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DIMINISHING THE LEGAL IMPACT OF NEGATIVE SOCIAL ATTITUDES TOWARD ACQUAINTANCE RAPE VICTIMS

Michelle J. Anderson*

Rape law often condemns females who are not chaste and excuses males who act with sexual entitlement. Rape law has been a significant site for the valorization of female chastity and constraint, on the one hand, and male prowess and freedom, on the other. It continues to reflect the sexism of a culture resistant to ceding male control over sexuality. Legal reform of rape law over the past forty years has greatly helped those who experience stranger rape that includes violence extrinsic to the rape itself. However, this generation of reform did not sufficiently help those whose experiences are more common: those raped by acquaintances without extrinsic violence. To tackle this larger problem, the law must undergo another generation of renewal, one that works affirmatively to diminish the legal impact of negative social attitudes toward acquaintance rape victims. This article proposes a range of legal reforms to that end.

Like other cultural narratives around sexuality, rape law often condemns females who are not chaste and excuses males who act with sexual entitlement. Rape law has been a significant site for the valorization of female chastity and constraint, on the one hand, and male prowess and freedom, on the other. It continues to reflect the sexism of a culture resistant to ceding male control over sexuality. Legal reform of rape law over the past forty years has greatly helped those who experience stranger rape that includes violence extrinsic to the rape itself. However, this generation of reform did not sufficiently help those whose experiences are more common: those raped by acquaintances without extrinsic violence. To tackle this larger

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problem, the law must undergo another generation of renewal, one that works affirmatively to diminish the legal impact of negative social attitudes toward acquaintance rape victims.

This article proposes a range of legal reforms to that end. The marital rape exemption and the historical requirements in rape law of resistance, corroboration, and chastity continue to infect both statutory law and the way that actors with the criminal justice system—police, prosecutors, judges, and juries—see the crime of rape. Reforming each of these areas with an eye toward diminishing the legal impact of negative social attitudes toward acquaintance rape victims is the next step in rape law reform.

I. ACQUAINTANCE RAPE¹

When asked to imagine the classic rape, the American mind often conjures up a narrative something like this:

A fair young woman is walking home alone at night. Grey street lamps cast shadows from the figure she cuts through an urban landscape. She hurries along, unsure of her safety. Suddenly, perhaps from behind a dumpster, a strange, dark man lunges out at her, knife at her throat, and drags her into an alley where he beats her until she bleeds and threatens to kill her. The young woman puts up a valiant fight to protect her sexual virtue, but the assailant overcomes her will and rapes her. Afterwards, she immediately calls the police to report the offense.

The classic rape narrative is woven from a racist and sexist mythology specific to American history. Color infuses the yarn: sinister blackness against innocent whiteness, in a conflict that draws red blood. Extrinsic, violent assaults by a stranger are the weft and warp of the tale: the rapist's wielding of a knife, his dragging her into an alley, his beating, his threat of death.

Despite generations of repeated storytelling, this type of rape is, in terms of actual incidence, a statistical outlier—so different from the norm as to be exceptional rather than typical. Allow me to contrast that narrative with

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1. This section derives from a previously published article by this author: All-American Rape, 79 St. John's L. Rev. 625 (2005).

a description of a typical rape, one in which you may imagine that both the offender and the victim are of your own race:

A young male and female meet at a party and begin to talk, drink, and flirt. They wander to a quiet place together. Once there, he pushes her down, pins her, and begins kissing her aggressively. She does not want to be rude. He must have misunderstood, she thinks. The alcohol is getting to her, she feels dizzy, and she wonders if she is going to throw up. She says, "Ummm . . . wait . . . please . . . I'm not sure that this is what we should do." He ignores her and begins taking off her clothes. She cannot get away and her panic rises. She cries as he penetrates her. Shamed by the experience, she does not tell anyone until three years later when she confides in a trusted friend. She never calls the police.

This time there is no extrinsic, violent assault by a stranger: no knife, no dragging into an alley, no beating, no threat of death. There is no black male attack on white femaleness, no brawl that draws red blood. Yet, this story represents the statistical norm of sexual assault in this country: no matter the race of the parties, it is typical of rape.

The typical rape in the United States does not happen in an alleyway. It most often happens in the victim's own home or in the home of a friend, relative, or neighbor.² The typical rape is not launched by a stranger. Acquaintances and intimate partners commit the vast majority of rapes.³ The typical rape does not involve a black man attacking a white woman. Rape is overwhelmingly an intraracial crime.⁴ The typical rape involves no knives, guns, or other weapons.⁵ Rapists usually find verbal coercion and pinning sufficient.⁶ The typical rape does not involve valiant physical

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2. U.S. Department of Justice, *Criminal Victimization in the United States, 2002 Statistical Tables*, tbl. 61 (2002): indicating that the highest percentages of rapes occur in the victim's home or the home of a friend or relative.

3. *Id.* at tbl. 43: stating that about 68 percent of rapes and sexual assaults are committed by acquaintances, relatives, and intimates.

4. *Id.* at tbl. 42: indicating that 86 percent of black victims report black offenders and 14 percent report white offenders, whereas 76 percent of white victims report white offenders and 13 percent report black offenders.

5. *Id.* at tbl. 66: showing that 85 percent of rapes and sexual assaults involve no weapons.

6. Mary P. Koss et al., *Stranger and Acquaintance Rape: Are There Differences in the Victim's Experience?*, 12 *Psychol. Women Q.* 1, 20 (1988): "Assaults by strangers were perceived as more violent than assaults by acquaintances. . . . Stranger rapes were more likely than acquaintance rapes to involve threats of bodily harm, hitting, slapping, and display or use of weapons."

resistance on the part of the victim. Frozen in fright, many women cry or remain passive in the face of a sexual attack.⁷ The typical rape does not involve a victim with untainted sexual virtue. Rape happens to imperfect, complicated souls—like all of us—whose sexual pasts could not withstand critical public scrutiny. The typical rape does not include a prompt report to the police; many victims never report their most harrowing experiences to any authority figures.⁸

English common law defined rape as a man obtaining sexual intercourse by force and without a woman's consent. In 1769, in his *Commentaries on the Laws of England*, William Blackstone explained that rape was the "carnal knowledge of a woman forcibly and against her will."⁹ "Forcibly" meant that the man used physical force or its threat to obtain sexual penetration. "Against her will" meant that the woman did not consent to sexual penetration, and the law required that she resist him to the utmost of her physical capacity to express her nonconsent. As the following sections of this article demonstrate, the common law of rape came to include a corroboration requirement, a prompt complaint requirement, a resistance requirement, a chastity requirement, a martial rape exemption, and a cautionary instruction warning judicial decision makers to treat a rape complainant's testimony with suspicion. Each of these doctrines in rape law has been subject to substantial reform, but rape law needs more reform still.

II. CORROBORATION, PROMPT COMPLAINT, AND CAUTIONARY INSTRUCTIONS¹⁰

Under English common law the prompt complaint requirement meant that a woman had to complain swiftly of rape to officials or she could not obtain legal redress for the crime. Henrici de Bracton, an influential thirteenth-century English legal scholar, explained:

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7. Robert Finn, Paralysis Common Among Sexual Assault Victims, *Fam. Prac. News*, Mar. 1, 44 (2003).

8. Bonnie S. Fischer, Francis T. Cullen & Michael G. Turner, U.S. Dep't of Justice, *The Sexual Victimization of College Women* 17, 23–24 (2000).

9. William Blackstone, 2 *Commentaries on the Laws of England* 209 (1895).

10. This section derives from a previously published article by this author: *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 *Bost. L. Rev.* 945 (2004) [hereinafter *Legacy*].

When therefore a virgin has been so deflowered and overpowered against the peace of the lord the King, forthwith and whilst the act is fresh, she ought repair with hue and cry to the neighboring vills, and there display to honest men the injury done to her, the blood and her dress stained with blood, and the tearing of her dress, and so she ought to go to the provost of the hundred and to the searjeant of the lord the King, and to the coroners and to the viscount and make her appeal at the first county court.¹¹

Despite the humiliation a victim might feel about revealing a degrading, personal attack, a rule emerged requiring that she “forthwith and whilst the act is fresh” complain of being raped to “honest men . . . the provost . . . the searjeant . . . the coroners . . . the viscount and . . . the first county court.”¹² If she failed to do so, she was not allowed to bring a claim of rape in court.¹³ In 1962, the American Law Institute (ALI), which was established to promote updating and standardizing American common law, turned the prompt complaint requirement in rape law into a strict statute of limitations, which its Model Penal Code still contains: “Prompt Complaint. No prosecution may be instituted or maintained under this Article [for sexual offenses] unless the alleged offense was brought to the notice of public authority within [3] months of its occurrence.”¹⁴ No other crime in the Model Penal Code, from serious felonies to petty misdemeanors, requires a similar prompt complaint.

The corroboration requirement in rape law meant that a man could not be convicted of rape unless the complainant had corroborative evidence of the assault, such as bruises or ripped clothing that proved a struggle.¹⁵ Bracton assumed a rape victim should be able to “display to honest men the injury done to her, the blood and her dress stained with blood, and the tearing of her dress.” The ALI’s Model Penal Code turned this assumption into a requirement, which it still contains: “No person shall be convicted of any felony under this Article [for sexual offenses] upon the uncorroborated

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11. Henrici de Bracton, 2 *De Legibus Et Consuetudinibus Angliae* 483 (Sir Travers Twiss trans., 1879).

12. *Id.*

13. *State v. Hill*, 578 A. 2d 370, 374 (N.J. 1990): reviewing the history of the “hue and cry” requirement in the common law.

14. Model Penal Code § 213.6(4).

15. Bracton, *supra* note 11, at 483: describing the evidence a rape victim should be able to present.

testimony of the alleged victim.”¹⁶ A man may be convicted of burglary or homicide upon the credible but uncorroborated testimony of one person, but not so with rape. If a rape victim does not have corroboration, she does not have a case.

Cautionary instructions in rape law warned jurors to weigh the testimony of a rape complainant with particular circumspection. The seventeenth-century English jurist Sir Matthew Hale believed that 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.”¹⁷ Hale admonished:

we may be the more cautious upon trials of this nature, wherein the court and the jury may with so much ease be imposed upon without great care and vigilance; the heinousness of the offence many times transporting the judge and jury with so much indignation, that they are over hastily carried to the conviction of the accused thereof, by the confident testimony sometimes of malicious and false witnesses.¹⁸

Many jurisdictions in the United States responded to Hale’s admonition by requiring courts to issue cautionary instructions to juries warning them to assess the complainant’s testimony in rape cases with extra suspicion. The Model Penal Code continues to mandate such a warning:

In any prosecution before a jury for an offense under this Article [for sexual offenses], the jury shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private.¹⁹

Again, no other crime in the Model Penal Code requires a similar cautionary jury instruction.

The prompt complaint requirement, corroboration requirement, and cautionary instructions were three interdependent, legal rules designed to make the crime of rape harder to prove than other felonies. In many jurisdictions,

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16. Model Penal Code § 213.6(5).

17. 1 Mathew Hale, *The History of the Pleas of the Crown* 635 (Robert H. Small ed., 1st Am. ed. 1847) (1736).

18. *Id.* at 636.

19. *Supra* note 16.

if a woman failed to complain promptly, she would be forgiven if she had corroborative evidence of having been raped.²⁰ If a woman suffered a rape that produced no corroborative evidence, a prompt complaint itself might serve as the necessary legal corroboration.²¹ A judge was frequently required to issue cautionary instructions in a rape case unless the complainant proffered corroborative evidence of the offense.²² In many jurisdictions, then, prompt complaint and corroboration substituted for one another, and cautionary instructions were triggered by a complainant's failure to promptly complain or offer corroborative evidence of the crime.

The prompt complaint requirement, corroboration requirement, and cautionary instructions are each founded on faulty assumptions. The prompt complaint requirement, for example, assumes that if someone were really raped, she would immediately report the crime to the police. However, most rape victims do not promptly report the crimes they suffer to police or other authorities. In fact, most never report. According to the 1992–2000 U.S. Bureau of Justice Statistics' National Crime Victimization Survey, 63 percent of rapes, 65 percent of attempted rapes, and 74 percent of sexual assaults were not ever reported to the police.²³ A 1997 Bureau of Justice Statistics' random sample survey of 4,446 college-aged women in the United States found that, although about one in ten had been raped and another one in ten had experienced an attempted rape, fewer than five percent of those victims reported their rapes or attempted rapes to police or campus authorities.²⁴ Of those rape victims who do tell police or other authorities of having been sexually attacked, a substantial percentage delays reporting for a period of time.²⁵ Most women who are raped, therefore, do not promptly complain.

The corroboration requirement assumes that, if a woman were really raped, she would have corroborative evidence of the assault. Corroboration

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20. Legacy, *supra* note 10, at 964–77.

21. *Id.*

22. *Id.*

23. Callie Marie Rennison, Bureau of Justice Statistics Selected Findings, Rape and Sexual Assault: Reporting to Police and Medical Attention 1992–2000 1 tbl. 1, 2 (2002): reporting results of the study.

24. Fischer et al., *supra* note 8, at 23.

25. One quarter of the rape victims who reported their attacks to the police delayed reporting for more than 24 hours: National Victim Center, Rape in America: A Report to the Nation 5–6 fig. 7 (1992).

in a rape case usually refers to physical injuries from the assault, torn clothing, or other evidence of a physical struggle. Contrary to popular belief, however, physical injury from rape is uncommon.²⁶ The U.S. Department of Justice studied victims admitted to hospital emergency rooms for rape, a population that one would assume suffers from more serious and numerous physical injuries than victims not admitted to emergency rooms after rape. Sixty-eight percent of these admitted emergency room rape victims suffered no nongenital physical injuries, 26 percent suffered mild nongenital physical injuries, only 5 percent suffered moderate nongenital physical injuries, and a mere 0.02 percent suffered severe nongenital physical injuries.²⁷ Even genital physical injuries are rare, as most rape victims do not suffer the kind of genital trauma that hospital staffs can detect.²⁸

Another type of corroborative evidence might be torn clothing or other evidence of a serious physical battle between the assailant and the victim. Most rapes, however, do not involve a fight that would produce this kind of evidence. Most rapists, particularly acquaintance rapists, are able to subdue their victims with verbal coercion, alcohol, and pinning and need not resort to overt physical violence.²⁹ Many victims also become frozen with fear once an attack begins, which prevents physical resistance and makes a rapist's physical force unnecessary.³⁰

The assumption behind cautionary instructions in rape cases is that jurors are ordinarily biased in favor of an alleged rape victim and so should be cautioned against this natural inclination. As Hale explained, in rape cases, "the heinousness of the offense many times [would] transport the judge and jury" to convict.³¹ Although Hale's admonition is relevant to black on white stranger rapes where an American judge and jury may be transported to hasty conviction, in most rape cases—which are intraracial and committed by acquaintances—social science indicates that jurors are unsympathetic to

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26. Linda E. Ledray, U.S. Department of Justice, Sexual Assault Nurse Examiner (SANE) Development and Operation Guide 69–70 (1999) (collecting studies).

27. *Id.*

28. *Id.* at 70.

29. Heather Karjane, Bonnie S. Fischer & Francis T. Cullen, U.S. Department of Justice, Campus Sexual Assault: How America's Institutions of Higher Education Respond 82, 85 (2002).

30. Michelle J. Anderson, Reviving Resistance in Rape Law, U. Ill. L. Rev. at 994 n. 260 (1998) [hereinafter *Reviving Resistance*].

31. Hale, *supra* note 17, at 636.

the victim, scrutinizing her behavior to excuse the defendant's behavior.³² Cautionary instructions warning juries to evaluate the victim's testimony carefully in light of her "emotional involvement" in the crime do not mitigate societal bias in favor of rape complainants. Instead, such cautionary instructions reflect and aggravate societal bias against rape complainants.

Therefore, the scientific data indicate that most rape victims not only do not promptly complain, they do not ever complain to police or other legal authorities of having been sexually victimized. Corroborative evidence of sexual assault—such as torn clothes or injuries—is not only uncommon, it is downright rare. Instead of exhibiting a bias in favor of rape victims that jurors need to be cautioned against, jurors tend to be biased against rape victims, and traditional cautionary instructions in rape cases only exacerbate that bias.

Legal scholars and others have criticized the prompt complaint requirement, corroboration requirement, and cautionary instructions in the criminal law of rape. As a result, these three doctrines have eroded steadily. South Carolina continues to mandate prompt complaint, but only for spousal sexual offenses.³³ Only three states require corroboration: Texas requires corroboration, unless the complainant makes a prompt outcry to authorities, New York requires corroboration when a complainant's mental incapacity forms the basis of her nonconsent, and Ohio requires corroboration for the crime of sexual imposition.³⁴ Less than ten states require cautionary instructions when there is no corroboration of an alleged rape, but at least half of state codes prohibit judges from issuing these instructions.³⁵ Because the doctrines are based on faulty assumptions, legislatures in the remaining states should continue to reform their statutes by entirely banishing the prompt complaint requirement, corroboration requirement, and cautionary instructions to enhance rape law's fairness.

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32. Gary LaFree, *Rape & Criminal Justice: The Social Construction of Sexual Assault* 217–18 (1989): explaining that juries were less likely to convict the defendant of rape if the victim engaged in such non-gender-conforming behavior as leaving home without a male, hitchhiking, walking outside alone, engaging in sex outside of marriage, working in "disreputable occupations," or engaging in traditionally male activities like riding motorcycles or spending time at bars.

33. S.C. Code Ann. § 16-3-615(B) (West 2003).

34. N.Y. Penal Law § 130.16 (McKinney 2004); Ohio Rev. Code Ann. § 2907.06(B) (West 2004); Tex. Crim. Proc Code Ann. § 38.07(a) (Vernon 2004).

35. Legacy, *supra* note 10, at 974–77.

III. RESISTANCE REQUIREMENT³⁶

Rape law has traditionally emphasized a woman's physical resistance to evaluate both her lack of consent and the defendant's use of force. At common law, the state had to prove beyond a reasonable doubt that the woman resisted her assailant to the utmost of her physical capacity to prove that an act of sexual intercourse was rape. The movement from the common law's utmost resistance requirement to today's general absence of a formal resistance requirement has not been a linear historical progression. However, a rough chronology of the evolution of resistance in rape law reveals how resistance has remained a standard of model behavior against which courts have evaluated women's actions, and how resistance has remained relevant to the two crucial issues in proving rape—nonconsent and force.

The utmost resistance requirement mandated that a potential rape victim must struggle to the utmost of her physical capacity.³⁷ If a woman did not resist the rape to the utmost of her physical capacity, she was not raped. The Wisconsin Supreme Court applied the utmost resistance requirement in the 1906 case of *Brown v. State*. The woman in *Brown* testified:

I tried as hard as I could to get away. I was trying all the time to get away just as hard as I could. I was trying to get up; I pulled at the grass; I screamed as hard as I could, and he told me to shut up, and I didn't, and then he held his hand on my mouth until I was almost strangled.³⁸

The Wisconsin Supreme Court overturned Brown's conviction because the woman had not adequately resisted him. The court stated that the victim only once said, "Let me go," and that her screams were "inarticulate."³⁹ The court concluded that the woman's failure to resist physically with "hands and limbs and pelvic muscles" required the reversal of Brown's conviction.⁴⁰

The utmost resistance requirement eventually came under scrutiny because of its harmful effect on victims. Some states began to require that women exert only "earnest" resistance to establish that an act of sexual

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36. This section derives from *Reviving Resistance*, supra note 30.

37. *Moss v. State*, 45 So. 2d. 125, 126 (Miss. 1950): "[A] mere tactical surrender in the face of assumed superior physical force is not enough . . . resistance must be unto the uttermost."

38. See, e.g., *Brown v. State*, 106 N.W. 536, 537 (Wis. 1906).

39. *Id.* at 538.

40. *Id.*

intercourse was without consent and by force.⁴¹ Less than a handful of states maintain an earnest resistance requirement in their rape statutes.⁴² In rejecting the utmost and earnest resistance requirements, other jurisdictions require only “reasonable” resistance on the part of the rape victim.⁴³ Under this standard, the woman is not required to resist if she reasonably believes that resistance would be useless and would result in serious bodily injury.⁴⁴ Less than ten states retain a reasonable resistance requirement in their statutes today.⁴⁵

Many other states eliminated the formal resistance requirement altogether, concluding that prosecutors should be able to establish that a rape occurred even in the absence of any resistance by the woman. The Model Penal Code has also eliminated resistance as a legal prerequisite for a rape conviction. The majority of U.S. jurisdictions do not mention resistance in the statutory language describing rape. At least six other states explicitly note in their criminal codes that physical resistance is not required to substantiate a rape charge.⁴⁶ Unfortunately, even in these states, the formal elimination of a resistance requirement from codified law has often been a victory more apparent than real. In practice, statutory reform has not obviated the legal significance of physical resistance. A few states’ codes provide insight into how courts approach evidence of resistance, even when it is not formally required. The Iowa Criminal Code, for example, states:

It shall not be necessary to establish physical resistance by a participant in order to establish that an act of sexual abuse was committed by force or against the will of the participant. However, the circumstances surrounding the commission of the act may be considered in determining whether or not the act was done by force or against the will of the other.⁴⁷

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41. See, e.g., Susan Estrich, *Rape*, 95 *Yale L.J.* 1087, 1123–24 (1986).

42. See, e.g., Ala. Code 13A-6-60(8), -61(1) (1994); Or. Rev. Stat. 163.305(1), .375(6) (1990 & Supp. 1996); W. Va. Code 61-8B-1(1)(a), -8B-2(a)-(b)(1) (1992 & Supp. 1997).

43. Estrich, *supra* note 41, at 1131.

44. See, e.g., *Satterwhite v. Commonwealth*, 111 S.E.2d 820 (Va. 1960).

45. *Reviving Resistance*, *supra* note 30, at 966.

46. See, e.g., Alaska Stat. 11.41.470(8)(A) (Michie 1996); Fla. Stat. Ann. 794.011(1)(a) (West 1998); Iowa Code Ann. 709.5 (West 1993); Ky. Rev. Ann. 510.010(2) (Michie 1996); Me. Rev. Stat. Ann. Tit. 17-A §251(E) (West 1993 & Supp. 1997); Ohio Rev. Code Ann. 2907.02(C) (Anderson 1996).

47. Iowa Code Ann. 709.5.

Therefore, although resistance is not required for a conviction, the lack of resistance may determine whether an act of intercourse occurred without consent and by force. Even in the absence of a formal resistance requirement, many courts continue to define force and nonconsent in terms of the woman's resistance. Although women are no longer required to resist to the utmost according to statutory law in any jurisdiction, the working definitions of force and nonconsent still often make a woman's physical resistance a legal necessity.

One reason that only 13 percent of rape victims physically resist their sexual attackers⁴⁸ is that they have been warned that fighting back will result in their own serious bodily injury or death. A number of rape victims have testified in rape trials that they had heard and believed this warning. As one rape victim said: "I remember talking with people about rape and they always said not to resist . . . that a female could be killed, beaten, or mutilated. I didn't want that to happen."⁴⁹ Many police departments have explicitly discouraged women from active, physical resistance, and instead encouraged women to employ "passive resistance" and to do "what you were taught to do as girls growing up."⁵⁰

For women to do what they were taught to do as girls—to remain passive in the face of a sexual attack—all but ensures rape completion. Contrary to popular belief, passivity does not protect women from being raped or from suffering serious physical injuries beyond the scope of the rape itself.⁵¹ Studies indicate that, because rapists seek to perpetrate harm rather than to be harmed, they can be deterred by a woman's active, physical resistance.⁵² If a woman fights back and injures the rapist, he may also choose not to assault another woman again. Resistance can thus deter rape both specifically and generally. In addition to helping to deter rape, active resistance may decrease the psychological damage a woman experiences

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48. Bureau of Justice Statistics, *Highlights from 20 Years of Surveying Crime Victims* 30 (1993).

49. Ann Burgess & Lynda Holmstrom, *Coping Behavior of the Rape Victim*, 133 *Am. J. Psychiatry* 413, 416 (1976): quoting rape victim.

50. Nancy Gager & Cathleen Schurr, *Sexual Assault: Confronting Rape in America* 65 (1976): quoting police officer from Washington, D.C.

51. Py Bateman, *Let's Get Out from Between the Rock and the Hard Place*, 1 *J. Interpersonal Violence* 111 (1986).

52. Gary Kleck & Susan Sayles, *Rape and Resistance*, 37 *Soc. Probs.* 149 (1990).

from sexual attack, even if the rape is completed.⁵³ Women who fight back blame themselves less for having been raped.⁵⁴ They are less depressed and less suicidal afterward, and ultimately, they recover from the trauma of rape more quickly.⁵⁵

A rape victim's resistance to a sexual attack should not be required by rape law, but rape reform cannot stop there. The wisdom of the common law is that, where present, a woman's resistance expresses much about whether an act of sexual intercourse occurs without consent and by force. The folly of the common law is the notion that a woman's resistance should be evaluated against an ideal standard. Women, like men, react in unpredictable ways under conditions of psychological and physical abuse. A woman's actions during the trauma of sexual attack cannot be fairly measured against any model of behavior.

The solution is that resistance cannot be necessary to obtain a conviction, but it should be sufficient. A woman's verbal or physical resistance should each be sufficient to prove nonconsent and force in a rape prosecution. The law should value women's verbal and physical resistance without penalizing those women who, for any number of reasons, do not resist. This new law would break cleanly from a history of judging women's resistance against an ideal standard.

IV. CHASTITY REQUIREMENT⁵⁶

The early English common law of rape focused on lost virginity. Recall that Henrici de Bracton explained:

When therefore a virgin has been so deflowered and overpowered against the peace of the lord the King, forthwith and whilst the act is fresh, she ought repair with hue and cry to the neighboring vills, and there display to

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53. Reviving Resistance, *supra* note 30, at 987–90.

54. Grace Galliano et al., Victim Reactions During Rape/Sexual Assault: A Preliminary Study of the Immobility Response and its Correlates, in Patricia Eastaale ed., *Without Consent: Confronting Adult Sexual Violence* 108 (1993).

55. Bonnie L. Katz & Martha R. Burt, Self Blame in Recovery from Rape, in Ann Wolbert Burgess ed., *Rape and Sexual Assault II*, passim (1988).

56. This section derives from a previously published article by this author: From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law, 70 *Geo. Wash. L. Rev.* 51 (2002) [hereinafter Chastity Requirement].

honest men the injury done to her, the blood and her dress stained with blood, and the tearing of her dress, and so she ought to go to the provost of the hundred and to the searjeant of the lord the King, and to the coroners and to the viscount and make her appeal at the first county court.

At trial, the loss of the complainant's virginity remained a key issue. In the case of the gang rape, for example, punishment of the first man who raped a virgin differed from that meted out to the second or third man. The rule was explained thusly: "to deflower a virgin and to have connection with her after she has been deflowered, the same punishment does not follow each act."⁵⁷

Even after a focus on virginity waned, rape law traditionally insisted that the sexual history of a woman who alleged that she was raped was relevant to the truth of her allegation.⁵⁸ A chaste woman was considered more likely to have resisted the defendant's sexual advances and to have lodged a legitimate claim of rape.⁵⁹ By contrast, an unchaste woman was considered more likely to have succumbed willingly to the defendant's sexual advances and to have lied about it later.⁶⁰ Courts presumed that if a woman was unchaste, she had broken societal mores already and so was significantly more likely to continue to defy those mores by lying as a witness under oath.⁶¹ Embedded within rape law, therefore, was an informal, though powerful, normative command that women must maintain an ideal of sexual abstinence to obtain legal protection, an implicit chastity requirement.

This chastity requirement derived from a distorted normative vision of consent to sexual intercourse that was ingrained in rape law. Historically, rape law portrayed consent to sexual intercourse as a kind of temporally unconstrained permission that could be imprecise regarding act and even transferable to other people. Consent to sexual intercourse under certain circumstances lacked temporal constraints: at common law, a woman could

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57. Bracton, *supra* note 11, at 481–93.

58. As the Illinois Supreme Court explained in 1954, "In order to show the probability of consent, the general reputation of prosecutrix for immorality and unchastity was of extreme importance and may be shown. The underlying thought is that it is more probable that an unchaste woman would assent to such an act than a virtuous woman." *People v. Fryman*, 22 N.E.2d 573, 576 (Ill. 1954).

59. Chastity Requirement, *supra* note 56, at 69–80.

60. *Id.*

61. Leon Lerwin, "Unchaste Character," Ideology, and the California Rape Evidence Laws, 54 S. Cal. L. Rev. 35, 46 (1980): noting theory that "a moral flaw in one area of her character (sexual laxity) reflected on other aspects of her character (e.g., honesty) as well."

not accuse her husband of raping her. Vows given at the marital altar meant that a woman legally consented to her husband's sexual advances for the rest of her life.⁶² In other words, once a woman lost her chastity to her husband, his sexual transgressions against her were no longer rape.

Consent was also often thought to be imprecise as to act: consent to nonpenetrative sexual intimacies with a man meant functional consent to sexual intercourse with him. Once a woman had engaged in other sexual behavior with the defendant, courts became sympathetic with the argument that he had every reason to believe that she consented to sexual intercourse with him. As the Iowa Supreme Court put it in 1911, a complainant's previous "voluntary sexual relations with the defendant, may and should have been considered as substantive proof of the fact that, whatever the act done, it was with the consent of the prosecutrix."⁶³ Consent was also, in practice and effect, transferable to other parties: If a woman consented to sexual intercourse with men to whom she was not married, she was deemed indiscriminate in her sexual life. As a result, her sexual consent lost a differentiated and unique nature, and she was considered to have functionally consented to sex with others.

In practice, a rape defendant was able to question a complainant in detail about her prior sexual behavior, looking for evidence that she failed to personify a model of sexual modesty. These questions allowed the defendant to suggest that the complainant was routinely unchaste and "asking for it" on the night in question. Questions included: "Isn't it true that you have acted lewdly with other men in the late hours at bars when you were in a drunken state?"⁶⁴ "Isn't it true that you have been known to kiss men at parties?"⁶⁵ "Isn't it true that you have had sexual intercourse many times before with a number of different men?"⁶⁶ Having been unchaste with other men before was enough to suggest functional consent to sexual intercourse with the defendant himself.

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62. Nancy Cott, *Public Vows: A History of Marriage and the Nation* 160–61 (2000).

63. *State v. Johnson*, 133 N.W. 115, 116 (Iowa 1911).

64. *Frady v. State*, 90 S.E. 2d 664, 665 (Ga. 1955): "[Defense] counsel [will] be permitted to cross-examine her thoroughly as to any prior act of lewdness with the accused and with other men."

65. *Satterwhite v. State*, 23 S.W. 2d 356, 361 (Tex. Crim. App. 1929): asking complainant about kissing men and attending parties with alcohol.

66. *People v. Biescar*, 275 P. 851, 854 (Cal. Dist. Ct. App. 1929): holding that cross-examination of a complainant about sexual intercourse with other men was appropriate.

This traditional conception of consent to sexual intercourse—temporally unconstrained permission that was nonspecific as to act and transferable to others—shaped the chastity requirement in rape law. The law often required a woman to be sexually virtuous, engaging in no significant sexual behavior outside the scope of marriage, before it would protect her if she were raped (by someone other than her husband). Women heard the rules: If you want the criminal law to vindicate you if you are raped, you better have led an unsullied sexual life. By having been unchaste with the defendant or others before, you assumed the risk that men would sexually violate you.

About a quarter of a century ago, rape shield laws emerged on the legal landscape to curtail the excesses of the chastity requirement. They circumscribed defendants' abilities to cross-examine rape complainants about their sexual histories and to proffer evidence on the same matter. In the late 1970s and early 1980s, almost all jurisdictions in the United States adopted some form of rape shield statute. Legislators concluded that it was illogical to assume that the complainant consented to sexual intercourse with the defendant, or was more likely to lie under oath, simply because she had previously consented to sexual intercourse with someone else.

Rape shield laws, however, have failed to protect women fully from the harsh restraints of the chastity requirement. Although most rape shield laws appear to bar the admission of a rape complainant's sexual history except under limited and carefully defined circumstances, their exceptions routinely gut the protection they purport to offer. For example, U.S. Federal Rule of Evidence 412 states that evidence to prove a rape complainant's "other sexual behavior" or "sexual predisposition" is inadmissible, except: (1) when it is offered "to prove that a person other than the accused was the source of semen, injury or other physical evidence," (2) when it is offered to prove consent and it consists of "specific instances of sexual behavior by the alleged victim with respect to the person accused," or (3) when the exclusion of the evidence "would violate the constitutional rights of the defendant."⁶⁷ The first exception—the admission of evidence to prove that a person other than the accused is the source of semen or injury—is crucial because it may explain the physical evidence of sexual penetration or force had another source other than the defendant.

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67. Fed. R. Evid. 412(b)(1)(C).

However, the second and third exceptions to the federal shield (and to analogous state shields), are not appropriate, as they render the armor defective. The second exception—the admission of sexual history with the defendant—cracks the shield because men with whom the complainant has been previously intimate commit 26 percent of all rapes.⁶⁸ The third exception—the admission of evidence when its exclusion would violate the defendant’s constitutional rights—often crumbles what is left of the shield because courts routinely misinterpret and exaggerate the scope of the defendant’s constitutional right to inquire into the complainant’s sexual history, particularly when the complainant is deemed promiscuous with the defendant or others.⁶⁹ Despite the passage of rape shield laws, then, many of the sexual norms behind the chastity requirement continue to control courts’ evaluations of the relevance of a complainant’s sexual history today.

Rape shield laws were designed to protect rape victims from the public exposure of their private sexual lives at trial. What became Federal Rule of Evidence 412, for example, was passed as a bill entitled the “Privacy Protection for Rape Victims Act.”⁷⁰ Floor debates focused on how traumatic it was for women to have to discuss their private sexual lives in public, rather than on the unfairness of measuring rape complainants against a yardstick of sexual morality. A concern for sexual privacy paved the way for courts in the future to look with disdain on those women who fail to keep their sexual lives private. It allows courts today to impose a promiscuity prohibition on those rape complainants who have substantial reputations for sexual activity. Retrograde notions of sexual propriety thereby continue to confound rape cases in which the complainant’s sexual history is disputed.

Rape law has been wrong to help create, perpetuate, and enforce moral judgments on women’s sexual lives. To do so is unrelated to the law’s truth-seeking function. Women deserve to have the criminal law vindicate them when they are raped, even if they have been previously unchaste or promiscuous with the defendant or with others. By engaging in significant sexual behavior, a woman should not have to assume the risk that men will violate

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68. Ronet Bachman & Linda Saltzman, U.S. Department of Justice, *Violence Against Women, Estimates from the Redesigned Survey* 3, 6 (1995).

69. Chastity Requirement, *supra* note 56, at 86–94.

70. 124 Cong. Rec. 36, 256 (1978).

her sexual autonomy. It should not matter whether a woman is a virgin or a so-called “whore” before the law: she deserves to be treated with legal respect, regardless of her sexual past. The law should reject both the ancient chastity requirement and the modern promiscuity prohibition and replace them both with a sexuality license, one that affords women the ability to be sexual without subjecting themselves to negative legal consequences when they are raped.

Foundational to this sexuality license is a better normative vision of consent to sexual intercourse. Consent is specific as to act, temporally constrained, and not transferable to another person. Examples illustrate each of these principles. A woman may choose to engage in numerous acts of sexual intercourse for years, and then pledge to become a “Born-Again Virgin.” A girl may choose to engage in oral sex with her boyfriend, but not vaginal intercourse. A woman may choose to engage in sexual intercourse with four different men, and not the fifth. Consent to sexual intercourse is, therefore, temporally constrained permission that is specific as to act and nontransferable to other people.

I propose a New Rape Shield Law that would admit evidence of the complainant’s sexual conduct and sexual communication with the defendant on the instance in question to shed light on the issue of consent on the instance in question. It would, however, bar direct or opinion evidence of the complainant’s sexual conduct or sexual communication prior or subsequent to the instance in question. This evidentiary ban would include conduct and communication with third parties as well as conduct and communication with the defendant.

There would be three important exceptions to what would otherwise be a general ban. First, like Federal Rule of Evidence 412, evidence that might prove that there is an alternative source for the semen, pregnancy, disease, or injury of the complainant would be admissible under the statute. Second, evidence of prior discussions between the complainant and the defendant regarding how consent will be conveyed between them and evidence of negotiations between the complainant and the defendant regarding specific sexual acts that are at issue would also be admissible. This kind of evidence may illuminate what the complainant consented to on the instance in question as well as what the defendant reasonably believed that she consented to on the instance in question. Third, evidence that might prove that the complainant is biased or had a motive to fabricate a charge of rape would also be admissible under the New Rape Shield Law. Under

the U.S. Constitution, the defendant must be given the opportunity to prove that the complainant is biased.⁷¹ Other than these three exceptions, evidence of a complainant's prior sexual conduct or sexual communication with third parties or with the defendant would be excluded.

This law would decrease substantially defendants' opportunities to encourage the jury to evaluate the complainants' pasts against a model of sexual purity. It would narrow admissible evidence to that which is relevant and nonprejudicial, and thus helps the truth-seeking function of the law.

V. THE MARITAL RAPE EXEMPTION⁷²

At least since the seventeenth century, rape law has included a formal marital rape exemption.⁷³ This exemption meant that men could not be charged with raping their wives, and if they were, marriage provided them with a complete defense. The most enduring justification for the marital rape exemption under English common law was the notion that the marriage contract granted women's ongoing consent to sexual activity with their husbands.

Beginning in the 1970s, feminist reformers in the United States set their sights on this antiquated rape doctrine and worked to eliminate it from law. Many people believe that reformers won the battle against the marital rape exemption. This belief is, unfortunately, incorrect. In the United States, about half the states retain marital immunity in one form or another. Although marital immunity for the specific crime of forcible rape is dead, immunity for other sexual offenses thrives. For example, some states grant marital immunity for sex with a wife who is incapacitated or unconscious and cannot consent.⁷⁴ Other states grant marital immunity for sexual offenses unless requirements such as prompt complaint, extra force,

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71. *Davis v. Alaska*, 415 U.S. 308, 309 (1974).

72. This section derives from a previously published article by this author: Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates, 54 *Hastings L.J.* 1465 (2003).

73. Hale, *supra* note 17, at 629.

74. See, e.g., Alaska Stat. § 11.41.420(a)(3) (Michie 2001): marriage is defense to second degree sexual assault if the victim is incapacitated or unaware the sexual act is being committed.

separation, or divorce are met.⁷⁵ The law still makes it harder to convict men of sexual offenses committed against their wives. In so doing, the law in these jurisdictions degrades married women and affords men who sexually assault their wives an unwarranted preference.

Contrary to popular belief, wife rape tends to be more violent and psychologically damaging than stranger rape. Abolishing the preference that men enjoy when they rape their wives is crucial to redressing the harms caused by wife rape. At a minimum, the feminist reform agenda begun in the 1970s must be completed. The law must eliminate marital immunity that continues to contaminate sexual offense statutes. Because discrimination against married women who are sexually assaulted by their husbands is indefensible, law should provide no favorable treatment to men who sexually assault their wives. Formal neutrality in rape law on the marital status of the complainant and the defendant—affording no preference to married men who rape their wives—is the bare minimum the law must have to claim fairness to women.

However, formal neutrality is not enough. Formal neutrality fails to solve a deeper and more intractable problem. The marital rape exemption did more than merely protect men from being prosecuted for raping their wives. It presaged the devastating impact that a prior sexual relationship between a defendant and a complainant has on a claim of rape today. Substantial bias against sexually active women who are raped by their intimates takes the form of a common but improper inference of consent to the sex alleged to have been rape based solely on the existence of a prior intimate relationship between the parties. The improper inference of ongoing consent in sexual relationships is a doctrinal problem that affects rape by intimates, regardless of the marital status of the parties.

Jurisdictions should adopt a new law on sexual offenses to correct the improper inference of ongoing consent. This new law would cover sexual conduct between the defendant and the complainant in marriage, cohabitation, dating, or other circumstances. The law should indicate that a prior sexual relationship between the parties, whether in marriage, cohabitation, dating, or another context, does not provide the defendant with a defense

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75. See, e.g., Haw. Rev. Stat. § 707–700 (2001) note in 2002 Haw. Laws Act 36 (H.B. 2560) (West 2002): “married” does not include spouses living apart; Kan. Stat. Ann. § 21–3501 (2001): person is not considered spouse if couple is living apart or either spouse has filed for separation or divorce or for relief under protection from abuse act.

to the charged sexual offense. This provision would also declare that the complainant's consent on the instance in question may not be inferred based solely on her consent to the same or different acts with the defendant on other occasions.

Legally declaring that a prior sexual relationship between the defendant and the complainant—in marriage, cohabitation, dating, or other circumstances—shall not be a defense to a sexual offense will not end the occurrence of sexual offenses by intimates. It will, however, end the marriage between an intimate relationship and the improper inference of ongoing consent to sexual intercourse. Because the ideology of ongoing consent has bullied the legal interpretation of intimate relationships in rape cases for generations, such a divorce is long overdue.

CONCLUSION

The historical requirements of prompt complaint, corroboration, cautionary instructions, resistance, and chastity have greatly harmed those raped by acquaintances and intimates. Moreover, the marital rape exemption provided the theoretical underpinnings to two damaging notions: (1) that familiar relationships between the parties mean that rape is not possible, not harmful, or not legally cognizable, and (2) that a woman assumes the risk of sex because of a prior relationship with the defendant. These are devastating notions for acquaintance rape victims. The next generation of rape law reform has to abolish the remnants of the requirements for prompt complaint, corroboration, and cautionary instructions. It has to reformulate the legal import of verbal and physical resistance and allow each to weigh fairly for the complainant without holding her behavior against an ideal standard. It has to enhance rape shield laws to narrow the admissibility of prejudicial evidence of a complainant's sexual history. Finally, it has to create jury instructions that put to rest the assumptions of ongoing consent in marital, intimate, or acquaintance relationships.