil Rights issued a "Dear Colleague" letter to schools in April of 2011 that reiterated their responsibility to protect students from sexual violence. The letter stated that grievance mechanisms for resolving complaints should use a "preponderance of the evidence" standard rather than a "clear and convincing evidence" standard. See Weizel, *supra* note 222, at 1616–17.

<sup>270</sup> Most states have reformed the evidence requirements for rape cases and no longer require corroborating evidence. See Denno, *supra* note 37, at 214. Massachusetts has never had a corroboration requirement. See Anderson, *Campus Sexual Assault*, *supra* note 220, at 993.

<sup>271</sup> The Campus Sexual Violence Elimination (SaVE) Act, passed as part of the Violence Against Women Act reauthorization in 2013, codifies many of the sexual assault prevention and response requirements identified in the Office of Civil Rights' "Dear Colleague" letter. However, the new law does not codify the "preponderance of the evidence" standard. See *The Campus Sexual Violence Elimination (SaVE) Act*, <http://www.securityoncampus.org/campus-sexual-violence-elimination-save-act> (last accessed March 24, 2013) (describing provisions of new law); Tyler Kingkade, *College Sexual Assault Victim Advocates Hail VAWA Passage*, THE HUFFINGTON POST, (March 1, 2013, 7:08 PM), [http://www.huffingtonpost.com/2013/03/01/college-sexual-assault-vawa\\_n\\_2786838.html](http://www.huffingtonpost.com/2013/03/01/college-sexual-assault-vawa_n_2786838.html) (describing Campus SaVE Act and reactions to its passage).

ple to believe that rape is always traumatically violent nonetheless makes many acquaintance rapes—which tend not to be so—seem less believable. As the comment from one Amherst survivor's roommate about "going out every weekend" demonstrates, some people disbelieve survivors who do not appear broken or bruised. In a social context where perpetrators might already benefit from greater credibility due to their status within the campus community, this presumption weakens the position of many rape survivors at colleges.

Similarly, even when a student is found guilty of sexual misconduct, the absence of evidence of blatant physical violence or obvious, devastating harm might contribute to perceptions that the rape itself does not warrant a strong response. At Amherst, where the school's disciplinary committees included few women, such issues of perception might have had a significant impact.<sup>272</sup> According to some, students found responsible for sexual assault consistently suffered less serious repercussions than did those who committed other violations of the conduct code.<sup>273</sup>

### C. *Another Reading of What Happened?*

Initially, the stories of Epifano, Malone, and others at Amherst seem like classic examples of the failure of colleges everywhere to protect students from sexual violence and of the criminal justice system on the whole to address acquaintance rapes. We assume that the students were indeed victims of rape and that the students who committed those acts should have received serious punishment. However, we know only one piece of the story. To paraphrase the words of one of the Amherst deans, it might, indeed, be "more complicated."

An alternative reading of what happened could be that Amherst's inadequate reaction to its students' sexual assaults might have represented an awkward attempt to resist the victim/perpetrator framework by dealing with multiple possible viewpoints. While the college did a poor job of validating and supporting student rape survivors at the campus, the victim/perpetrator framework's capacity to shape perceptions of what happened and what should follow may have made it difficult for Amherst to attempt a better, more nuanced response.

The discourse that erupted in response to Epifano's story illustrates the difficulty of responding to rape in a nuanced way that acknowledges the possibility of different points of view between perpetrators and victims. Soon after it appeared, a fellow student who was "a member in a sexual assault prevention organization" commented online that the lack of clear verbal communication between students contributed to rapes, "especially when [the rapist] is unaware he is raping [the victim]," and noted that

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<sup>272</sup> Baker, *supra* note 248.

<sup>273</sup> *Id.*

sometimes neither party “realize[s] the implications of their actions, or lack of actions.”<sup>274</sup> In response, other students posted a flurry of responses, many of them vitriolic, accusing the poster of “victim blaming.” One person noted that rapists were “mentally ill” or “evil.”<sup>275</sup> Other commenters angrily stated that any “rape prevention” that focused on the victim’s behavior at all was wrong and that men simply needed to be “taught” not to rape.<sup>276</sup> As the comments went back and forth online, the debate came to center on whether a response to rape could acknowledge the perpetrator’s point of view without taking his “side” and thereby supporting rape. Just as Epifano seemed to feel that any mention of the perpetrator’s point of view undermined the seriousness of her injury, many commenters suggested that any characterization of rape that challenged the dichotomous assumptions of the victim/perpetrator framework had no place in the discourse.

Similarly, the discussion of how institutions of higher education respond to rape tends to fall into two camps—one arguing for schools to treat allegations of student sexual misconduct far more harshly and another arguing for the protection of due process for accused students.<sup>277</sup> Oftentimes, the result seems to be an intractable conflict, with reforms aimed at improving institutional responses to campus sexual violence framed as incompatible with the protection of individual students’ rights.

Beyond limiting feminist discourse about institutional responses to rape, the victim/perpetrator framework limits our ways of thinking about and responding to rape at an individual level, with harmful consequences. For, if perpetrators of rape are constructed as undifferentiated misogynists and predators with no room to articulate their own perspectives and experiences, it is no wonder that persons who commit acts of rape resist acknowledging the nature of their actions and recognizing the attendant harm. Similarly, while self-blame can be profoundly disempowering for rape victims, there is

<sup>274</sup> A fellow colleg. . . , Comment to *An Account of Sexual Assault at Amherst College*, THE AMHERST STUDENT (Oct.18, 2012, 2:47 PM), <http://amherststudent.amherst.edu/?q=comment/37440#comment-37440>.

<sup>275</sup> Ed, Comment to *An Account of Sexual Assault at Amherst College*, THE AMHERST STUDENT (Oct. 19, 2012, 6:51 AM), <http://amherststudent.amherst.edu/?q=comment/38171#comment-38171>.

<sup>276</sup> See, e.g., Disgusted, Comment to *An Account of Sexual Assault at Amherst College*, THE AMHERST STUDENT (Oct.18, 2012, 4:19 PM), <http://amherststudent.amherst.edu/?q=comment/37578#comment-37578>; Dartmouth, Comment to *An Account of Sexual Assault at Amherst College*, THE AMHERST STUDENT (Nov. 5, 2012, 9:54 PM), <http://amherststudent.amherst.edu/?q=comment/58698#comment-58698>.

<sup>277</sup> See Paul E. Rosenthal, *Speak Now: The Accused Student’s Right to Remain Silent in Public University Disciplinary Proceedings*, 97 COLUM. L. REV. 1241, 1242–53 (1997) (describing the conflict created by pressures for universities to aggressively address rape allegations on their campuses and the need to protect accused students’ due process rights); Tyler Kingkade, *Campus SaVE Act Depends on Reauthorization of Violence Against Women Act*, THE HUFFINGTON POST, (February 19, 2013, 2:53 PM), [http://www.huffingtonpost.com/2013/02/19/campus-save-act-vawa\\_n\\_2640048.html](http://www.huffingtonpost.com/2013/02/19/campus-save-act-vawa_n_2640048.html) (describing criticism of SaVE Act and other feminist reforms aimed at lowering the burden of proof for campus rape adjudications as removing necessary safeguards for accused students).

also a risk of disempowerment in defining victims as unable to do anything to prevent or respond to violence. As feminists have long recognized in other contexts, there is some value to claiming ownership over the capacity and the right to resist. In the context of rape, celebrating this resistance can be an important and powerful way of healing.

In the end, while the victim/perpetrator framework seems to favor the rights of victims, it might actually harm them by limiting our ways of thinking about and responding to rape. When people equate the suggestion that a rape victim might take certain actions to avoid rape with “victim blaming,” it can actually undermine attempts to address acquaintance rape by shutting down all acknowledgement and analysis of perpetrators’ subjective experiences. Likewise, when survivors of rape or sexual assault have only limited options for seeking redress, none of which actually provides the justice and accountability they need, their experiences go unseen and unacknowledged. The result is a painful and dehumanizing incongruity between the internal sensation of harm and the external denial of its validity. Epifano ultimately demanded recognition of the harm she had experienced by entering into the public discourse and publicizing what happened to her. Malone took his own life.

The Parts above have described the victim/perpetrator framework and explored how it operates within liberal and radical feminist approaches to rape, the law of rape, and extra-legal contexts such as college campuses. As each of these examples shows, the victim/perpetrator framework creates a variety of problems. Not only does the framework contribute to the non-recognition of some acts as rape, but it can also interfere with the formulation of effective responses to rape. The following, final part of this Note explores one alternative.

#### IV. RESISTING SIMPLE DICHOTOMIES: TOWARDS AN INTERSECTIONAL FEMINIST MODEL OF RAPE

Considering the implications of the critiques discussed in this Note and attempting to consider alternatives raises two fundamental questions. First, is there a way of conceptualizing rape that makes it possible to validate injury and harm without attributing blame? Second, does feminism require an enemy?

Janet Halley criticizes feminism’s tendency toward a dualistic framing of gendered oppression, where the masculine is the source of all harm, the feminine is the site of all injury, and feminism is always on the side of the feminine, what she calls the feminist commitment to “m>f, and carrying a brief for f.”<sup>278</sup> She argues that the feminist tendency to treat this binary construction of the world as a kind of morally perfect “structural totalism”<sup>279</sup>

<sup>278</sup> HALLEY, *supra* note 48, at 55.

<sup>279</sup> *Id.* at 344–45.

renders it “unable to see around corners of its own construction.”<sup>280</sup> As a consequence, she argues, feminism might not only be getting in the way of its own anti-oppression project, but it might also be in the business of generating harm. In conclusion, Halley proposes that it might be time to “take a break from feminism.”<sup>281</sup>

The problem with taking a break is that it leaves intact what is already in place. As this Note has attempted to show, the victim/perpetrator framework is pervasive in shaping responses to rape, both within the law and outside of it. Taking a break from the dominant feminist approaches to rape is useless without articulating a meaningful alternative. In examining the potential of restorative justice as a mechanism for implementing a more discursive feminist approach to rape, this Part explores one such theoretical alternative—an intersectional model of rape.

#### A. *A Rupture in the Fabric of Human Recognition*

One way to conceptualize rape differently is to develop an “intersectional model of rape.” Drawing on intersectional theories of feminism, an intersectional model of rape would resist broad generalizations about the nature and root causes of rape as a form of gendered violence.<sup>282</sup> Since both sex and gender hierarchies exist in the midst of other intersecting axes, an intersectional model of rape would treat individual acts of rape as contextual, always recognizing that power can operate in a multiplicity of ways and sometimes differently than the dominant feminist discourse would predict. Rather than treating rape victims and perpetrators as functions of their roles in the act of rape, an intersectional model of rape would treat each as an individual person whose humanity should be affirmed.

What would a model of rape that resists generalizations look like? This Note proposes that an intersectional model might treat rape less as an act of sexual and social domination and more as a break in the mutual process of relating to one another as human beings, or, put more simply, as a rupture in the fabric of human recognition.

“Recognition” is both the process and the end point by which we ascribe meaning to one another. Judith Butler describes recognition as an experience that we are always seeking and through which we become constituted as “socially viable beings.”<sup>283</sup> In this way, Butler argues that recognition operates as a form of inter-subjective and constitutive power, which has

<sup>280</sup> *Id.* at 321.

<sup>281</sup> *Id.* at 346–47.

<sup>282</sup> See Dixon, *supra* note 51, at 283–84 (describing the themes of intersectional feminism as resisting claims about the commonality of women’s experiences and as focusing on the ways that “sex and gender hierarchies circulate and intersect with other hierarchies in ways that make gender injustice deeply contextual in nature”).

<sup>283</sup> See Butler, *supra* note 67, at 2. Drawing on the Hegelian tradition, Butler notes that “desire is always a desire for recognition.” *Id.*

the ability to confer “humanness” on some individuals but also to deprive it from others, thereby “producing a differential between the human and the less-than-human.”<sup>284</sup> Butler is concerned with the ways in which some persons are “recognized as less than human” or, in some cases, “not recognized as human at all.”<sup>285</sup> She argues that part of the paradox of gender is that while gender wants recognition, the schemes of recognition that are available may be de-humanizing.<sup>286</sup>

Building on Butler’s understanding of recognition, an intersectional model of rape might posit that a rupture in the fabric of human recognition occurs when one person fails to relate to another as fully human. While it can happen for a variety of reasons, this rupture is characterized by a disjuncture between the humanity of one person as he or she experiences it and the recognition denied (human-ness) or conferred (subhuman-ness) by another person, which renders the first person “undone” as a subject.<sup>287</sup>

Arguably, this kind of rupture is at the root of all forms of gendered violence and occurs in any situation where a person is made less than human or, as Butler calls it, “differentially produced.”<sup>288</sup> For example, street harassment of women by men is not merely an invasion of the victim’s privacy but a violation of her sense of self. The harasser’s recognition of the victim as a sexual object rather than as a person causes the sense of violation.<sup>289</sup>

In rape, we can see evidence of this rupture in survivors’ accounts of de-humanization and objectification.<sup>290</sup> Reflecting on her own experience of rape, Lynne Henderson described this phenomenon as follows:

Rape denies that you are a person, that you exist. . . . [U]ndesired sex at least does not completely deny your personhood. Women are not helpless in lovemaking, or even in the going-along-with-it instance where sexual desire may not exist but affection does;

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<sup>284</sup> *Id.*

<sup>285</sup> *Id.*

<sup>286</sup> *Id.* (“If part of what desire wants is to gain recognition, then gender, insofar as it is animated by desire, will want recognition as well. But if the schemes of recognition that are available to us are those that ‘undo’ the person by conferring recognition, or ‘undo’ the person by withholding recognition, then recognition becomes a site of power by which the human is differentially produced.”).

<sup>287</sup> *See id.*

<sup>288</sup> *Id.* A discussion of the further application of this theory to other forms of gendered violence is outside the scope of this Note but worthy of further exploration.

<sup>289</sup> *See* Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517, 535–40 (1993) (describing the effects of street harassment on women as objectifying and establishing coercive control over women in public spaces).

<sup>290</sup> *See* LOUISE DU TOIT, *A PHILOSOPHICAL INVESTIGATION OF RAPE: THE MAKING AND UNMAKING OF THE FEMININE SELF* 82 (2009) (“[H]er body swallows up her whole existence and its limits become the limits of her world; she becomes pure immanence, pure body and dead, objective fleshiness without a trace of subjectivity, transcendence or a will of her own. . . . Becoming an object in this way, means that the world she once inhabited as a subject is destroyed, and in its place she finds herself in a place or world that cannot be mastered or ordered but only endured.”).



whereas women experience total helplessness and obliteration during rape. When a woman's existence just does not matter, intercourse becomes rape.<sup>291</sup>

Because the harm of rape is so integrally tied to the denial of human-ness, recognition of that experience of harm and acknowledgement of its moral wrongness matters enormously for rape survivors.<sup>292</sup>

One problem with the victim/perpetrator framework is that it puts rape survivors in a double bind with respect to the recognition of their capacity for agency and experience of harm. When the framework recognizes rape victims as such, it validates their subjective experiences of harm, but it also constructs them as passive objects of violence. But if survivors do not pursue recognition, their harm goes unseen; for, most people equate the existence of the victim's experience of injury and harm with the identification of the perpetrator as a rapist. In this way, the victim/perpetrator framework gives rape victims the choice between the non-recognition of agency and the non-recognition of harm. Either option serves to render life "unlivable."<sup>293</sup>

In contrast to the victim/perpetrator framework, an intersectional model of rape rests on the premise that harm can exist and deserve sympathy regardless of how it came to pass. Whereas the victim/perpetrator framework treats the recognition of harm and the attribution of blame as one and the same, an intersectional model of rape treats the validation of harm and the quest for accountability as two separate elements.

Accordingly, the recognition of harm in an intersectional model of rape depends neither on the attribution of blame nor on either party ascribing to a particular role of victim or perpetrator in the interaction. If we re-examine *Berkowitz* from an intersectional standpoint, we may see both Robert and Linda as having suffered harm—the recognition of the harm that one person might have suffered does not necessarily negate the truth of the other person's experience of harm, nor does it necessarily absolve responsibility. Rather, this recognition of mutual capacity to experience and cause harm draws our attention to the humanity of all persons involved and encourages an inquiry into the root causes of their actions.

In many ways, an intersectional model of rape is actually a post-structuralist model. For, in resisting binaries and focusing on the ways in which human-ness is constituted and reproduced through ideologies and social in-

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<sup>291</sup> Lynne N. Henderson, Review Essay, *What Makes Rape a Crime?*, 3 BERKELEY WOMEN'S L.J. 193, 226 (1988) (emphasis omitted).

<sup>292</sup> See Koss, *supra* note 37, at 207 ("Sex crimes, like any other intentional harm done to one human being by another, cause a sense of transgression that triggers needs for acknowledgment of wrongdoing and repair of the damage caused.").

<sup>293</sup> Judith Butler describes this paradox of recognition with respect to gender. While recognition is critical for our ability to exist as humans in this world, we are often subject to recognition in some ways and the denial of recognition in others; this back-and-forth can render life extremely difficult. See BUTLER, *supra* note 67, at 4 ("I may feel that without some recognizability I cannot live. But I may also feel that the terms by which I am recognized make life unlivable.").

teractions, an intersectional model of rape treats individual acts of sexual violence as highly contingent and intrinsically tied to processes of sex and gender performance.<sup>294</sup> In this way, an intersectional model of rape resists heteronormativity. While acknowledging the way in which sex and gender shape individual acts of sexual violence, it does not presuppose who inhabits what role or what normatively “good” and “bad” sex look like.

Hence, an intersectional model of rape looks to the ways that individuals are subjectively shaped by social and cultural norms. From this perspective, we can see how in some contexts one person might believe he or she is engaging in consensual sex while the other person experiences the same interaction as rape. This matters enormously because it allows us to move away from a battle of dueling narratives where only one truth is possible to a more nuanced understanding of rape that recognizes such contradictions as not only real but as sometimes inevitable.

Further, by encouraging such an inquiry without necessarily ascribing to a particular framework of blame or fault at the outset, an intersectional model of rape offers an opportunity for rape perpetrators to examine their own actions while supporting survivors in doing the same. When the nature of the act itself is unclear, it offers both parties an opportunity to seek clarification and meaning. This is valuable not only because it is through speaking that rape survivors regain their sense of self<sup>295</sup> but also because it encourages perpetrators to acknowledge the harm of their actions and creates genuine opportunities to engage with the root causes of such de-humanization.

Finally, because an intersectional model of rape recognizes that both victims and perpetrators are subject to the limiting nature of identities, norms, and context, while also exercising agency within these constraints,<sup>296</sup> it is able to conceive of rape outside of a single, dichotomous model of power. While the capacity of one person to exercise power over another can contribute to the rupture of human recognition that occurs in rape, an intersectional model does not require the exertion of power in a single direction only. Rather, just as the harm of rape can flow in multiple directions, the act(s) of (non)recognition that constitute an experience as rape are shaped by a multiplicity of social forces that can come together in unexpected ways. Within an individual act of rape, who has power over whom may not always

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<sup>294</sup> See Dixon, *supra* note 51, at 284–86 (describing the general themes of post-structural and post-modern feminisms, which view sex as “performatively produced,” sexual difference as the product and necessary condition for heteronormativity, and both performance and difference as being shaped by discourse).

<sup>295</sup> C. Quince Hopkins, *Tempering Idealism with Realism: Using Restorative Justice Processes to Promote Acceptance of Responsibility in Cases of Intimate Partner Violence*, 35 HARV. J.L. & GENDER 311, 325 (2012).

<sup>296</sup> This conceptualization of agency as co-constitutive and relational has appeared in feminist theories of sexuality. See, e.g., Kathy Miriam, *Toward a Phenomenology of Sex-Right: Reviving Radical Feminist Theory of Compulsory Heterosexuality*, 22 HYPATIA 210, 224 (2007) (arguing that women’s sexuality is attuned to power relations such that many women experience agency through their sexual subordination).

be clear. By de-linking our understanding of rape from a particular hierarchical and gendered paradigm of power, an intersectional model of rape opens new space for both the recognition of certain acts as rape and for feminist theorizing about the ways power may be differently implicated in such acts.

*B. Applying Theory to Practice: Restorative Justice as an Alternative Response to Rape*

By placing rape into a broader social context and utilizing a discursive, individualized process, an intersectional model of rape allows for the possibility of multiple perspectives while empowering survivors to articulate their own narratives and, in so doing, to reclaim their humanity. In this way, an intersectional model of rape is in tension with the adversarial structures of the law and the criminal justice system.

“Restorative justice” offers one possibility for the incorporation of an intersectional model of rape into legal and quasi-legal processes. The term “restorative justice” encompasses a diverse array of alternative approaches to violence and draws from cultural traditions around the world. As a result, there is no single model for what restorative justice looks like. What all restorative justice approaches have in common, however, is that they aim to examine criminal acts not in isolation but within a broader social and cultural context.<sup>297</sup>

Broadly defined, restorative justice is “a process to involve, to the extent possible, those who have a stake in a specific offense and to collectively identify and address harms, needs, and obligations, in order to heal and put things as right as possible.”<sup>298</sup> Rather than treating crime as a conflict between an offender and the state, restorative justice treats it as a break in the social fabric of the community and attempts to use a discursive, collaborative process to arrive at a just resolution. Justice is determined by the extent to which all parties participate, feel validated, acknowledge the harm, consider the matter settled, and make amends.<sup>299</sup> Hence, at its core, restorative justice is grounded in concepts of “mutual responsibility and interdependence.”<sup>300</sup>

Recognizing its value for both crime victims and the broader community, some jurisdictions in the United States have begun using restorative justice processes as a complement to the traditional legal system, though

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<sup>297</sup> See Kate E. Bloch, *Reconceptualizing Restorative Justice*, 7 HASTINGS RACE & POVERTY L.J. 201, 203–11 (2010); see also HOWARD ZEHR, *THE LITTLE BOOK OF RESTORATIVE JUSTICE* 20 (2002).

<sup>298</sup> ZEHR, *supra* note 297, at 37.

<sup>299</sup> *Id.* at 36–41. While restorative justice is generally described according to these principles, the actual form that it can take varies widely. Not all forms are seen as equally faithful to these values. See Bloch, *supra* note 297, at 203–11 (describing various restorative justice models).

<sup>300</sup> Kay Pranis, *Restorative Values and Confronting Family Violence*, in RESTORATIVE JUSTICE AND FAMILY VIOLENCE 25 (Heather Strang and John Braithwaite eds., 2002).

generally only for relatively minor crimes.<sup>301</sup> Similarly, some institutions have begun using restorative justice as an alternative mechanism for resolving conflicts. For example, a growing number of colleges and universities are experimenting with the use of restorative justice as a means of responding to student misconduct, though none yet have begun using it to respond to campus rape.<sup>302</sup>

Though the use of restorative justice processes to respond to violent crime remains controversial, a small number of feminists argue that it may, if harnessed in the right way, offer rape survivors a viable alternative or, in some cases, a meaningful addition to the traditional criminal justice system.<sup>303</sup> Mary Koss, whose work on college campuses in the 1980s highlighted the problem of acquaintance rape among students, has since become a major advocate for restorative justice as an effective means of responding to at least some acquaintance rapes.<sup>304</sup> Koss argues that a restorative justice approach offers a more victim-centered model:

[Restorative justice] condemns violence in meaningful and consequential ways, permits telling stories, encourages admissions of offending, validates [survivors'] experiences and reassures them that they are not to blame, provides more options for those who do not want formal prosecution, and provides space for airing upset-

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<sup>301</sup> See, e.g., Yvonne Byrd & Judith Gibson, *Restorative Justice: ADR in Criminal Cases*, 36 VT. B.J. 49, 52 (2010) (discussing use of restorative justice approaches for an array of criminal and civil cases as a complement to traditional legal processes in Vermont); Hon. T. Bennett Burkemper, Nina Balsam, & May Yeh, *Restorative Justice in Missouri's Juvenile System*, 63 J. MO. B. 128, 131–33 (2007) (discussing use of restorative justice within the juvenile justice system in Missouri). One notable and very rare use of restorative justice for a serious crime occurred recently in a Florida murder case at the behest of the families of the perpetrator and victim. See Paul Tullis, *Can Forgiveness Play a Role in Criminal Justice?*, N.Y. TIMES, Jan. 6, 2013, at MM28.

<sup>302</sup> Justine Darling, *Restorative Justice in Higher Education: A Compilation of Formats and Best Practices* 3 (2011) (unpublished M.A. thesis, University of San Diego).

<sup>303</sup> See, e.g., Hodak, *supra* note 95, at 1110–18 (discussing mediation as an alternative to traditional criminal prosecutions for acquaintance rapes). Some feminists have also begun to advocate for the use of restorative justice to respond to intimate partner violence generally. See, e.g., Hopkins, *supra* note 295, at 315–17 (discussing benefits of restorative justice diversion programs for domestic violence cases); Laurie S. Kohn, *What's So Funny About Peace, Love, and Understanding? Restorative Justice as a New Paradigm for Domestic Violence Intervention*, 40 SETON HALL L. REV. 517, 576–94 (2010) (proposing a restorative justice-based intervention program as an alternative to criminal and civil processes in the context of domestic violence); see also Katherine van Wormer, *Restorative Justice as Social Justice for Victims of Gendered Violence: A Standpoint Feminist Perspective*, 54 SOC. WORK 107, 113–14 (2009) (arguing that a restorative justice response to physical and sexual violence against women provides opportunities for fostering meaningful social change).

<sup>304</sup> Koss, *supra* note 37, at 224–27; Mary P. Koss, *Restorative Justice for Acquaintance Rape and Misdemeanor Sex Crimes*, in RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN 218, 218–34 (James Ptacek ed., 2010) (describing RESTORE program in Arizona, which, in collaboration with the criminal justice system, uses restorative justice to respond to acquaintance rape). The RESTORE program excludes rapes involving repeat offenders, where physical injuries resulted, where children were harmed, or where the parties were strangers. *Id.*

ting aspects of the incident that may not formally qualify as crimes and therefore would be excluded by any other legal process.<sup>305</sup>

Critically, restorative justice is fundamentally non-adversarial and hence, with the right controls in place, can offer a better environment for ensuring that all participants speak and listen in a balanced way.<sup>306</sup>

Restorative justice offers one avenue through which an intersectional model might enter legal and quasi-legal responses to rape. While it is always necessary to ensure that any process does not overly benefit the party with greater privilege,<sup>307</sup> restorative justice suggests that it is possible to acknowledge the perspectives of all parties involved in a non-adversarial format that avoids putting each account on trial, and to recognize and vindicate the harm of rape without measuring such recognition and vindication only by the length of the prison sentence imposed on the offender.<sup>308</sup> While some might argue that rape is too serious for such a non-adversarial approach,<sup>309</sup> I would argue that it is precisely the nature of the harm and the need for transformation that makes restorative justice necessary.

### C. *Considering the Downsides*

Like any theory, an intersectional model of rape will have its limits. It will invariably serve some objectives—both political and theoretical—better than others. One possible criticism of an intersectional model of rape might be that focusing on harm without asserting blame undermines the moral function of rape recognition and its benefit to rape survivors. However, this moral function is undermined only if we continue to think in terms of the victim/perpetrator framework. If we can separate harm from the roles of victim and perpetrator, it becomes possible to conceive of it as real and meaningful independent of any single account of what happened.

<sup>305</sup> Koss, *supra* note 37, at 223.

<sup>306</sup> *Id.*

<sup>307</sup> See generally Pamela Rubin, *A Community of One's Own?: When Women Speak to Power About Restorative Justice*, in *RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN* 79 (James Ptacek ed., 2010) (discussing proposal for restorative justice approach to sexual assault in Nova Scotia and the serious problems of justice, safety, and accountability raised when such programs are created without an awareness of the dynamics of gender/power and an explicit agenda to ensure that victims are not marginalized).

<sup>308</sup> Kathleen Daly, *Sexual Assault and Restorative Justice*, in *RESTORATIVE JUSTICE AND FAMILY VIOLENCE* 62, 63 (Heather Strang & John Braithwaite eds., 2002) (discussing criticisms of the feminist attempt “to vindicate gendered harms through recourse to criminal law” as “vindica[ting] gendered harms via harsh penal sanctions”).

<sup>309</sup> Indeed, for this reason most jurisdictions in the United States that utilize restorative justice explicitly prohibit its use for gendered crimes such as sexual assault and rape. James Ptacek, *Resisting Co-Optation: Three Feminist Challenges to Antiviolence Work*, in *RESTORATIVE JUSTICE AND VIOLENCE AGAINST WOMEN* 5, 9–10 (James Ptacek ed., 2010). Likewise, federal funding for such programs is largely prohibited. Koss, *supra* note 37, at 226.

Nicola Lacy argues that recognizing the harm of rape is one of the most important, and often missing, functions of the way in which the law and society should respond to such violence.<sup>310</sup> Despite decades of feminist reforms, Lacy argues, the criminal legal process continues to silence rather than validate rape survivors' experiences of harm:

Rape victims giving evidence in court are effectively silenced, caught between the equally inept discourses of the body as property, framed by legal doctrine but incapable of accommodating their experience, and the feminine identity as body, which pre-judges their experience by equating it with stereotyped and denigrating views of female sexuality.<sup>311</sup>

This process "denies rape victims both the status of personhood and the chance to approach the court as an audience capable of acknowledging their trauma."<sup>312</sup> Recognizing these shortcomings, Lacey advocates the reconstruction of the judicial process so that it is not only "a political space in which precisely the contestation of meanings . . . might take place" but also one where the "positive integrity" and "full humanity" of both rape survivors and those who are accused of rape is recognized.<sup>313</sup>

Similarly, the victim/perpetrator framework is problematic because it assumes in every case of rape that the roles of the parties involved, their relationship, and the harm that results are the same. In doing so, the framework not only contributes to problems that feminist rape reforms seek to address but silences rape survivors by assuming that a particular narrative of what rape means is representative of the experiences of all rape survivors. An intersectional model of rape—by focusing on survivors' "affective and moral" experiences and opening space for the articulation of these experiences from survivors' own standpoints, without necessarily dehumanizing the perpetrator—attempts to respond to this problem. By offering the space for the recognition of harm without presupposing its nature, source, and meaning, an intersectional model of rape seeks to actually do it justice.

Two additional and related criticisms of an intersectional model of rape might be that because it does not explicitly respond to patriarchy, it will reinforce male privilege and that by acknowledging rapists' perspectives and capacity for experiencing harm, such a model might end up letting rapists "off the hook."<sup>314</sup> However, placing the validation of harm at the forefront

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<sup>310</sup> See Lacy, *supra* note 68, at 62.

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> *Id.* at 62 n.48, 66.

<sup>314</sup> The argument that a failure to account for male privilege will simply allow the more powerful party to take advantage is one of the main criticisms of the use of mediation to respond to gendered violence generally. See Koss, *supra* note 37, at 224 (describing criticisms of mediation and restorative justice as responses to gendered violence); see also Sarah Curtis-Fawley & Kathleen Daly, *Gendered Violence and Restorative Justice: The Views of Victim Advocates*, 11 VIOLENCE AGAINST WOMEN 603, 610, 625–26 (2005)

and delinking it from the attribution of blame does not remove accountability from the picture. The starting point for such a model should always be the perspective of the rape survivor and the goal to repair the harm experienced. The difference is that rather than attempting to validate the rape survivor's reality by denying the perpetrator's, an intersectional model of rape acknowledges both as being not only real but integral to the event itself.

Similarly, an intersectional model of rape does not deny or ignore the existence of privilege or power. Indeed, such a model explicitly recognizes that all acts of violence are rooted in a social context that includes power dynamics. Rather, what distinguishes an intersectional model of rape is not that it fails to recognize patriarchy, but rather that it does not impose a simplistic, uni-directional model of male dominance on all acts of rape that assumes the roles and characteristics of the parties according to a particular dynamic of gender and power. Instead, it permits survivors to articulate their own experiences from their own standpoints.

Approaches based on individualized accounts rooted in a person's unique situation are not foreign to feminist theory, nor are they incompatible with recognition of the existence generally of patriarchy. Standpoint feminism, which has long recognized the value of such an epistemological approach, argues that giving voice to perspectives outside a masculine framework of hierarchy and dichotomy offers profound possibilities for thinking in new ways about resisting gendered forms of oppression.<sup>315</sup> Indeed, the value of storytelling has long been recognized as critical for responding to and healing from sexual violence by feminists of all manner of theoretical approaches.<sup>316</sup> By viewing rape survivors as occupying a unique position shaped by the intersection of multiple identities, an intersectional model of rape seeks to create space for the articulation of survivors' perspectives outside of the confines of the victim/perpetrator framework's dualism.

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(discussing the criticisms that restorative justice is insufficiently stringent and causes the re-victimization of victims).

<sup>315</sup> See Nancy C. M. Hartsock, *The Feminist Standpoint*, in *DISCOVERING REALITY* 283, 283–305 (Sandra Harding & Merrill B. Hintikka eds., 1983) (articulating the theory and epistemology of standpoint feminism). Traditional standpoint feminism has been criticized for generalizing about women's experiences and perspectives. See COLLINS, *supra* note 116, at 18 (criticizing the view of some standpoint feminists that there is a single feminine perspective, and arguing that because sexism occurs in relation to other systems of domination, which together form a "matrix of domination," different women may be uniquely situated). Nonetheless, even if we recognize that there is no single perspective necessarily shared by all rape survivors, I would argue that there is still a substantial theoretical benefit to making space for individual survivors to speak from their own experiences, particularly when these experiences might not comport with traditional feminist thinking about rape. See generally HOOKS, *supra* note 116 (articulating the benefits of a more inclusive feminist movement that includes space for all voices, particularly those who have been traditionally marginalized).

<sup>316</sup> See Buchhandler-Raphael, *supra* note 205, at 181–91 (discussing feminist arguments in favor of ensuring that rape victims are able to effectively engage in narrative storytelling about their experiences).

A related criticism of an intersectional approach to rape may be that it obscures the operation of patriarchy. But the example of acquaintance rape suggests that patriarchy does not play into every instance of rape in the simplistic way that the dominant feminist paradigms would suggest. In some cases, the dynamic of power between parties does not run so obviously in one direction, and sexual violence does not necessarily implicate patriarchy in the way liberal and radical feminist approaches tend to assume.

Katherine Franke has argued that the power dynamics in sexual relations have grown more complicated in recent years:

[S]ex seems to have become a less dense transfer point for relations of [gender-based] power for some women a generation younger. . . . This is not to say that sex no longer plays a role in gender-based hierarchies, but rather, that we might want to reassess the synergistic danger it presents today compared with the period in which we first formulated these analyses twenty years ago.<sup>317</sup>

Franke's argument is particularly pertinent in the context of acquaintance rapes on college campuses. While the construction of gender and the function of male privilege both play important roles in such rapes, an absolute dichotomy of power between the victim and perpetrator may be less common today. Particularly in cases where rapes occur between students who are both members of the same social group, the way in which power dynamics operate within the interaction are likely to be more complicated.

Finally, another criticism that might be leveled at an intersectional model of rape is that by focusing on harm it may fall into the same trap this Note has already criticized by serving to actually reinforce the traumatization of rape survivors. For, by placing the subjective experience of harm at the center of the inquiry, one could argue that an intersectional model of rape actually reifies rape as trauma and all rape victims as profoundly traumatized. But an intersectional model of rape, unlike the victim/perpetrator paradigm, operates in a way that minimizes that risk.

An intersectional model of rape does not assume a single model of harm. Rather, it allows survivors to articulate their own narratives without presupposing how they should look. Moreover, unlike the victim/perpetrator framework, an intersectional model of rape delinks the recognition of harm from the attribution of roles in the interaction. In doing so, it aims to recognize the experience of harm without allowing such harm to define the survivor. Hence, within an intersectional model of rape, harm does not necessarily equate to victimhood and disempowerment in the way that it does in the victim/perpetrator framework.

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<sup>317</sup> Franke, *supra* note 79, at 202 (footnote omitted) (internal quotation marks omitted).



Ultimately, the intersectional model proposed in this Note is tentative at best. The alternative it offers is far from perfect and will not fit every example of rape. In some cases, the liberal and radical feminist theoretical models may indeed be descriptive of the nature of the act and the parties involved. Nonetheless, many rapes occur in conditions of ambiguity and complexity, and our existing feminist paradigms make inadequate sense of such interactions. The benefit of an intersectional model of rape is that it is not totalizing. Its inability to describe every aspect of gendered violence is both acceptable and expected. What matters is that we, as feminists, avoid falling back on simplistic explanations long-established and continue to do the hard work of considering new ways of thinking about and responding to the enduring problems of violence and de-humanization in our world.

#### CONCLUSION

Elizabeth Schneider argues that feminism should account for the true complexity of women's lives by rejecting overly simplistic narratives, even when they might be convenient:

We must seek to understand both the social context of women's oppression, which shapes women's choices and constrains women's agency and resistance, and also recognize women's agency and resistance in a more nuanced way. This means that we reject simple dichotomies, give up either/ors, learn to accept contradiction, ambiguity, and ambivalence in women's lives, and explore more "grays" in our conceptions of women's experience, rather than seeing only "blacks" and "whites."<sup>318</sup>

The dominant feminist discourse on rape and rape law reform, as articulated by the liberal and radical feminist approaches discussed in this Note, reflects a profoundly dichotomous view of rape victims, perpetrators, and harm. This victim/perpetrator framework is rooted not only in our culture and history but in the adversarial dynamics of our system of criminal law and adjudication.

While the victim/perpetrator framework may seem to benefit rape survivors by demanding that we always believe their accounts, it actually undermines the feminist anti-rape project. At the individual level, it reinforces simplistic ways of thinking about victims, perpetrators, and the harm of rape that can contribute to the non-recognition of certain acts as rape and the disempowerment of rape survivors. More broadly, it limits feminist discourse and theory on social and legal responses to sexual violence.

Hence, while the victim/perpetrator framework may stem from a necessary push back against the law's tendency to disbelieve rape survivors and

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<sup>318</sup> Elizabeth M. Schneider, *Feminism and the False Dichotomy of Victimization and Agency*, 38 N.Y.L. SCH. L. REV. 387, 397 (1993).

deny that certain acts were rape, and though it remains in many respects a convenient discursive tool, it is also damaging. Feminism needs to adopt a more nuanced approach if it is to improve responses to sexual violence. This process will necessarily require us to rethink our understandings of agency, culpability, and harm as well as the effectiveness of legal reform as a means of addressing the problem of rape. While the intersectional model of rape and the process of restorative justice proposed in this Note may offer one possibility, there are certainly others that are worthy of reflection.