

From “Ladies First” to “Asking for It”: Benevolent Sexism in the Maintenance of Rape Culture

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The problem of sexual violence against women has been analyzed with an eye to the causal significance of misogyny, but legal analysis has neglected the role played by other facets of sexism, including ostensibly “benevolent” sexism (or chivalry), in the perpetuation of rape culture, which normalizes this violence. Additionally, discussions of sexual violence often overlook the epidemic of acquaintance rape, although it accounts for the majority of sexual assaults committed. This Comment draws on social psychology and gender theory to posit that benevolent-sexist ideologies construct women as creatures devoid of agency, leading men to routinely presume women’s consent to sexual activity whether or not such consent in fact exists. The legal treatment of women’s rape and sexual harassment claims shows the catastrophic effects of this process as women are relegated cognitively, socially, and legally to a role of passive receptivity—forced to prove an absence of consent as men are taught to assume its presence. This Comment reviews legal proposals to address rape and sexual harassment, some of which have been implemented, and concludes that direct legal reforms alone are insufficient. It asserts that gender norms, and the rigid binary division of gender, must be broken down if the rates at which rape is committed and acquitted are to decrease. It finally

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identifies possible steps that target the root of sexism and rape culture—binary gender differentiation—and concludes that the liberation of queer, trans, and intersex communities is essential to the feminist project of eradicating sexual violence.

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INTRODUCTION

The restaurant is closing. A young woman sits across the table from her date—a man in whom she has no romantic interest but who has been pleasant enough over dinner. He offers to drive her home. She says she would rather take the train. “Oh, no,” he protests. “I can’t let you do that. What if you get raped?” She stares at him quizzically. In an attempt to justify his assessment of the danger, or, bizarrely, to flatter her, he clarifies, “I mean, *I would rape you.*”¹

According to Susan Griffin, “[i]n the system of chivalry, men protect women against men. . . . Indeed, chivalry is an age-old protection racket which *depends for its existence on rape.*”² In this Comment, I will argue that this posited dependence is really a symbiosis: rape culture,³ or the complex of images and ideologies in society that normalize sexual violence, depends on chivalry for its existence. More precisely, it depends on the attendant ideologies that place women on a pedestal and strip them of agency in the process. While the link between rape and misogyny is obvious, the role of ostensibly benevolent sexism⁴ in sexual violence is less intuitive because many see the effects of this modern chivalry as beneficial to women.⁵ While discussions of the relationship between benevolent sexism and rape culture are occurring within social psychology,⁶ they remain largely absent from legal scholarship.⁷

1. This anecdote comes from the account of a personal friend. *See also* Cameron Esposito, “*You’re a good-looking girl . . . I want to attack you,*” A.V. CLUB (Sept. 26, 2014, 12:00 AM), http://www.avclub.com/article/youre-good-looking-girl-i-want-attack-you-209697?utm_source=Twitter&utm_medium=SocialMarketing&utm_campaign=Default:1:Default (describing an experience in which a compliment included a threat of sexual violence).

2. Susan Griffin, *RAPE: THE POLITICS OF CONSCIOUSNESS* 11 (1986) (emphasis added).

3. Rape culture refers to a system of normalized sexual violence. *See generally* *What Is Rape Culture?*, FORCE: UPSETTING RAPE CULTURE, <http://upsettingrapeculture.com/rapeculture.php> (last visited Oct. 20, 2014) (“In a rape culture, people are surrounded with images, language, laws, and other everyday phenomena that validate and perpetuate, rape. Rape culture includes jokes, TV, music, advertising, legal jargon, laws, words and imagery, that make violence against women and sexual coercion seem so normal that people believe that rape is inevitable. Rather than viewing the culture of rape as a problem to change, people in a rape culture think about the persistence of rape as ‘just the way things are.’”).

4. *See* Peter Glick & Susan T. Fiske, *An Ambivalent Alliance: Hostile and Benevolent Sexism as Complementary Justifications for Gender Inequality*, 56 *AM. PSYCHOLOGIST* 109, 109 (2001) [hereinafter *An Ambivalent Alliance*] (defining benevolent sexism as “characterizing women as pure creatures who ought to be protected, supported, and adored and whose love is necessary to make a man complete”).

5. Peter Glick & Susan T. Fiske, *The Ambivalent Sexism Inventory: Differentiating Hostile and Benevolent Sexism*, 70 *J. PERSONALITY & SOC. PSYCHOL.* 491, 510 (1996) [hereinafter *Ambivalent Sexism Inventory*] (noting that benevolent sexist attitudes “are subjectively positive in feeling tone (for the perceiver) and also tend to elicit behaviors typically categorized as prosocial (e.g., helping) or intimacy-seeking” and that “men who are benevolent sexists may actually treat women more favorably than men on many counts (although many women may view this ‘favorable’ treatment as patronizing”).

6. *See, e.g.,* Dominic Abrams et al., *Perceptions of Stranger and Acquaintance Rape: The Role of Benevolent and Hostile Sexism in Victim Blame and Rape Proclivity*, 84 *J. PERSONALITY &*

Most legal proposals addressing rape have focused on changing statutes or procedures to facilitate prosecution, treating rape at the “incident” level rather than as a systemic problem and directing attention to the point after the assault.⁸ This Comment attempts to bridge this interdisciplinary gap. It imports two important themes from social psychology into a legal framework: the treatment of rape as an infection at the social and cultural level rather than a

SOC. PSYCHOL. 111 (2003) (finding that benevolent sexism, unlike hostile sexism, did not predict rape proclivity in men, but benevolent sexism correlated with rape-supportive attitudes, tending to assign blame to victims of acquaintance rape); Kristine M. Chapleau et al., *How Ambivalent Sexism Toward Women and Men Support Rape Myth Acceptance*, 57 SEX ROLES 131 (2007) (finding that hostile sexism as well as the “complementary gender differentiation” component of benevolent sexism are correlated with rape myth acceptance); G. Tendayi Viki & Dominic Abrams, *But She Was Unfaithful: Benevolent Sexism and Reactions to Rape Victims Who Violate Traditional Gender Role Expectations*, 47 SEX ROLES 289 (2002) (finding that participants with indications of high benevolent sexism expressed a greater tendency to blame victims of acquaintance rape when the victim is described as “married”).

7. *But see* Andrew E. Taslitz, *Willfully Blinded: On Date Rape and Self-Deception*, 28 HARV. J.L. & GENDER. 381, 407–08 (2005) [hereinafter *Willfully Blinded*] (defining chivalry as “the three interrelated ideas that women are vulnerable and need men’s protection; that they must in some respects be put on a pedestal and treated with special courtesy; and that they are the physically weaker sex so that violence against them by men is especially awful,” and noting that while “the chivalry norm [is] pernicious because it suggests that women are too weak to compete with men in many fields,” the norm is widespread enough in our culture that men are almost certainly sufficiently aware of it that they should be precluded from asserting a “stupidity” defense to non-consent in acquaintance rape); G. Tendayi Viki et al., *Evaluating Stranger and Acquaintance Rape: The Role of Benevolent Sexism in Perpetrator Blame and Recommended Sentence Length*, 28 LAW & HUM. BEHAV. 295, 301 (2004) (finding that the higher an individual scored in benevolent sexism, the less she or he tended to blame the perpetrator of an acquaintance rape, and the shorter the sentence was that she or he would recommend for that perpetrator); Richard L. Wiener et al., *Perceptions of Sexual Harassment: The Effects of Gender, Legal Standard, and Ambivalent Sexism*, 21 LAW & HUM. BEHAV. 71, 87 (1997) (finding benevolent sexist beliefs to trigger a “protectionist” effect that led individuals high in benevolent sexism to rate instances of sexual harassment as more severe or damaging to the plaintiff under certain conditions).

8. *See, e.g.*, Krista M. Anderson, *Twelve Years Post Morrison: State Civil Remedies and a Proposed Government Subsidy to Incentivize Claims by Rape Survivors*, 36 HARV. J.L. & GENDER 223, 257 (2013) (suggesting the creation of a “Survivor Recovery Subsidy Fund” to help more sexual assault survivors bring civil claims against their assailants); David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1197–99 (1997) (summarizing calls for rape law reform as including renaming of the crime to “sexual assault,” changing the standard for liability to negligence or strict liability, and redefining rape to eliminate the element of force and require affirmative consent; noting that the main goals of reform have been “to encourage reporting of rapes, and to facilitate prosecution of the perpetrators”); Jessica D. Khan, *He Said, She Said, She Said: Why Pennsylvania Should Adopt Federal Rules of Evidence 413 and 414*, 52 VILL. L. REV. 641 (2007) (advocating for the adoption of these Rules to aid in prosecution and conviction of rapists). *But see* Caroline Palmer & Bradley Prowant, *Re-Thinking Minnesota’s Criminal Justice Response to Sexual Violence Using a Prevention Lens*, 39 WM. MITCHELL L. REV. 1584, 1584–85 (2013) (arguing that solutions to sexual violence should be re-framed from the perspective of prevention and that the most effective response would combine after-the-fact intervention with preventative measures such as education); Dana Vetterhoffer, *No Means No: Weakening Sexism in Rape Law by Legitimizing Post-Penetration Rape*, 49 ST. LOUIS U. L.J. 1229 (2005) (arguing that a statutory change that explicitly includes post-penetration rape as rape not only helps to redress rapes that have already happened by encouraging reporting, but may help change attitudes about rape at the societal level as well).

series of disconnected dots, and the knowledge that rape is the product of a multifaceted complex of sexism supported by benevolent as well as hostile ideologies. By arguing for responses to rape that target socialized assumptions about sexuality and gender, this Comment proposes legal and extralegal interventions that combat sexism and sexual violence as deep, systemic problems rather than isolated incidents of discrimination or assault.

This Comment proceeds in four parts. In Part I, I review research on the implicit stereotypes⁹ that drive the association of men with conventionally agentic¹⁰ spheres, such as the workplace, and of women with conventionally non-agentic spheres, such as the home. I also discuss the literature on ambivalent sexism (the combination of misogyny and chivalry—i.e., hostile and benevolent sexism)¹¹ and explain how three intertwined, commonplace systems—gender differentiation, paternalism, and heterosexuality¹²—form the necessary underpinning of ambivalent sexism. I further explore the process of “de-agentification,” or how sexist ideologies and practices reify the association between women and passivity by encouraging men to assume agency on their behalf. In Part II, I provide examples from the media to contend that the de-agentification attendant to benevolent sexism leads to a pattern of men presuming women’s consent to sexual activity.¹³ In Part III, I examine the legal

9. See, e.g., Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945, 949–50 (2006) (explaining that implicit stereotypes are associations between social groups and traits that reside below the level of conscious awareness).

10. Merriam-Webster defines *agency* as “the capacity, condition, or state of acting or exerting power.” *Agency Definition*, MERRIAM-WEBSTER.COM, <http://www.merriam-webster.com/dictionary/agency> (last visited Oct. 20, 2014). Throughout this Comment, *agentic* will be used to characterize individuals and groups that are capable of or engaged in exercising power or autonomy, as well as the domains or activities associated with agentic groups. *De-agentification* (and related forms like *de-agentify*) will refer to the process, either active or passive, of diminishing the agency of a group or an individual.

11. See *An Ambivalent Alliance*, *supra* note 4, at 109 (describing sexism as “ambivalent” inasmuch as it is composed of two seemingly opposite but related varieties of beliefs and behaviors: hostile sexism, which covers conventional misogyny, and benevolent sexism, which entails evaluating women as pure and good but in need of protection).

12. *Ambivalent Sexism Inventory*, *supra* note 5, at 493.

13. I note here that I will speak primarily in this Comment about men and women, and specifically about men as aggressors and women as victims. This focus is not intended to elide the experiences of individuals of nonbinary gender-identification, or of individuals who have experienced patterns of sexual aggression not conforming to this heteronormative model (e.g., sexual pursuit and/or abuse of men by women, or between members of the same gender). Nor does this focus “assume[] heterosexual subordination as the *exclusive* scene of sexuality and gender [and] thus itself become[] a regulatory means for the production and maintenance of gender norms within heterosexuality.” JUDITH BUTLER, UNDOING GENDER 55 (2004) (discussing concerns with the assumptions underlying Catharine MacKinnon’s approach to prohibiting sexual harassment) (emphasis added). Rather, this focus is a result of the fact that much of what I discuss depends on cultural narratives and stereotypes, the content of which is based largely on heteronormative and cisgender categories and relationships. There is certainly the potential for rich exploration of questions of sexualized power dynamics in non-heteronormative and non-cisgender communities, but most direct engagement with that exploration is beyond the scope of this Comment. However, this Comment is written from a perspective that

consequences of ambivalent sexism and women's de-agentification. Specifically, I explain how statutory law and case law presume women's sexual receptivity and thus burden women with proving that sexual harassment was unwelcome¹⁴ or that rape was indeed non-consensual.¹⁵ When women defy the norm of passivity, such as by working in the sex industry, their cases face additional challenges. Finally, I argue that hostility on the parts of prosecutors and jurors to claims of acquaintance rape makes sexual assault by partners, friends, or dates notoriously difficult to prosecute,¹⁶ even though these account for the majority of committed sexual assaults.¹⁷

In Part IV, I consider possible solutions that respond to these problems, which stem from the same forces that support benevolent-sexist ideology and behavior. First reviewing legal responses that other advocates of rape law reform endorse,¹⁸ I then propose several legal and social steps more preventative in nature that aim to conquer rape culture closer to its genesis. I contend that the overarching goal must be to increase acceptance of nonnormative genders and sexualities to undermine binary gender differentiation, which enables both hostile and benevolent sexism to persist.

acknowledges the complexities of gender, and the primary attention given to women and men and heterosexual dynamics is pragmatic rather than reflective of an ideological blind spot.

14. See *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 68 (1986) and the discussion in Part III.A.

15. While this is in one sense merely the normal burden of proof that is required to establish a criminal defendant's guilt, legal scholars have noted that the prosecution of a rape case entails additional, special burdens as well. See, e.g., Bryden & Lengnick, *supra* note 8, at 1195–96 (“Although false reports of rape are no more common than of other crimes, justice system officials are highly skeptical of women who claim to have been raped by acquaintances. . . . Afraid that losing cases will look bad on their records, prosecutors are excessively reluctant to prosecute acquaintance rapists. When they do prosecute, the system puts the defendant rather than the victim on trial. Juries, motivated by the same biases as other participants in the system, often blame the victim and acquit the rapist.”) (citations omitted); Vetterhoffer, *supra* note 8, at 1259 (“The prosecutor [in a rape case] must overcome strong societal biases against rape victims, attempt to keep the victim's sexual history out of evidence, and work with definitions of ‘consent’ and ‘force’ that tend to be pro-rapist. Sexist stereotypes and rape myths often support jury findings that the victim consented.”) (citations omitted).

16. Bryden & Lengnick, *supra* note 8, at 1195–96; Vetterhoffer, *supra* note 8, at 1230 (“Both historically and currently, acquaintance rape law has been chiefly reflective of male standards and perspectives, and has thus greatly favored rapists. Corroboration requirements, resistance requirements, and sexist interpretations of terms like ‘consent’ and ‘force,’ are all prime examples of this phenomenon.”).

17. EDWARD O. LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* 338 (1994) (finding that only 4 percent of women who had experienced forced sexual contact were assaulted by strangers; the rest were by romantic partners, someone the woman knew well, or a mere acquaintance); NAT'L VICTIM CTR. & CRIME VICTIMS RESEARCH CTR., *RAPE IN AMERICA: A REPORT TO THE NATION* 4 (1992) (finding that 22 percent of surveyed rape victims had been attacked by someone they had never seen before or did not know well, while 27 percent were raped by relatives, 19 percent by current or former romantic partners, and 29 percent by other non-relatives like friends or neighbors).

18. See, e.g., Bryden & Lengnick, *supra* note 8; Donald Dripps, *After Rape Law: Will the Turn to Consent Normalize the Prosecution of Sexual Assault?*, 41 AKRON L. REV. 957 (2008); Khan, *supra* note 8; Vetterhoffer, *supra* note 8; *Willfully Blinded*, *supra* note 7.

Restructuring work-family dynamics, comprehensive sex education, the empowering use of sexual images, and advancement of reproductive autonomy all hold promise for transforming the cultural landscape into one that is more egalitarian and consent-aware and less characterized by violence and sexual shame.

I.

LADIES FIRST: A “BENEVOLENT” BIAS

A. Ambivalent Sexism

This section will orient the reader to the mechanisms that underlie rape culture by exploring the concept of “ambivalent sexism,” which is composed of two symbiotic parts: hostile sexism and benevolent sexism.¹⁹ Understanding these different manifestations of sexism is crucial to understanding rape culture because much of the social structure that encourages or allows sexual violence against women is, like benevolent sexism, more subtle than the misogyny that people typically associate with sexism. Revealing the operations of benevolent sexism should lay a foundation for understanding how rape culture persists: what puts women in positions of relatively low agency, and why it appears that they continue to put up with it.

“Ambivalent sexism” refers to the combination of hostile sexism and so-called benevolent sexism—two categories of justifications for gender inequality.²⁰ Hostile sexism is defined as “an adversarial view of gender relations in which women are perceived as seeking to control men, whether through sexuality or feminist ideology.” Benevolent sexism refers to “characterizing women as pure creatures who ought to be protected, supported, and adored and whose love is necessary to make a man complete.”²¹ While at first glance these ideologies seem opposed, the theory of ambivalent sexism posits that they are inextricably connected. Peter Glick and Susan Fiske explain that both benevolent and hostile sexism stem from the same three interrelated sources (gender differentiation, heterosexuality, and paternalism²²), and that hostile sexism depends on benevolent sexism for (the verisimilitude of) legitimacy.²³

Understanding hostile and benevolent sexism as the twin products of a common set of causes suggests that the same underlying premises justify both arms of systemic gender inequality. The first source, gender differentiation, or the notion that “men are men” and “women are women” and never the twain

19. *An Ambivalent Alliance*, *supra* note 4, at 109.

20. *Id.*

21. *Id.*

22. *Ambivalent Sexism Inventory*, *supra* note 5, at 493.

23. *An Ambivalent Alliance*, *supra* note 4, at 114–15.

shall meet,²⁴ is responsible for the social prescription that each group must stay within certain bounds of stereotypical behavior.²⁵ While these norms can be somewhat flexible (for example, a young girl might behave as a “tomboy” with few social consequences), they can also be incredibly coercive.²⁶ This sorting

24. Of course, this is empirically unsound: those with transgender, genderqueer, intersex, or otherwise nonbinary or gender non-conforming identities are living proof that this rigid conceptualization of gender is short-sighted. See generally BUTLER, *supra* note 13, for a thorough and prescient discussion of how and why members of these communities claim space for bodies and identities that transcend the binary norm.

25. See, e.g., Elizabeth Dutro, “*But That’s a Girls’ Book!*” *Exploring Gender Boundaries in Children’s Reading Practices*, 55 THE READING TCHR. 376, 377 (2001) (“[Gender] boundaries are one example of how the male-female dualism functions . . . [O]pposing notions of femininity and masculinity are one way that humans construct and organize the world. These opposing ideas include weak/strong, passive/active, emotional/stoic, and nurturing/detached . . . These stereotypes become gender ‘myths’ or expectations that are risky to challenge.”). It is worth noting, however, that under an intersectional analysis, gender norms, the ability to adhere to those norms, and the responses to deviations therefrom are likely to differ for men and women according to race, class, and other variables.

“Because ideological and descriptive definitions of patriarchy are usually premised upon white female experiences, feminists . . . may make the mistake of assuming that since the role of Black women in the family and in other Black institutions does not always resemble the familiar manifestations of patriarchy in the white community, Black women are somehow exempt from patriarchal norms. For example, Black women have traditionally worked outside the home in numbers far exceeding the labor participation of white women. An analysis of patriarchy that highlights the history of white women’s exclusion from the workplace might permit the inference that Black women have not been burdened by this particular gender-based expectation. Yet the very fact that Black women must work conflicts with norms that women should not . . . Thus, Black women are burdened not only because they often have to take on responsibilities that are not traditionally female but, moreover, their assumption of these roles is sometimes interpreted within the Black community as either Black women’s failure to live up to such norms or as another manifestation of racism’s scourge upon the Black community.” See, e.g., Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, U. CHI. LEGAL F. 139, 146–47 (1989) (citations omitted).

26. See Paul Kivel, “*The ‘Act Like A Man’ Box*,” in MEN’S LIVES (Michael S. Kimmel et al., eds., 2007) at 148–49 (discussing the coercive norms of masculine behavior as a “box” that boys learn they must not step outside of, and listing the verbally and physically abusive tactics employed to keep boys within the “box”); see also BUTLER, *supra* note 13, at 55 (discussing the consequences for trying to transverse or transcend the gender binary altogether: “The social punishments that follow upon transgressions of gender include the surgical correction of intersexed persons, the medical and psychiatric pathologization . . . of ‘gender dysphoric’ people, the harassment of gender-troubled persons on the street or in the workplace, employment discrimination, and violence.”); BUTLER, *supra* note 13, at 1 (noting that “one does not ‘do’ one’s gender alone. One is always ‘doing’ with or for another, even if the other is only imaginary.”); Sandra Lee Bartky, *Foucault, Femininity, and the Modernization of Patriarchal Power*, in THE POLITICS OF WOMEN’S BODIES: SEXUALITY, APPEARANCE, AND BEHAVIOR 25, 27–28 (Rose Weitz ed., 1998) (extending Foucault’s notion of self-surveillance as the genesis of “docile bodies” to women, emphasizing that “disciplinary practices” act differently on men and women to produce women’s bodies as even more “docile” than men’s; exploring the effects of “three categories of such practices: those that aim to produce a body of a certain size and general configuration; those that bring forth from this body a specific repertoire of gestures, postures, and movements; and those that are directed toward the display of this body as an ornamented surface . . . on female identity and subjectivity.”).

of women and men into two different boxes comes with both punishments and rewards to incentivize adherence to the socially prescribed rules for each gender.²⁷ Thus, the process of gender differentiation generates both "benevolent" and "hostile" effects: on the one hand, reverent attitudes toward women as pure and good, and on the other, the violence or abandonment that can occur when a woman abdicates her status as a "lady" by stepping outside the lines of proper deportment.²⁸

The other two causes that Glick and Fiske enumerate function similarly. Normative heterosexuality relies on the process of complementary gender differentiation for its existence and in turn "bequeaths" women to men as prizes to be treasured (under benevolent sexism) and as chattel to be used (under hostile sexism).²⁹ Finally, paternalism, like gender differentiation, takes two divergent forms, in one context urging the protection of women, and in another justifying their domination by men.³⁰ Understanding the ambivalent nature of sexism and how its seemingly opposing components stem from the same set of assumptions is vital to comprehending the way that rape culture finds purchase atop premises that ostensibly favor and protect women as a class.

As Glick and Fiske note, it is precisely because of its insidiousness that benevolent sexism is as dangerous as misogyny.³¹ Its facial innocence allows it to legitimate structures of gender inequality that might be overthrown if they entailed only the "stick" of hostile sexism without the corresponding carrot.³² In fact, in countries in which men exhibit the highest measures of hostile sexism, women's endorsement of benevolent sexism approaches that of men, in some cases even surpassing it.³³ Glick and Fiske postulated that this is a system-justification measure, allowing women in these countries to continue to tolerate a severely sexist society through finding a corresponding benefit to

27. See *An Ambivalent Alliance*, *supra* note 4, at 113 ("[B]enevolent sexism is used to reward women who embrace conventional gender roles and power relations, whereas hostile sexism punishes women who challenge the status quo."); Kivel, *supra* note 26, at 149–50 (in addition to outlining punishments for inadequately conforming to masculine norms, noting that staying inside the "box" comes with the perceived reward of solidarity with other, often more powerful, men).

28. See Chapleau et al., *supra* note 6, at 135 (finding that "[c]omplementary gender differentiation, the belief that women are refined ladies, may translate into the perception that women who violate this stereotype are partially responsible for making themselves vulnerable to sexual attack"); see also Abrams et al., *supra* note 6, at 120 (finding that the belief that victims who behave in ways that are "unladylike" lose the right to chivalrous protection mediates the link between benevolent sexism and rape-supportive attitudes).

29. *Ambivalent Sexism Inventory*, *supra* note 5, at 493.

30. See, e.g., *An Ambivalent Alliance*, *supra* note 4, at 111 (citing M. Moya, et al., *Women's Reactions to Hostile and Benevolent Sexist Situations*, presented at The Twenty-Second General Meeting of the European Association of Experimental Social Psychology, Oxford, England (July 1999)) (discussing a study in which women participants responded to scenarios in which men restricted their agency, such as by denying her a promotion or forbidding her from going out at night, offering either a benevolent or a hostile justification).

31. *An Ambivalent Alliance*, *supra* note 4, at 114–15.

32. *Id.* at 109.

33. *Id.* at 115.

reap.³⁴ Thus, the persistence of systemic gender inequality with a hostile component depends upon the expression of benevolent sexism. Furthermore, as benevolent sexism still requires the differentiation of women from men, it fosters the reification of gendered associations that tend to decrease the perception of women as sexually empowered agents, or even human.³⁵

The law's failure to take account of the interdependence of the two incarnations of sexism, or of the hostile flavor of the assumptions smuggled in under the guise of benevolence, has made for a pathetic system for preventing and redressing sexual violence.³⁶ By better mapping the path from these gendered assumptions to the victimization of women, lawmakers may realize that the "good intentions" underpinning chivalrous ideology indeed pave a road to hell. Better able to trace rape culture back to its source, they may be more capable of treating the ill. Because benevolent sexism on its face can seem deceptively favorable to women,³⁷ Glick and Fiske conclude that "[benevolent sexism] serves as a crucial complement to hostile sexism that helps to pacify women's resistance to societal gender inequality."³⁸ I postulate that benevolent sexism is likewise hostile sexism's "crucial complement" in the perpetuation of rape culture through the cognitive construction of women's de-agentified status.

B. Gender and Agency

The ideologies of benevolent sexism depend on casting women as a low-agency group relative to men.³⁹ Social psychological research shows that we associate men more strongly with agentic qualities, such as leadership, while we perceive women as characterized by "communal" traits, such as supportiveness.⁴⁰ One example of how these associations play out in a real-

34. *Id.*

35. See discussion *infra* Part I.B.2 regarding implicit dehumanization.

36. Viki et al., *supra* note 7, at 301 (discussing the association between benevolent sexist attitudes and the tendency to absolve sexual assault perpetrators of blame and recommend shorter sentences). Considering the stronger link from hostile sexism to stranger rape, on the one hand, and benevolent sexism to acquaintance rape, on the other (discussed *infra* Section III(B)(1)), the failure of the law to differentiate between stranger rape and acquaintance rape may be another part of this problem. See Bryden & Lengnick, *supra* note 8, at 1201–02 (noting that while there is no legal distinction between acquaintance and stranger rapes, in practice any rape accusation that differs from the "traditional" account of rape by a "knife-wielding stranger" is met with skepticism by the criminal justice system); Vetterhoffer, *supra* note 8, at 1248, 1259–60 (explaining that enacting rape statutes that explicitly encompass types of acquaintance rape is an important step in undermining rape myths that normalize stranger rape as the only type of "real" rape).

37. See *supra* note 5 and accompanying text.

38. *An Ambivalent Alliance*, *supra* note 4, at 109.

39. See *id.* (noting that benevolent sexism entails seeing women as deserving adoration but also as needing protection).

40. Nilanjana Dasgupta & Shaki Asgari, *Seeing is Believing: Exposure to Counterstereotypic Women Leaders and its Effect on the Malleability of Automatic Gender Stereotyping*, 40 J. EXPERIMENTAL SOC. PSYCHOL. 642, 645–47 (2004) (finding that participants in an Implicit

world realm is the ascription of communal qualities to women to justify their confinement to the home, while simultaneously viewing men as high-agency and thus more suited to the realm of paid work.⁴¹ It is through this type of complementary role differentiation that the corresponding differences in qualities take root and gain legitimacy. For instance, when women see household labor as an opportunity to express their “essential natures” as

Association Test were quicker to associate men with leadership and women with support in the control condition). For an explanation of the Implicit Association Test (IAT) and the theoretical grounding of implicit bias research, see generally Anthony G. Greenwald & Linda Hamilton Krieger, *Implicit Bias: Scientific Foundations*, 94 CALIF. L. REV. 945 (2006) (explaining that implicit stereotypes are associations between social groups and traits that reside below the level of conscious awareness; explaining how the IAT functions to test the extent to which participants hold these stereotypes).

41. See Joan Acker, *Gender, Capitalism, and Globalization*, 30 CRITICAL SOC. 17, 23–24 (2004) (explaining that “[a]s European and then American capital established dominance through colonization, empire, and today’s globalization, one of the cultural/structural forms embedded in that dominance has been the identification of the male/masculine with production in the money economy and the identification of the female/feminine with reproduction and the domestic The gender-coded separation between production and reproduction became, over time, an underlying principle in the conceptual and actual physical organization of work . . . and the ways that groups and individuals constructed meanings and identities. For example, the rules and expectations of ordinary capitalist workplaces are built on hidden assumptions about a separation of production and reproduction This gendered organization of social life provides the grounds for the reproduction of different and unequal lives of women and men, and for the reproduction of images and ideologies that support difference and inequality, long after the ideals and actualities of separate spheres for some have been weakened or, in some cases, have disappeared altogether.”); *Ambivalent Sexism Inventory*, *supra* note 5, at 493 (“Just as the traditional division of labor between the sexes creates complementary roles (men working outside the home, women within), the traits associated with these roles (and hence with each sex) are viewed as complementary.”); Brian A. Nosek et al., *Harvesting Implicit Group Attitudes and Beliefs From a Demonstration Website*, 6 GROUP DYNAMICS: THEORY, RES., & PRAC. 101, 108–09 (2002) (finding that IAT participants showed a “robust” association between men and the workplace and between women and the home). Note, however, that the IAT discussed in Nosek et al. did not account for race, and because of the very different relationship that Black women have to the workplace and the home as a result of slavery and later discrimination, the observations of Acker and Glick and Fiske will not apply to Black women—or other women of color—in quite the same way as they apply to white women. See Crenshaw, *supra* note 25 (urging caution when applying analysis of gendered issues to women of color, since without explicit use of an “intersectional” lens, analysis is likely to center on white women); Adrienne D. Davis, *Slavery and the Roots of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 457, 463, 465, 468 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004) (noting that in the time of slavery, there was no differentiation between “work” and “home” for enslaved Black women; additionally, “[a]n enslaved woman might be socially constructed as ‘masculine’ for the purposes of productive work and brutal physical punishment, but very much a woman for the purposes of reproductive and sexual exploitation. But, while white men sexually abused them as women, they refused to impute to them the ‘femininity’ ascribed to white women. . . . From the perspective of enslaved women, paternalism failed to capture the dynamics of the plantation. Nor was anyone trying to drive them from ‘masculine’ market work into ‘feminine’ domestic labor. The plantation was not susceptible to separate spheres logic, nor were enslaved women’s lives.”). For discussions of the relationships that other women of color have to the workplace, see YEN LE ESPIRITU, *ASIAN AMERICAN WOMEN AND MEN: LABOR, LAWS, AND LOVE* (2d ed. 2008); Susan E. Moreno & Chandra Muller, *Latinas in the U.S. Labor Force*, in WOMEN AND WORK: A HANDBOOK 38, 39 (Paula J. Dubeck et al. eds., 1996).

women,⁴² it is clear that the enactment of gender roles has become a vehicle for the reification of gender norms. When low-agency traits come to be seen as inherently feminine, high-agency conduct by men, whether aggression or protection, likewise seems natural and justified.

This Comment argues that men's ambivalent (aggressive and protective) treatment of women underpins rape culture by establishing a paradigm wherein men assume agency on behalf of women. Perhaps the starkest illustration of this paradigm is provided by a social psychology study assessing the extent to which men view women as "dehumanized"—measured by their proclivity for associating women with animals and objects.⁴³ While the study, perhaps encouragingly, did not find a significant association between women and animals overall, it did find that men who *do* associate women with animals are more likely to report willingness to rape or sexually harass a woman. They are also more likely to express victim-blaming or otherwise disparaging attitudes toward female rape survivors.⁴⁴ Likewise, while participants did not generally show a tendency to associate women with objects, when men did harbor this association, they also reported a greater willingness to engage in rape.⁴⁵ The study also found the association between women and animals (but not between women and objects) to correlate with a "[r]ape-behavioral analogue" that tested men's willingness to expose women to sexually violent photographs.⁴⁶

These results show that the very behaviors and attitudes that perpetuate rape culture are related to the dehumanization of women. Dehumanization, more than simple objectification, entails treating women "as a tool for men's own purposes," "as if there is no need to show concern for women's feelings and experiences," and "as if it is permissible to damage women."⁴⁷ If women's dehumanization relies at least in part on their de-agentification, and benevolent sexism facilitates this process through paternalistic ideologies, then benevolent sexism is culpable alongside hostile sexism for the systematic victimization of women by rape and sexual harassment.

42. Candace West & Don H. Zimmerman, *Doing Gender*, 1 GENDER & SOC'Y 125, 143–44 (1987).

43. Laurie A. Rudman & Kris Mescher, *Of Animals and Objects: Men's Implicit Dehumanization of Women and Likelihood of Sexual Aggression*, PERSONALITY & SOC. PSYCHOL. BULL. 1, 3, 6 (2012). Note that this study also relies on Implicit Association Tests (IAT) to generate its data. See Greenwald & Krieger, *supra* note 40.

44. *Id.* at 4–5.

45. *Id.* at 8.

46. *Id.* at 7–8.

47. Rudman & Mescher, *supra* note 43, at 10.

II.

“I KNOW YOU WANT IT”: HOW BENEVOLENT SEXISM CONSTRUCTS CONSENT

*A. The Opiate of the Disempowered*⁴⁸

While Glick and Fiske show that embracing benevolent sexism “pacifies” women in countries with particularly high rates of hostile sexism, thereby rendering them especially vulnerable to its effects,⁴⁹ benevolent-sexist ideologies exert more concrete negative effects as well. Two studies have identified a link between benevolent sexism and a loss of professional and personal power. The first found that women are more likely to interpret sexism in professional contexts (such as losing a promotion opportunity to a less qualified man) as well as personal contexts (such as being forbidden by a husband from going out at night) as less serious when the hypothetical perpetrator justified the action from a protective angle rather than a hostile one.⁵⁰ In other words, women are more complacent in losing their professional mobility and personal freedom when the ideology of benevolent sexism is invoked. Additionally, the study found that women without paid employment exhibited the highest endorsement of benevolent sexism *and* were more likely to forgive overtly hostile acts of sexism perpetrated by a husband⁵¹—suggesting that for women whose freedom is already imperiled by the condition of economic dependency, agency is further stripped away as they tolerate marital abuse that they might otherwise feel empowered to reject.

The second study uncovered a phenomenon termed the “glass slipper effect,” whereby young women who demonstrate implicit associations between their romantic partners and fantasy tropes (e.g., Prince Charming or “protector”) tend to hold less ambitious career aspirations, preferring to seek lower-paying jobs that would require less education in the future.⁵² This linkage between benevolent sexism and economic dependency could flow in either direction: women with lower career aspirations (or more limited prospects) tend to romanticize their partners in accordance with benevolent sexist stereotypes like the “knight in shining armor,” perhaps preparing to look to them for support; or women who see their male partners in a light consistent

48. See Karl Marx, *Introduction to a Contribution to the Critique of Hegel’s Philosophy of Right*, DEUTSCH-FRANZÖSISCHE JARBÜCHER, Feb. 1844, at 72 (publishing the introduction to Marx’s planned but unwritten work, in which the quotation “Die Religion . . . ist das Opium des Volkes” appears (often translated as “Religion is the opiate of the masses”)).

49. *An Ambivalent Alliance*, *supra* note 4, at 114–15.

50. *Id.* at 111 (citing M. Moya et al., *Women’s Reactions to Hostile and Benevolent Sexist Situations*, Address Before The Twenty-Second General Meeting of the European Association of Experimental Social Psychology, Oxford, England (July 1999)).

51. *Id.* at 114–15.

52. Laurie A. Rudman & Jessica B. Heppen, *Implicit Romantic Fantasies and Women’s Interest in Personal Power: A Glass Slipper Effect?*, 29 PERSONALITY & SOC. PSYCHOL. BULL. 1357, 1359, 1367 (2003).

with these stereotypes willingly plunge themselves into financial reliance on those partners, limiting their own potential in the process.⁵³

B. Bias and Benevolence in the Media

While the studies above focused on the direct effects of benevolent sexism in the context of economic and professional life, popular culture and the media are suffused with examples of benevolent—as well as hostile—sexism working to symbolically deprive women of sexual agency. Researchers Max Weisbuch and Nalini Ambady explored the effects of media consumption on viewers' attitudes. They found that exposure to television clips where nonverbal behaviors indicated a bias in favor of slender female characters predicted more favorable reported attitudes toward slim women after watching.⁵⁴ Moreover, increased exposure to such biased media was associated with more dramatic indications of pro-slim, anti-fat bias for individual participants.⁵⁵ In a different experiment, participants showed greater racial bias after viewing television clips that depicted white characters exhibiting unfriendly non-verbal behavior toward black characters.⁵⁶ Essentially, cultural attitudes are transmitted in efficient, regular doses through media such as television and movies, and the more we watch, the more we learn to express those same attitudes ourselves. It follows that encountering the deluge of gendered images and narratives present in the media—in advertising, film and television, music, books, and more—leads to the same process of bias-reification in terms of complementary gender differentiation, heterosexual romance, and paternalism (Glick and Fiske's three legs of benevolent sexism⁵⁷). In particular, Hollywood's romantic tropes reinforce the perception that men's benevolently sexist treatment of women is desirable despite its disempowering effects.

The de-agentification of women in the media manifests in common romantic tropes that, upon closer examination, are more sinister than sweet. When a woman appears in a sexual or romantic context, the denial of her agency imputes her consent to whatever her male interactional partner does. Think of movies in which a woman is led, blind-folded, to a surprise destination of a man's choosing, or the numerous instances in which a male character cuts off the speech of a female character by initiating a kiss—even if what she was in the middle of saying implied she did not want the contact.⁵⁸

53. *See id.*

54. Max Weisbuch & Nalini Ambady, *Unspoken Cultural Influence: Exposure to and Influence of Nonverbal Bias*, 96 J. PERSONALITY & SOC. PSYCHOL. 1104, 1109–10 (2009).

55. *Id.*

56. Max Weisbuch et al., *The Subtle Transmission of Race Bias Via Televised Nonverbal Behavior*, 326 SCL 1711, 1711 (2009).

57. *Ambivalent Sexism Inventory*, *supra* note 5, at 493.

58. “Shut Up” Kiss, TV TROPES, <http://tvtropes.org/pmwiki/pmwiki.php/Main/ShutUpKiss> (last visited Oct. 22, 2014) (labeling this trope the “shut up kiss” and citing examples from arts and

This skewed perception of romance also appears in the popular holiday duet "Baby, It's Cold Outside." The song features a man "seducing" a woman who is trying emphatically to leave his home, countering her objections and preventing her exit—constantly denying her agency against a backdrop of choreography that hints he is merely coaxing a woman who is playing coy.⁵⁹ This narrative relies on an ideology of consent wherein he knows best what she wants—in spite of her objections—in order to construct the song's tension as flirtatious and sexy rather than as threatening and coercive.

These themes also appear in more obviously problematic contexts. For example, Robin Thicke's 2013 hit song "Blurred Lines" features a man narrating his pursuit of a "good girl" who has tried to evade his advances. The singer repeats again and again, "I know you want it."⁶⁰ Nothing she has said has given him this "knowledge." In fact, the audience gets a glimpse of the woman's true feelings when she appears in the video with a small stop sign balanced on her nude behind,⁶¹ but the singer ignores her literal signs of reservation, or treats them playfully rather than seriously. Under the ideology of consent that takes over in the absence of women's agency, the narrator does not need to consider his target's indications to the contrary in drawing his conclusion that she "want[s] it."

Even more explicitly, *Real Housewives* star Melissa Gorga allowed her husband to interject the following marital advice in her 2013 book, *Love Italian Style*: "Men, I know you think your woman isn't the type who wants to be taken, but trust me, she is . . . *If your wife says 'no,' turn her around, and rip her clothes off.* She wants to be dominated."⁶² Here, a woman's clearly enunciated "no" (even more unmistakable than the signs of reservation in "Blurred Lines") is urged to be deliberately ignored because it, apparently, means the opposite—and Gorga's male readers now possess the decoder ring so that they can feel confident in their own interpretive prowess. These artifacts of current American culture show in painful clarity an ideology that locates a woman's consent to sexual activity in the mind of the man pursuing her and not in her own communicative attempts.

media as disparate as Han and Leia in *Star Wars* and Petruchio and Katharina in *The Taming of the Shrew*).

59. Stephen Deusner, *Is "Baby, It's Cold Outside" a Date-Rape Anthem?*, SALON (Dec. 10, 2012, 1:14 PM), available at http://www.salon.com/2012/12/10/is_baby_its_cold_outside_a_date_rape_anthem/.

60. Jimmy Johnson, *Robin Thicke's Blurred Vision: A Critique of a Rape Anthem in Two Parts*, TRUTHOUT (Aug. 4, 2013), <http://www.truth-out.org/opinion/item/17847-robin-thickes-blurred-vision-a-critique-of-a-rape-anthem-in-two-parts>.

61. *Id.*

62. Tracie Egan Morrissey, *"Real Housewife" Melissa Gorga's New Book Advocates Marital Rape*, JEZEBEL (Sept. 24, 2013, 1:00 PM), <http://jezebel.com/real-housewife-melissa-gorgas-new-book-advocates-mar-1371722729> (emphasis added).

C. Dating, De-Agentified

These attitudes about consent permeate “pick-up artist” (PUA) culture, a community of men who purport to follow the teachings of evolutionary psychology to achieve sexual success.⁶³ Self-proclaimed PUAs are men who believe that women are fundamentally and essentially the same: submissive, attracted to confidence and outer appearance, and hard-wired to be picky in terms of sex partners.⁶⁴ Consequently, PUAs believe that gaining sexual access to them can be solved as a game, the basic premise of which is that the “female brain” is “naturally” disposed to respond favorably to a certain set of traits and maneuvers, dominance and persistence chief among them.⁶⁵ Further, PUA culture purports that any man can enjoy the success of “opening” (that is, picking up) any woman if he can cultivate and display what she is programmed to accept.⁶⁶ One observer exposes how PUA culture assumes the submissiveness of women as a general matter, using these premises to hone the “game”:

When PUAs discuss routines, they frequently put filler text like “bla bla” in place of the “target’s” (i.e., woman’s) dialogue, as anything she might say is presumed irrelevant while she’s being razzle-dazzled by a fast-talking man [She] is treated with no subjectivity; no matter what she says, the PUA’s next line in the script remains essentially the same. . . . PUAs are loath to take “no” for an answer, [and] [t]hey seem genuinely oblivious or hostile to the fact that women enjoy the agency to reject potential paramours⁶⁷

Because PUA culture simultaneously teaches men that they can predict what all women want and that rejection is never acceptable (being the failure of a “play,” not an expression of genuine disinterest),⁶⁸ its premises align with the de-agentifying tenets of benevolent sexism and the pro-rape attitudes espoused in popular media.

Similar sexual attitudes occur in more mainstream masculine social spaces, such as fraternities and sports teams.⁶⁹ In some of these groups, prestige and peer approval are won by having sex frequently and with a diverse array of women—crucially (and chillingly) “regardless of whether the sex was consensual or not.”⁷⁰ Men in these homosocial subcultures may “consciously

63. Virgil Texas, *Okc_ebooks: Pick-up Artists Trying to Chat Up a Robot Horse*, SLACKTORY (Feb. 15, 2013, 3:08 PM), http://slacktory.com/2013/02/okc_ebooks-deconstructs-online-pick-up-lines-with-horse_ebooks-tweets/.

64. Katie J.M. Baker, *Cockblocked by Redistribution: A Pick-up Artist in Denmark*, DISSENT MAG. (Fall 2013), <http://www.dissentmagazine.org/article/cockblocked-by-redistribution>.

65. Texas, *supra* note 63.

66. *See id.*

67. *Id.*

68. *See Baker, supra* note 64.

69. *Willfully Blinded, supra* note 7, at 408–10.

70. *Id.* at 408.

‘know’ that some of their sexual partners do not consent. They simply do not care.”⁷¹ One observer’s characterization of these men’s motivations suggests that the rapes they commit in the course of trying to gain peer approval may be traced back to the same coercive gender norms elaborated earlier:⁷²

Having sex, as much and as obviously as possible, is an esteem-enforced behavior-specific norm for many young men. Date rapists rape to gain, or at least not lose, the esteem of others. Demonstrating one’s masculinity, “being a man,” is the abstract, internalized norm that gives meaning to the act of having sex. Thus, just as one proves oneself a good neighbor by mowing one’s lawn, one proves oneself masculine by having as much sex as possible. The norm of frequent sex supports the masculinity norm. The act of having sex means one is demonstrating one’s masculinity.⁷³

Thus, these men may be driven to rape partially by their own need to affirm their masculinity; relatedly, they may also be driven by benevolent-sexist sentiments, such as that men must be in charge during sex, and that “nice women” do not have sex before marriage.⁷⁴ In fact, using his power to cause a woman to violate that norm—ultimately with her consent in the case of seduction, or without in the case of rape—may hold a particular thrill for the man in this scenario.⁷⁵ As a consequence of this cluster of sexist norms, it is “particularly easy for men to assume or simply ignore the question of consent because the [sex-role] paradigms assign to men the role of Aggressor and to women the role of passive Recipient.”⁷⁶

Thus, while hostile sexism may find expression in the face of rejection,⁷⁷ benevolent sexism’s signature is still evident in the underlying processes that

71. *Id.* (focusing on levels of conscious, semi-conscious, and unconscious awareness and how awareness of non-consent at any level should trigger culpability).

72. *See* Dutro, *supra* note 25 (explaining how gendered oppositions trigger children to differentiate their behavior and interests to conform to gender norms); Kivel, *supra* note 26 (describing the “Act Like A Man Box”).

73. Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 673 (1999).

74. *Id.* at 674; Andrew W. Taslitz, *Race and Two Concepts of the Emotions in Date Rape*, 15 WIS. WOMEN’S L. J. 3, 58 (2000) [hereinafter *Two Concepts*] (explaining how endorsement of gender differentiation leads to rape: “The empirical data show that date rapists are particularly accepting of sexist stereotypes. Date rapists draw especially sharp lines between the sexes. They view men and women as radically different beings, with different thoughts, emotions, and capacities. Each sex plays clearly different social roles The date rapist’s ability to see women as the other enables him to revel in her debasement and to take pleasure in his domination of her psyche.”).

75. *Two Concepts, supra* note 74, at 57–58 (comparing seduction and date rape in terms of the aggressor’s sense of having “invert[ed]” his target’s values).

76. Baker, *supra* note 64, at 674.

77. *See* Baker, *supra* note 64 (noting that semi-famous PUA “Roosh” recounts his rage at failing to seduce women in Denmark, describing one such woman as a “stupid, ugly, fat, cock-blocking bitch”); *see also* Texas, *supra* note 63 (noting that rejected PUAs are liable to become “angrier or hornier”); Komo News, *Police: Denied Sex, Man Kills Girlfriend With Vacuum Cleaner*, KOMONEWS.COM, <http://www.komonews.com/news/local/Police-Denied-sex-man-kills-girlfriend-with-vacuum-cleaner--231991621.html> (Nov. 14, 2013, 5:50 PM) (In Washington state, a man whose

construct the logic of consent responsible for “Blurred Lines” and the brand of masculinity espoused by fraternities and PUAs. By negating women’s agency, benevolent sexism promotes practices and ideologies whereby *men* are encouraged to act on behalf of women—from opening doors and paying for meals to deciding when a woman will have sex. Popular film, music, and dating practices send a clear message: women are supposed to accept men’s sexual advances, and men are supposed to make them⁷⁸—ideally without asking.

III.

SHE WAS ASKING FOR IT: THE LEGAL TREATMENT OF RAPE AND SEXUAL HARASSMENT

Both of the normative themes just described, passivity as receptivity and passivity as non-initiation, manifest themselves in the legal treatment of rape and sexual harassment. Current legal frameworks hurt women by enforcing these norms in two related ways.⁷⁹ First, legal actors routinely presume that women are willing recipients of their victimizers’ conduct.⁸⁰ Second, women charging rape or harassment often see their cases harmed by evidence of exercising sexual agency, or indeed exhibiting any behavior that is not traditionally feminine.⁸¹ As the latter situation illustrates, benevolent-sexist

girlfriend refused to have “make-up sex” with him following an argument became enraged and beat and strangled her to death).

78. See *Willfully Blinded*, *supra* note 7, at 407 (noting that under the ideology of chivalry, “[t]here is certainly . . . a common understanding that, in sexual matters, men should pursue and press for as much sex as quickly as possible, while women should receive and seek to go forward sexually more slowly than men.”).

79. There is obvious overlap between these ideas. For example, at what point is a judge’s disapproval of a promiscuous woman’s rape complaint subsumed by saying that the judge presumed she consented? Even so, this discussion will attempt to keep the two analytically distinct. To that end, the argument that legal actors presume consent will refer to *a priori* presumptions: ones written into the law, and those that are salient even before the complainant has done anything “wrong.” When an official’s perception that the individual complainant acted inappropriately weakens a case, the case will fall under the second prong.

80. For example, rape statutes used to commonly require the victim to show both “resistance” (first “utmost” and then merely “reasonable”) and “corroboration” (such as by injuries) to make a credible case. SUSAN ESTRICH, *REAL RAPE* 43–47 (1987); Susan Estrich, *Rape*, 95 *YALE L.J.* 1087, 1123–24 (1986). While these requirements have been officially stricken from most states’ rape statutes, in practice they tend to persist. See CASSIA SPOHN & JULIE HORNEY, *RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT* 163 (1992) (finding officials to be “substantially affected by corroboration and resistance factors in judging the likelihood of a jury conviction” in all six studied jurisdictions). David P. Bryden, *Redefining Rape*, 3 *BUFF. CRIM. L. REV.* 317, 356 (2000). The practical effect of requiring these elements is a presumption that, in the absence of corroboration and a showing of resistance, the victim really consented.

81. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 69 (1986) (holding that a woman’s sexually provocative speech or dress can damage her sexual harassment claim); Bryden & Lengnick, *supra* note 8, at 1328, 1348, 1355, 1365, 1366 (supporting the assertion that “the prosecutor’s proof problems are most acute when the putative acquaintance rape victim’s behavior violates traditional standards of female morality or prudence”); see also Vetterhoffer, *supra* note 8, at 1249 (describing the “rape myth” that “[o]nce women entice men . . . the men are absolved . . . of their moral responsibility to control their sexual appetites” and its effect that if a woman dresses or acts provocatively, is drunk, or

tendencies to protect and revere women extend only as far as compliance with the norms of femininity.⁸² When the assumption that women are “refined ladies”⁸³ meets an unladylike woman, benevolent attitudes can give way to notions that she deserves no protection and participated in whatever victimization she got.⁸⁴

Importantly, while women acting outside the bounds of “ladylike” behavior may seem to fare particularly poorly under rape culture,⁸⁵ this does not mean that women staying within those bounds can expect much better. For one, myriad negative cases for victims of sexual harassment and rape reveal just how easy it is for a judge or jury to eject a woman from the zone of protection that benevolent sexism affords “good” women.⁸⁶ Furthermore, an impossible Catch-22 exists: even if a woman has comported herself in accordance with acceptable, “ladylike” behavior, chances are she will not have done enough to convince the legal system that she truly did not consent to the harassment or assault she experienced.⁸⁷ The following sections will illustrate

is sexually active, then one may “accept the truth of the woman’s assertions as to [the rape] but decide that these actions are not legitimate grounds for complaint by a woman like that”) (internal quotation marks and citations omitted).

82. See An Ambivalent Alliance, *supra* note 4, at 113 (finding that “[m]en’s hostile sexism scores uniquely predicted negative attitudes toward career women, whereas their benevolent sexism scores predicted positive attitudes toward homemakers”); *supra* notes 25–30; and the discussion of the punishments and rewards that incentivize gender-conformity *supra* Part I.A.

83. Chapleau et al, *supra* note 6, at 135.

84. *Id.* (finding that the belief that women are these “refined ladies” can lead to the perception that stereotype-violating women share responsibility for their sexual victimization); Abrams et al, *supra* note 6, at 120 (finding that the association between benevolent sexism and rape-supportive attitudes is mediated by the belief that victims who behave in ways that are “inappropriate” for a “lady” lose the right to chivalrous protection).

85. See Bryden & Lengnick, *supra* note 8, at 1238–41 (listing factors that may cause a police officer to unfound a rape complaint, including a woman’s promiscuity, prostitution, alcohol or drug use, “risky behavior,” voluntary conduct with the man preceding the rape, or uncooperative or inarticulate behavior).

86. See, e.g., Meritor Sav. Bank, 477 U.S. at 69 (holding that an alleged harassment victim’s sexual fantasies and provocative speech or dress can tend to show the harassment was not “unwelcome”); Commonwealth v. Berkowitz, 609 A.2d 1338 (Pa. Super. Ct. 1992) (declining to convict the rapist of a young woman who drank alcohol and voluntarily entered the dorm room where the rape later occurred); see also Vetterhoffer, *supra* note 8, at 1252 (“One may wonder what gender norms a woman must violate to be deemed blameworthy for a violent act perpetrated solely by her attacker. . . . [If she] was flirting; if she was attractively dressed; if she was, in the man’s perception, a tease; if she went out with a man, necked with him, and invited him to her apartment for coffee; even if she only said ‘hello’ to him at the office—it was her fault.”) (internal quotation marks and citations omitted).

87. Andrew E. Taslitz, *Patriarchal Stories I: Cultural Rape Narratives in the Courtroom*, 5 S. CAL. REV. L. & WOMEN’S STUD. 387, 447 (1996) [hereinafter *Patriarchal Stories*] (exploring the cultural rape narrative of “silenced voices” and defining this Catch-22: “Our cultural narratives teach women that muting and silence are sex-appropriate behavior. . . . Consequently, their initial reaction to rape is often one fully consistent with cultural expectations: silence. However, if the woman ultimately regains her voice and reports the rape, her very silence is offered as evidence that she lies. While she is ordinarily expected to be mute, she is expected to and must speak promptly, loudly, and with anguish if there is a ‘real’ rape. . . . But the woman is now in a ‘Catch-22’: if she speaks, she will face

how both of these processes operate to put legal redress out of reach for victims of sexual harassment and rape. The remainder of this Part will proceed by discussing sexual harassment in general, sexual harassment of workers in sexualized industries, rape by acquaintances, and rape of those who defy the norms of traditional femininity.

A. Sexual Harassment

The process of proving a sexual harassment claim exemplifies how hard women who experience sexualized aggression must work to overcome the general presumption that women are receptive to this type of conduct. Under Title VII, to prove a hostile work environment claim of sexual harassment, a plaintiff must show not only that the harassment was (1) “because of sex”⁸⁸ and (2) sufficiently “severe or pervasive” to create a working environment that was both objectively and subjectively abusive,⁸⁹ but she must also show that the harassing conduct was “unwelcome.”⁹⁰

Placing the burden on the plaintiff to show unwelcomeness creates a presumption that the sexual harassment was welcome, which is significant partly because other types of harassment claims proceed differently. For example, plaintiffs alleging racial harassment under Title VII do not have to show that the harassment was unwelcome;⁹¹ no reasonable person believes that racially harassing conduct would be welcomed. The stumbling block with sex seems to be that the same conduct that a woman would welcome from “her husband or boyfriend”⁹² is suddenly objectionable when a different man does it.⁹³ Unlike the example of racial harassment, then, there are certain contexts in

skepticism, having the burden of proving that she found voice only because of the exceptional circumstance . . . if she is silent, then that silence will be evidence that any later speech is not credible.”); see also *Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287 (11th Cir. 2007) (holding that waiting too long to complain can be fatal to a sexual harassment claim).

88. 42 U.S.C. § 2000e-2(a)(1) (2012).

89. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993).

90. *Meritor Sav. Bank*, 477 U.S. at 68; 29 C.F.R. § 1604.11 (1991).

91. Mary Radford, *By Invitation Only: The Proof of Welcomeness in Sexual Harassment Cases*, 72 N.C. L. REV. 499, 505 (1994) (citing Brief for the United States and the Equal Employment Opportunity Commission as Amici Curiae, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979), 1985 WL 670162, at *13 (“Whereas racial slurs are intrinsically offensive and presumptively unwelcome, sexual advances and innuendos are ambiguous . . .”).

92. *Burns v. McGregor Elec. Indus.*, 989 F.2d 959, 963 (8th Cir. 1993) (reversing the lower court’s opinion and recognizing that judging welcomeness out of context would be tantamount to permitting sexual harassment).

93. See *Burns v. McGregor Elec. Indus.*, 807 F. Supp. 506, 508 (N.D. Iowa 1992) (holding that a plaintiff whose coworkers taunted her for appearing nude in magazine pictures could not satisfy the element of unwelcomeness because she would not have been offended if someone to whom she was attracted had spoken to her about the pictures). Such a troubling result could be avoided by accepting that, like Heraclitus’s river, conduct by one person in one context with one set of intentions is not truly the same as similar-appearing conduct by a different person in a different context. See PLATO, 12 PLATO IN TWELVE VOLUMES (CRATYLUS), at § 402(a) (Harold N. Fowler trans., Harv. Univ. Press 1921) (paraphrasing Heraclitus as saying that one cannot step into the same river twice); see also Brief

which otherwise sexually harassing behavior could become permissible. However, the courts' and the Equal Employment Opportunity Commission's (EEOC) decisions to make welcomeness the default takes the wrong approach to reconciling women's different responses in these situations. Instead of setting the burden on the defendant to prove welcomeness,⁹⁴ sexual harassment law presumes *a priori* that women (and other victims of harassment) are receptive to even violently aggressive conduct.⁹⁵

Because welcomeness is presumed, courts often look to the victim's responses to the harassing conduct for evidence to the contrary. To a court, certain conduct can resemble condoning the harassment and, as such, can undermine a plaintiff's showing of unwelcomeness. For example, a female police officer failed to show that harassment directed at her was unwelcome because the court found evidence of her "enthusiastic receptiveness to sexually suggestive jokes and activities."⁹⁶ Omission of certain expected acts can have the same effects. For instance, "the failure to file a complaint, while not completely fatal to the plaintiff's claim, may raise suspicion as to whether the conduct was welcome."⁹⁷ If a plaintiff informally complains, such as by telling the harasser that the conduct is offensive or asking the harasser to stop, a court may still find insufficient evidence to rebut the presumption of welcomeness. In one case, the Seventh Circuit found a plaintiff's rejection of sexual advances to be "neither unpleasant nor unambiguous," giving the harasser "no reason to believe that his moves were unwelcome."⁹⁸ In other words, the presumption of welcomeness sets a high bar: if a plaintiff's response is not immediate, negative, firm, and in some cases, official, then the court may conclude that the conduct was not harassment at all.

for the United States and the Equal Employment Opportunity Commission as *Amici Curiae*, *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986) (No. 84-1979), 1985 WL 670162, at *13 (noting that sexual conduct may be perceived as "denigrating or complimentary, as threatening or welcome, as malevolent or innocuous" depending on the context).

94. See Radford, *supra* note 91, at 525 (arguing for shifting the presumption to one of unwelcomeness, and the corresponding burden of showing welcomeness to defendants, in sexual harassment cases).

95. See, e.g., *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 60 (1986) (requiring plaintiff to prove unwelcomeness when she was publically fondled, followed into the restroom, and forcibly raped by her supervisor).

96. *Reed v. Shepard*, 939 F.2d 484, 491 (7th Cir. 1991).

97. Radford, *supra* note 91, at 520; see also *Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287 (11th Cir. 2007) (noting that waiting too long to complain can be fatal to a plaintiff's sexual harassment claim); *Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 784 (1st Cir. 1990) (noting that the plaintiff's assertion of unwelcomeness would be bolstered by "more emphatic means of communicating the unwelcomeness of the supervisor's sexual advances, as by registering a complaint").

98. *Dockter v. Rudolf Wolff Futures, Inc.*, 913 F.2d 456, 459 (7th Cir. 1990).

This view of welcomeness unfortunately overlooks the many legitimate reasons why a plaintiff, especially a woman,⁹⁹ might delay or decline to complain about sexual harassment. The young police officer felt that participating in sexualized jokes was the only way she could be accepted at work.¹⁰⁰ Others may fear retaliation, either in terms of an adverse employment action or escalation of the harassing behaviors.¹⁰¹ Punishing women who complain of sexual harassment for failing to complain early and clearly enough illustrates the “Catch-22” Taslitz described:¹⁰² society teaches women to be silent and demure, and to avoid “clearly communicat[ing] [their] own desire *not* to have sex,”¹⁰³ but then this social expectation punishes women who adhere to it. The woman who laughs nervously after sexual jokes or decides not to register a formal complaint, whether because she fears official retaliation or is seeking the social rewards promised to “good” women under benevolent sexism,¹⁰⁴ seems less credible for the ambiguity or delay of her response. While courts thus assume that these initially silent or conciliatory plaintiffs actually “welcomed” the harassing conduct, women who flout these norms of feminine behavior by speaking up are likely to be rejected as inappropriate candidates for paternalistic protection under the benevolent sexist framework.¹⁰⁵ *Meritor* left later courts wide discretion in choosing which women fall out of the bounds of Title VII’s protection by holding that the plaintiff’s “sexually provocative speech or dress” and “personal fantasies” are “obviously relevant” to the issue of welcomeness.¹⁰⁶

99. See *Ellison v. Brady*, 924 F.2d 872, 879 (9th Cir. 1991) (adopting a “reasonable woman” standard for evaluating the severity and pervasiveness of sexual harassment, and noting “there is a broad range of viewpoints among women as a group, but . . . many women share common concerns which men do not necessarily share. For example, because women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser’s conduct is merely a prelude to violent sexual assault. Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.”) (citations omitted).

100. *Reed*, 939 F.2d at 492 (7th Cir. 1991).

101. See *Chamberlin*, 915 F.2d at 784 (recognizing that, although registering a formal complaint would have strengthened plaintiff’s showing of unwelcomeness, taking such action could prompt the termination of her employment and as such would have been a risk); *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 888, 906 (1st Cir. 1988) (in which the plaintiff was put on probation after complaining of harassment, and her initial expressions of disinterest in the harasser’s advances resulted in “unfriendly” and “hostile” retaliation at work).

102. See *Patriarchal Stories*, *supra* note 87, at 447.

103. *Id.* at 441.

104. See *supra* notes 25–28 and accompanying text.

105. See *Patriarchal Stories*, *supra* note 87, at 440–41 (explaining that both women who voice their own sexual desires and women who reject men’s sexual overtures are viewed as “equally aggressive, assaulting male prerogatives and feelings” and that “a clear expression of [their] own wishes is unacceptable, angry, and deserving of punishment.”).

106. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68–69 (1986).

Women working along the continuum of sexualized industries, from cocktail waitressing and casino dealing to stripping to prostitution,¹⁰⁷ represent a special class of women who fail to qualify for the protection afforded (at least in theory) to norm-conforming women. Women in these jobs may face a higher risk of sexual harassment than others¹⁰⁸ and also more skepticism when it comes to protecting them from harassment. For example, some legal scholars, seeing employment in a sexualized industry as the worker’s choice, advocate shielding employers from harassment claims with an assumption of the risk defense.¹⁰⁹ There are several problems with this proposition. As one scholar points out, applying assumption of the risk in this context overlooks the realities of economic hardship as a factor constraining “choice”: unlike women of financial means, “[w]omen who have no access to wealth, education, or well-paying jobs may be forced for financial reasons to work in jobs requiring that they openly sell their sexuality” to maintain a comfortable life.¹¹⁰

Moreover, while these jobs involve some amount of sex or sexuality, they are still *jobs*,¹¹¹ and, as such, come with a job description—an understanding of which risks reasonably are and are not terms of employment.¹¹² The requirement that the job’s context be taken into account when assessing alleged harassment¹¹³ should also apply to sexualized labor. Thus, sexual contact that was explicitly negotiated with a brothel customer would not give rise to a valid claim of harassment, but sexual contact or attention that is *not* a term of

107. One author examines these as four job types along the continuum of sexualized work. See Ann C. McGinley, *Harassment of Sex(y) Workers: Applying Title VII to Sexualized Industries*, 18 YALE J. L. & FEMINISM 66, 68 (2006). But see Adrienne Davis, *Regulating Sex Work: Assimilationism, Erotic Exceptionalism, and Beyond*, 103 CALIF. L. REV. (forthcoming 2015) (arguing that defining a “continuum” of sex work should be done with reference to the “sexual geography,” or to the degree of risk associated with a given sex-related job, rather than the more simplistic view that categorizes sex-related jobs according to their proximity to intercourse).

108. See McGinley, *supra* note 107, at 75, 77, 81–82, 86 (describing that in the casino setting, angry clients who are losing money may “hurl abusive gender-based epithets at the women, often calling them ‘bitch’ and ‘cunt’ . . . [.] openly discuss the women’s body parts, telling women dealers how they would use the women sexually . . . [.] make racist remarks about the Asian women dealers . . . [.] grab the women or threaten to rape or shoot them”; cocktail servers are often subject to “comments and groping by drunk customers”; exotic dancers can experience unwanted touching, even if the club has a rule against customers touching the workers; legal brothel prostitutes in Nevada enjoy a high amount of physical security because of their workplace structure, but are still subject to occasional violence; and last, brothel customers can go beyond the negotiated sexual contact and harass or assault the worker).

109. See Kelly Ann Cahill, *Hooters: Should there be an Assumption of Risk Defense to Some Hostile Work Environment Sexual Harassment Claims?*, 48 VAND. L. REV. 1107, 1109 (1995).

110. McGinley, *supra* note 107, at 90.

111. See Davis, *supra* note 41 (analyzing the inadequacies with assimilationist models that understand sex work as “just work,” as well as with exceptionalist models that understand sex work as so unique due to the sexual factors that it cannot be characterized as work).

112. See McGinley, *supra* note 107, at 68 (explaining that tolerance of behaviors that might constitute causes of action for harassment in other contexts may be a term or condition of employment).

113. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81–82 (1998).

employment, such as a customer violating a “no touching” rule at a strip club, would.¹¹⁴ The proposed assumption of the risk defense, by positing that women capitalizing on their sex appeal effectively waive their right to bring sexual harassment claims, bolsters the harmful ideology that women who exercise sexual agency do not deserve the same protection offered to those who do not. If their boundaries are violated, it is because they were “asking for it.”

B. Rape and Sexual Assault

Parallel to the plight of sexual harassment victims, who must overcome the legal presumption of welcomeness that impugns the legitimacy of their claims, rape survivors have the burden of proving that intercourse was non-consensual.¹¹⁵ This showing must overcome not only the presumption of innocence afforded criminal defendants, but also (if the survivor is a woman) the social presumption of women’s sexual receptiveness that sexist ideologies encourage. Todd Akin unwittingly encapsulated the problem quite well in his “legitimate rape” comment during the 2012 election cycle.¹¹⁶ The use of this phrase implied that what many women survive is somehow “illegitimate” and that it is not really rape. In 1874, a New York judge justified the “utmost resistance” standard necessary to prove a rape:

Can the mind conceive of a woman, in the possession of her faculties and powers, revoltingly unwilling that this deed should be done upon her, who would not resist so hard and so long as she was able? And if a woman, aware that it will be done unless she does resist, does not resist to the extent of her ability on the occasion, must it not be that she is not entirely reluctant? If consent, though not express, enters into her conduct, there is no rape.¹¹⁷

Akin’s unfortunate sound bite demonstrates that for some, this attitude still persists.

Women who are particularly likely to have the legitimacy of their victimization questioned include: (1) women assaulted by an acquaintance, and (2) women perceived as sexual agents, sexually promiscuous, or otherwise failing to fall within the normative bounds of femininity. The problems that

114. See McGinley, *supra* note 107, at 99–100.

115. See Bryden & Lengnick, *supra* note 8, at 1204 (clarifying that consent is usually the central issue in acquaintance rape cases, while stranger rape defendants usually concede that *someone* raped the victim, but that the defendant was misidentified). However, consent can be the main issue in a stranger rape case if the victim was a sex worker. See *id.* at 1360; State v. Williams, 564 N.E.2d 560 (Ohio 1986) (allowing evidence that the victim was a prostitute to impeach her testimony that she did not consent).

116. John Eligon, *Senate Candidate Provokes Ire With ‘Legitimate Rape’ Comment*, N.Y. TIMES (Aug. 19, 2012), http://www.nytimes.com/2012/08/20/us/politics/todd-akin-provokes-ire-with-legitimate-rape-comment.html?_r=0 (quoting Akin: “It seems to me, from what I understand from doctors, [pregnancies from rape are] really rare. . . . If it’s a legitimate rape, the female body has ways to try to shut that whole thing down.”).

117. People v. Dohring, 2 Cow. 141, 149 (N.Y. 1874).

women in each category face in proving that their rapes were non-consensual overlap: some of the behavior typical of women in acquaintance rape cases looks to legal actors like norm-defying conduct that would put women in the second category.¹¹⁸ Thus, while the following Section on acquaintance rape will deal mostly with the problem of presuming consent by women's silence or failure to resist, considerations that implicate norm-defiance in acquaintance rape cases will also be noted.

1. *Acquaintance Rape*

While hostile sexism maps easily to the "traditional" rape case involving a "knife-wielding stranger,"¹¹⁹ benevolent sexism is the arguable precipitator of many acquaintance rapes accomplished by verbal cajoling rather than overt violence.¹²⁰ As paternalistic ideology teaches men to minimize women's agency, it encourages them to usurp that diminished power to make determinations for women, including ones regarding consent to sex.¹²¹ Benevolent sexism's silencing effects serve women at least as poorly in the context of rape as in sexual harassment: normative femininity encourages women not to speak out before, during, or after the assault,¹²² but rape myths ensure that a complaint is only credible when a woman can demonstrate that she adamantly and consistently opposed the sexual conduct from the beginning¹²³ (or, perhaps, earlier¹²⁴). Indeed, one observer noted:

118. See Bryden & Lengnick, *supra* note 8, at 1203–04 (noting that in "[T]ypical [acquaintance rape] cases, attention usually focuses on the victim's character. If her pre-rape behavior violated traditional norms of female prudence or morality, many people blame her instead of the rapist.").

119. *Id.* at 1202; see also SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE* 366 (1975) (citing studies showing that rapes involving "strangers, weapons, and 'positive violence' [have] the highest chance of being believed" by police).

120. See Daphne Edwards, *Acquaintance Rape and the "Force" Element: When "No" is Not Enough*, 26 *GOLDEN GATE U. L. REV.* 241, 242 (1996) (noting that "verbal coercion" is the type of force typically used in acquaintance rapes); M. JOAN MCDERMOTT, *RAPE VICTIMIZATION IN 26 AMERICAN CITIES* (1979) (finding that non-stranger rapes were less likely to involve a weapon or to result in any physical injury beyond the rape itself); but see Bryden & Lengnick, *supra* note 8, at 1322 n.766 (citing statistics that at least half of acquaintance rape victims suffer bruises, cuts, or black eyes, and that 40 percent of such victims require medical attention; then explaining, "One reason this finding is counterintuitive is that the reader may unconsciously think of an 'acquaintance' as a college boy on a date, forgetting that the rapist may instead be a violent lover. According to a Justice Department survey injuries are almost twice as likely to occur if the attacker was a husband or boyfriend rather than a stranger. . . . Stranger rapes might be less violent on average because the stranger's threat, for example with a knife, induces a terrified compliance, while the acquaintance relies more often on actual rather than threatened force") (citations omitted). In the "violent lover" acquaintance rapes that Bryden and Lengnick note, hostile sexism is again the more obvious culprit.

121. See *supra* notes 94–96 and accompanying text.

122. See *supra* note 107 and accompanying text.

123. See Vetterhoffer, *supra* note 8, at 1249–52 (explaining how a post-penetration rape statute would undermine rape myths that teach that women cannot say "no" under certain circumstances—like when sex has already (consensually) commenced—and that silence or sometimes even refusal indicates that a woman simply wants to be "convinced").

The more involved the relationship the man and woman had before the [rape] and the more romantic it appears, the more reluctant people are to characterize forced sex as rape. Evidence that the man paid for the woman's food or entertainment on a date also predisposes third parties to noncriminal judgments about allegations of forced sex.¹²⁵

Thus, benevolent sexism exerts a *direct* effect on the decision-making processes of third parties (i.e., potential jurors). In addition to the process by which benevolent-sexist ideologies coerce women into patterns of silence that produce "bad facts" in their rape cases, invocation of the chivalrous custom wherein a man woos a woman with romance and paid-for outings apparently obscures the rape.

Women's silence also plays a substantial role in rape case attrition, particularly at the reporting phase and in the decision whether to prosecute. Although acquaintance rape comprises the substantial majority of all rapes,¹²⁶ survivors who knew their attackers may not see the experience *as* a rape and, for this reason or for others, overwhelmingly do not report it to the police.¹²⁷ If a survivor of acquaintance rape fails to categorize the incident as rape, this may be because the legal treatment of rape reveals a bias in favor of stranger rapes as "real" rapes, while claims of acquaintance rape essentially become trials of the victim.¹²⁸ If a survivor does classify her experience as rape but still declines to report it, other factors may be at play, such as desiring not to go through the ordeal of investigation and trial¹²⁹—but the perception that the criminal justice system will fail to take the accusation seriously probably carries weight here as well.¹³⁰ Bryden and Lengnick assert that "[t]he single most important reason

124. *See id.* at 1252–54 (giving examples of women's behavior prior to any sexual contact that popular opinion construes either as evidence of consent or evidence that the woman provoked and deserved the rape).

125. Samuel H. Pillsbury, *Crimes Against the Heart: Recognizing the Wrongs of Forced Sex*, 35 *LOY. L.A. L. REV.* 845, 876 (2002).

126. *See supra* note 17.

127. David G. Curtis, *Perspectives on Acquaintance Rape*, *THE AM. ACAD. OF EXPERTS IN TRAUMATIC STRESS*, <http://www.aaets.org/article13.htm> (reporting that only 27 percent of the women who reported incidents fitting the definition of rape thought of themselves as having been raped, and that only 5 percent reported their rapes to the police); *see also* Mary P. Koss, *The Hidden Rape Victim: Personality, Attitudinal and Situational Characteristics*, 9 *PSYCHOL. WOMEN Q.* 193, 206 (1985) (emphasizing that surveys designed to discern how many rapes are committed by acquaintances will return artificially low results unless questions are phrased so as to capture "hidden rape," or rapes of women who do not conceptualize their experience as such; most women who report experiences meeting the definition of rape but who do not label the experience as rape were assaulted by acquaintances).

128. *See* Bryden & Lengnick, *supra* note 8, at 1202–04.

129. *See* JEANNE C. MARSH ET AL., *RAPE AND THE LIMITS OF LAW REFORM I* (1982) (noting that the prospect of "humiliating and degrading treatment by hospital staff, police officers, prosecutors, defense attorneys, and judges" deters victims from reporting and going through with prosecuting rape cases).

130. *See* STAFF OF S. COMM. ON THE JUDICIARY, 103D CONG., *THE RESPONSE TO RAPE: DETOURS ON THE ROAD TO EQUAL JUSTICE* 38 (Comm. Print 1993) ("It is the fear of what a jury will think that drives [rape] survivors not to report, police to refuse to arrest in 'futile' cases, and

why most rapists are not punished is the failure of victims to report the crime to the police, or their later refusal to cooperate as a prosecution witness.”¹³¹ Additionally, “prosecutors resist pursuing acquaintance cases for two reasons: first, a prior relationship introduces ambiguity about whether or not a crime has occurred; second, prosecutors perceive an increased risk that the victim will not cooperate in prosecution of acquaintance offenses.”¹³² This first reason as applied to rape cases exemplifies the presumption that the victim likely consented; the second suggests a self-fulfilling prophecy of sorts. If victims do eventually fail to cooperate in prosecuting acquaintance rapes, it could be because they perceive that the prosecutors’ hesitancy—based on the fear of the very non-cooperation that is borne out—signals a doomed case.

They are, unfortunately, not often wrong. One of the reasons that acquaintance rape is so difficult to prove is that most states’ rape statutes still contain an element of “force.” This element is usually defined broadly enough to hint at protection for victims of acquaintance rape, but courts construe the element narrowly enough to “perpetuate the myth that rape is [only] accomplished through physical violence beyond unwanted penetration.”¹³³ Some scholars are cautiously optimistic that states may be phasing out the force requirement: sixteen states and the District of Columbia now criminalize nonconsensual sex where there is no force,¹³⁴ and “jurisdictions that retain the force element are treating it with increasing hostility.”¹³⁵ Such jurisdictions accept “psychological force,”¹³⁶ “constructive force,”¹³⁷ or physical actions like moving the victim’s head toward the penis¹³⁸ as sufficient to satisfy the

prosecutors to dismiss prosecutions as ‘unwinnable.’”); see also Barbara Fromm, *Sexual Battery: Mixed Signal Legislation Reveals Need for Further Reform*, 18 FLA. ST. U. L. REV. 599, 600 (1991) (noting that prosecutors rarely even file a charge because of the low likelihood of obtaining an acquaintance rape conviction).

131. Bryden & Lengnick, *supra* note 8, at 1214.

132. *Id.* at 1216.

133. Edwards, *supra* note 120, at 242.

134. Michelle J. Anderson, *All-American Rape*, 79 ST. JOHN’S L. REV. 625, 631–32 (2005) (albeit the offense is only a misdemeanor in half of these states).

135. Dripps, *supra* note 18, at 967.

136. *State v. Haschenburger*, No. 05 MA 192, 2007 WL 969067, at *5 (Ohio Ct. App. Mar. 27, 2007) (recognizing that “subtle,” “slight,” “psychological,” or “emotionally powerful” force may be all that is present in a case of a relative or authority figure raping a child, but that these kinds of force are sufficient in this circumstance); *but see Commonwealth v. Pierce*, 34 Phila. Co. Rptr. 548, 553 (Pa. Com. Pl. 1997) (issuing a jury instruction that clearly differentiates between “intellectual, moral, emotional or psychological force” that is sufficient for a finding of rape and “the sort of argument, persuasion or seduction that might induce a female voluntarily to consent to intercourse”).

137. *Commonwealth v. Martin*, 630 S.E.2d 291, 292 (Va. 2006) (collapsing “constructive force” into incapacity to legally consent); *Commonwealth v. Fuller*, 845 N.E.2d 434, 442 (Mass. App. Ct. 2006) (noting that the involved person’s “age, size, sophistication, [the] location, and other circumstances” can inform a jury’s finding of constructive or circumstantial force).

138. *People v. Sadler*, No. 904-2003, 2004 WL 2077780, at *2 (N.Y. Sup. Ct. 2004) (concluding that grabbing the victim’s arm and pushing her head toward the defendant’s penis is sufficient to show forcible compulsion, “even though the victim did not immediately cry out or suffer any actual physical injury”).

requirement. However, caution is warranted because of the schism between the relatively pro-autonomy attitudes of the “elite” (judges, legislators, and legal scholars) and the attitudes of average potential jurors, who are more likely to endorse rape myths and fail to find rape where there is no force, regardless of the statutory language.¹³⁹ Thus, “the typical verbal coercion used in acquaintance rapes is not recognized as ‘forcible rape,’ but instead rationalized as legal ‘seduction.’”¹⁴⁰

Judges and juries have engaged in such rationalization adeptly, effectively imputing consent to women who knew their attackers. From 2008 to 2012, grand juries in a Texas county failed to return an indictment in 51 percent of acquaintance rape cases, even when there was photographic evidence of the assault or when the defendant confessed to the rape.¹⁴¹ In *Commonwealth v. Berkowitz*, a case of acquaintance rape on a college campus, a Pennsylvania court found that the force used was insufficient to constitute “rape” because the victim had gone to her friend’s dorm room of her own volition, and once there, was free to leave at any time prior to or during the assault.¹⁴² Even though her assailant pushed her down onto the bed and straddled her while he removed her clothes, the court held that this was an insufficient degree of force.¹⁴³ Even though the victim clearly and repeatedly said “no,” her rapist testified that he believed she was “moaning” it “passionately. . . [as] *thinly veiled acts of encouragement*.”¹⁴⁴ While the court did not adopt his outrageous reading of the victim’s protests, it did note that she did not physically resist or scream.¹⁴⁵ *Berkowitz* illustrates the dangerous dynamics explored in Part II: a young man infers a woman’s consent to sex, despite her clear indications to the contrary, because he either believes he knows best what she *really* wants¹⁴⁶ or he does not care.¹⁴⁷ Moreover, the court is complicit in this violation, declining to find rape because it both fails to understand a woman’s resistance *as resistance* and because it presumes the contact was consensual.¹⁴⁸

139. Dripps, *supra* note 18, at 971–73.

140. *Id.*

141. Tim Madigan, *In Tarrant County, Acquaintance Rape Cases Often Die in Grand Jury Room*, STAR-TELEGRAM (Aug. 19, 2012), <http://www.star-telegram.com/2012/08/19/4190561/rape-unpunished-in-tarrant-county.html>.

142. *Commonwealth v. Berkowitz*, 609 A.2d 1338, 1344, 1346–47 (Pa. Super. Ct. 1992).

143. *Id.* at 1346–47.

144. *Id.* at 1341 (emphasis added).

145. *Id.* at 1342, 1344.

146. *See supra* notes 79–83 and accompanying text.

147. *Willfully Blinded*, *supra* note 7, at 408.

148. The court in this case clarifies that Pennsylvania’s rape statute does *not* contain a requirement that the victim “resist” in order to categorize an event as rape. However, the “forcible compulsion” element often means in practice that if sufficient resistance cannot be established, the “force” element cannot be satisfied. *See Edwards*, *supra* note 120, at 251–52, 258–63. The *Berkowitz* court noted that the victim could have simply walked away and in effect resisted the contact. *See* 609 A.2d at 1343–44.

One crucial point that the *Berkowitz* court overlooks is the social context in which acquaintance rapes occur. Because coercive gender norms encourage women to be polite, accommodating, and minimally assertive,¹⁴⁹ many women and girls may experience difficulty with firmly refusing sexual advances from friends or dates.¹⁵⁰ This pattern of passive socialization encourages women to acquiesce to the dominance and demands of men, particularly in heterosexual relationships. Girls are taught to avoid saying “no” whenever possible¹⁵¹—let alone making a scene of kicking, screaming resistance to sexual contact.¹⁵² These patterns are borne out in the typical date or acquaintance rape: most such rapes occur after verbal pestering, emotional manipulation, or physical persistence (frequently not reaching the level of force required by some courts).¹⁵³ Moreover, if women do show resistance during an assault, it is far more likely to be verbal than physical, such as by plainly saying “no” or by more subtle means like trying to reason with the assailant or stall the sexual contact.¹⁵⁴ In cases like these, the rape is unlikely to fall within a state statute’s purview,¹⁵⁵ and even if it does, a jury may elect to impose its own understandings of force, consent, and the expected behavior of a “good” victim in a rape case and thereby fail to convict the defendant.¹⁵⁶ Perhaps due to a lack of understanding of the power of gender norms over women and juries, the law neglects women who respond to rape by acquaintances with just the behavior they have been taught.

149. See Dutro, *supra* note 25, at 377; see also *Patriarchal Stories*, *supra* note 87, at 447 (discussing the enforcement of silence).

150. Harriet Jacobs, *Another Post About Rape*, FUGITIVUS (June 26, 2009), <http://fugitivus.wordpress.com/2009/06/26/another-post-about-rape-3/> (“[W]omen are raised being told by parents, teachers, media, peers, and all surrounding social strata that: it is not okay to set solid and distinct boundaries and reinforce them . . . [;] it is not okay to appear distraught or emotional . . . [;] it is not okay to refuse to agree with somebody, over and over . . . [;] it is not okay to completely and utterly shut down somebody who obviously likes you . . . Women who are taught not to speak up too loudly or too forcefully or too adamantly . . . are not going to shout “NO” at the top of their goddamn lungs just because some guy is getting uncomfortably close.”).

151. See *Patriarchal Stories*, *supra* note 87, at 440–41.

152. Ironically, while the law prefers this behavior in cases alleging rape, society highly discourages this response. See *id.*; Jacobs, *supra* note 150 (“Women who are taught that physical confrontations make them look crazy will not start hitting, kicking, and screaming until it’s too late, if they do at all.”).

153. See Edwards, *supra* note 120 at 268–69.

154. *Id.* at 270; Susan Schwartz, *An Argument for the Elimination of the Resistance Requirement from the Definition of Forcible Rape*, 16 LOY. L.A. L. REV. 567, 577 (1983) (reporting that some women attempted to verbally resist by using phrases like, “[M]y husband will be home soon” or “I have to go to the bathroom first”).

155. See Anderson, *supra* note 134, at 631–32. Only sixteen states criminalize rape without force; thirty-four do not. See *id.*

156. See Dripps, *supra* note 18, at 971–73.

2. Norm-Defying Women

When women who flout the norms of “proper” femininity are raped, the criminal justice system is prone to see their injuries as illegitimate. This applies not only to women who violate norms that are explicitly tied to sexuality, but also to women who engage in conduct that legal actors believe is sufficiently risky or unladylike that it renders them undeserving of legal recourse. For example, scholars have noted that police officers might “unfound” a rape complaint (decide that it is untrue) if the woman was drinking or using drugs at the time, if she was hitch-hiking, or if she previously had trouble with the police, among other reasons.¹⁵⁷ These same factors may lead juries to acquit defendants,¹⁵⁸ perhaps as a means of punishing (consciously or not) the victim for her norm-violating behavior. One observer found that “[m]any recognize a kind of provocation excuse for men, that where the woman acted in a sufficiently enticing way—if she indicated sexual interest, directly or indirectly . . . the man’s disregard of her nonconsent to particular sexual activity thereafter should be legally excused.”¹⁵⁹

However, not every norm violation is punished, and not every act in accordance with the norms of proper femininity is rewarded. For example, one study found that subjects rated the justifiability of a rape higher if the woman initiated the date or went to the man’s apartment instead of out in public. This finding suggests a possible “punishment” effect for these norm-violating behaviors—but the subjects also rated the rape as more justifiable if the man paid for the date.¹⁶⁰ Bryden and Lengnick postulate that this may reflect a belief that the man is entitled to sex for having paid, since it cannot reflect the same punishment for norm violations (because allowing a man to pay for a date is norm-conforming).¹⁶¹ They also note that the “punishment” hypothesis has not been borne out in stranger rape cases, citing research that found the victim’s moral character to be of little consequence to jurors’ verdicts in cases where defendants alleged misidentification (typically stranger rape cases).¹⁶²

While further research is needed to ascertain the degrees to which, and circumstances in which, norm-violating behaviors matter to legal actors

157. Bryden & Lengnick, *supra* note 8, at 1238–40 (compiling a list of factors associated with unfounding decisions by other researchers).

158. *Id.* at 1348, 1365 (summarizing other research that has found that “drinking by the woman was the factor that most often induced jurors to acquit in rape cases,” and “[J]uries tend to disbelieve rape accusations made by female hitchhikers.”); Pillsbury, *supra* note 125, at 876 (“Evidence that the woman had been drinking or was dressed provocatively inclines decision makers against a criminal judgment.”).

159. Pillsbury, *supra* note 125, at 876.

160. Bryden & Lengnick, *supra* note 8, at 1267–68 (citing Charlene Muehlenhard, *Misinterpreted Dating Behaviors and the Risk of Date Rape*, 6 J. SOC. & CLINICAL PSYCH. 20, 24–25 (1988)).

161. *Id.*

162. *Id.* at 1268–69.

involved with rape cases, it seems that seriously breaking sexual norms, as by engaging in sex work, is often used to the detriment of a rape case.¹⁶³ In 2007, a Philadelphia judge ruled that a nineteen-year-old sex worker who had been raped by four men at gunpoint had not suffered *rape* but had instead experienced "theft of services."¹⁶⁴ More recently, a transgender woman engaged in sex work was strangled by a potential client who became enraged when he discovered that her genitals did not accord with her gender presentation.¹⁶⁵ The defendant's attorney brazenly argued for a shorter sentence for his client:

A sentence of [twenty-five] years to life is an incredibly long period of time. . . . Shouldn't that be reserved for people who are guilty of killing certain classes of individuals? . . . Who is the victim in this case? Is the victim a person in the higher end of the community? . . . Amanda was engaged in a life of prostitution¹⁶⁶

The fact that these women engaged in sex for remuneration seemed to deprive them, in the minds of these men, of equal standing in society and of the right *to not be sexually violated*. In addition, Amanda's transgender status likely served as grounds for her "punishment," as is all too often the case.¹⁶⁷ Thus, the law colludes with society in brutally enforcing norms of femininity, whether related to sexual non-agency or to the proper configuration of a woman's body, by failing to adequately punish rape and harassment when women contravene those norms.

Promiscuous women (or those merely perceived as such¹⁶⁸) could suffer the same vengeful reaction under the law. Rudman and Mescher's study¹⁶⁹ found that men's dehumanization of women was linked with uncharitable

163. ZSUZSANNA ADLER, RAPE ON TRIAL 101 (1987) (finding in a study of English rape trials that "the conviction rate of those accused of raping a woman whose sexual reputation was markedly discredited during the trial was 48 percent. This includes women who had in the past suffered from sexually transmitted diseases, those who had a reputation in the local community for being sexually available, those who had been involved in sexual intercourse with a number of persons within a short period of time and whose who were alleged to be prostitutes.").

164. Daniel Denvir, *Philly Judge Who Ruled Rape of Prostitute Didn't Count as Rape Up for Vote*, CITY PAPER (Oct. 31, 2013), <http://citypaper.net/article.php?Philly-judge-who-ruled-rape-of-prostitute-didn-t-count-as-rape-up-for-vote-16780>.

165. Christina Carrega-Woodby, *Hey, She was Just a Ho: Sick Bid by Killer's Lawyer*, N.Y. POST (Dec. 6, 2013, 6:16 AM), <http://nypost.com/2013/12/06/hey-she-was-just-a-ho-sick-bid-by-killers-lawyer/>.

166. *Id.* (convicting Amanda's killer and sentencing him to twenty-nine years in prison, scolding the defense attorney for his comments.)

167. Most studies have found shockingly high rates of rape and sexual assault within the transgender community, the most common findings hovering around 50 percent. Rebecca L. Stotzer, *Violence Against Transgender People: A Review of United States Data*, 14 AGGRESSION & VIOLENT BEHAV. 170, 172 (2009).

168. See Reva B. Siegel, *A Short History of Sexual Harassment*, in DIRECTIONS IN SEXUAL HARASSMENT LAW, *supra* note 41, at 1, 4 (noting that historically "prosecutors and judges relied on all kinds of race- and class-based assumptions about the 'promiscuous' natures" of certain women).

169. Rudman & Mescher, *supra* note 43.

attitudes toward rape victims—one attitude being that “[s]exually experienced women are not really damaged by rape.”¹⁷⁰ This is the same type of attitude that justified a Philadelphia judge’s conclusion that a violent gang rape was not worth punishing as such because it only happened to a sex worker. This attitude reflects, again, that the effects of benevolent sexism include defining a standard of “good” womanhood. This relational category necessarily demands a foil, and while “women who fulfill conventional gender roles that serve men are placed on a pedestal and rewarded with benevolent solicitude, . . . women who reject conventional gender roles or attempt to usurp male power are rejected and punished with hostile sexism.”¹⁷¹

IV.

INTERVENTIONS: STRATEGIES FOR PREVENTION AND RESPONSE

Thus far, this Comment has traced the linkages between ambivalent sexism, implicit gendered associations, women’s de-agentification, and sexual violence in the progression from—as this Comment posits—“ladies first” to “asking for it.”

Part I described the dialectic relationship between (1) benevolent-sexist beliefs in (some types of) women as delicate, pure, and in need of protection and (2) association of women with the home and disassociation of women from production, leadership, and work. Part II described the path from this cluster of associations and beliefs to the social status of women as non-agents, and their treatment as such through the twin presumptions that they will not initiate sex and that they will be receptive to sexual advances made toward them. Part III applied the problematic presumptions developed in Part II to the legal treatment of various kinds of sexual harassment and sexual assault.

Now, in considering solutions, I will focus on two different groups of tactics to address the problem of rape culture. Part IV.A recapitulates rape law reform advocates’ proposals (some of which have already been set in motion) that aim to aid in the administration of justice after a sexual assault has already been committed. Part IV.B proposes novel interventions that strike closer to the roots of rape culture and attempt to transform our society so that sexual violence no longer occurs.

A. A Survey of Current Responses

Legal scholars writing in the areas of rape and harassment have already made many practical suggestions for improving the handling of sexual violence

170. *Id.* at 4–5. This attitude is particularly troubling in light of the knowledge that women of color may be automatically presumed to be more promiscuous than their white counterparts. *See, e.g.,* Crenshaw, *supra* note 25, at 147 (noting that in some states, courts would instruct juries that “unlike white women, Black women were not presumed to be chaste”).

171. *An Ambivalent Alliance*, *supra* note 4, at 113.

at every stage of the legal process. Some of these reforms have already been widely implemented,¹⁷² some have been adopted by a minority of jurisdictions,¹⁷³ and others have not yet been put into effect.¹⁷⁴ Due to wariness about the large changes to the status quo they would entail, some reforms may not seem workable until greater changes occur in society first.¹⁷⁵ This section reviews a sampling of these proposals, categorizing them as (1) reforms to definitions and standards, (2) reforms to admit or exclude certain kinds of evidence, and (3) reforms to the decision-making processes of judges and juries.

1. *Capturing Conduct*

As discussed in Part III, there are substantial gaps in the coverage of rape and sexual harassment law. These gaps disproportionately leave two types of women unprotected: those falling into the “silence” Catch-22,¹⁷⁶ and those whose defiance of the norms of ladylike behavior (especially vis-à-vis sexual agency) triggers punishment rather than protection under ambivalent sexism. Changes to the statutes and standards governing rape and sexual harassment could extend (ostensibly) existing protections to these categories of victims—or, put differently, capture the conduct of those who victimize them. This section will discuss proposals to bring more workplace conduct under the definition of sexual harassment by shifting the burden of proof and the welcomeness standard. Then it will discuss proposals to make more conduct punishable as rape by (1) removing the “force” element from state statutes, (2) enacting special statutes to criminalize acquaintance rape, and (3) imposing an affirmative standard for consent.

172. See Dripps, *supra* note 18, at 961, 965 (discussing the abandonment of the “resistance” requirement in rape statutes, the “universal admissibility” of rape trauma evidence, and the adoption of Federal Rule of Evidence 413, which makes the defendant’s past acts admissible for the purpose of showing propensity to rape).

173. See *id.* at 962, 967 (noting that a substantial minority of jurisdictions prohibit instructing the jury on a mistake defense as concerns consent; noting that sixteen states and the District of Columbia criminalize sex without consent even when there is no force).

174. See STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF THE LAW 271 (1998) (arguing for an affirmative standard for consent: “actual permission—nothing less than positive willingness, clearly communicated—should ever count as consent”); Michelle J. Anderson, *Negotiating Sex*, 78 S. CAL. L. REV. 1401, 1407 (2005) (arguing that “the law should define ‘rape’ as engaging in an act of sexual penetration with another person when the actor fails to negotiate the penetration with the partner before it occurs”).

175. Part IV.B will discuss social steps that could lay the groundwork for more ambitious practical reforms of the sort outlined in Part IV.A.

176. See *Patriarchal Stories*, *supra* note 87, at 440–41.

a. Welcomeness and Sexual Harassment

Currently, to prevail on a sexual harassment claim, a plaintiff must prove that the harassing conduct was “unwelcome.”¹⁷⁷ As discussed in Part III.A, the application of this requirement generally means that a plaintiff who does not either formally complain or informally (but firmly) tell the harasser to stop will face an uphill battle in trying to prove her claim.¹⁷⁸ However, research shows that filing formal complaints is rare: one study found that only 15 percent of female harassment targets and 7 percent of male targets took this action.¹⁷⁹ Most commonly, a target’s response to sexual harassment is passive—she does nothing, ignores the behavior, or avoids the harasser.¹⁸⁰ Others may go along with the behavior, or make a joke out of it; sometimes they will tell a harasser to stop, but the majority responds differently.¹⁸¹ The reasons for this were explored above but might include fear of retaliation,¹⁸² a desire to “belong” in the workplace,¹⁸³ or the pervasive influence of gender norms that enforce feminine passivity.

Given the relative rarity of directly and negatively engaging the harasser about his behavior, let alone filing a formal complaint, it is easy to see how the current burden and standards for showing unwelcomeness unfairly disadvantage women who respond to harassment in the typical way. To address this, Mary Radford proposes shifting the burden such that the harasser must prove welcomeness as an affirmative defense, and setting the standard according to the plaintiff’s invitation or consent.¹⁸⁴ This represents a much more appropriate understanding of the gender dynamics at work in sexual harassment cases: instead of presuming consent, this new standard would find the conduct welcome only when the defendant shows that the plaintiff affirmatively invited, solicited, or consented to the specific conduct at issue.¹⁸⁵ Correctly applied, this standard could result in many more plaintiffs feeling able to bring sexual harassment claims without fear of intrusion into the (irrelevant) details of their personal lives. The new standard might even send a

177. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986).

178. *See supra* notes 117–20 and accompanying text.

179. U.S. MERIT SYS. PROT. BD., *SEXUAL HARASSMENT IN THE FEDERAL GOVERNMENT: AN UPDATE* 27 (1988).

180. *Id.* at 27–28 (finding that 52 percent of harassed women did nothing, and 43 percent avoided the harasser; additionally, 42 percent of men who were harassed responded by doing nothing, while 31 percent of them avoided the harasser).

181. *Id.* (reporting that 4 percent of women went along with the harassing behavior, 20 percent made a joke of it, and 44 percent told the harasser to stop).

182. *See Chamberlin v. 101 Realty, Inc.*, 915 F.2d 777, 784 (1st Cir. 1990); *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 888, 907 (1st Cir. 1988).

183. *See Reed v. Shepard*, 939 F.2d 484, 492 (7th Cir. 1991).

184. Radford, *supra* note 91, at 525.

185. *Id.* at 531.

message to employers and potential defendants that is clear enough to change workplace culture.¹⁸⁶

b. Rape

i. “Force” and “Resistance”

Before the first wave of the rape law reform movement,¹⁸⁷ courts required a showing that the woman resisted her attacker to prove that an incident was rape and not seduction.¹⁸⁸ That abolishing the resistance requirement was among the first priorities in reform is not surprising: it (along with the corroboration requirement) hurt the chances of conviction by implying that, if the woman could not prove that she had fought back and been overcome, there had been no rape. The resistance requirement in rape statutes places plaintiffs in a Catch-22,¹⁸⁹ just as the presumption of welcomeness does in sexual harassment cases. Norms that compel women to silence and passivity¹⁹⁰ persist in the context of rape. Perhaps because of the force of these norms, women are more likely to resist unwanted sex verbally than physically, if at all.¹⁹¹ Moreover, women often have good reason not to resist an attacker: doing so can increase their risk of death in the assault.¹⁹² This is especially true in cases of stranger rape.¹⁹³ When assaulted by an acquaintance, women may be less likely to resist¹⁹⁴ as a result of being “less well-prepared psychologically”¹⁹⁵ to do so. In other words, being attacked by an acquaintance is disarming. It may be the case that, in the context of an acquaintance rape, women feel greater pressure from social norms against resistance¹⁹⁶ because the familiarity between the parties makes it difficult to immediately see the situation as an

186. *Id.* at 547.

187. *See* Bryden & Lengnick, *supra* note 8, at 1198–99 (distinguishing the phase of the reform movement in the 1970s that led to the removal of the resistance requirement, among other things, from more recent “second wave” reform proposals such as the removal of the force requirement).

188. *See Two Concepts, supra* note 74, at 20–21.

189. *See* discussion *supra* Part III.A.

190. *See Patriarchal Stories, supra* note 87, at 440, 447.

191. Schwartz, *supra* note 154, at 577.

192. Corey Rayburn, *Better Dead than Raped?: The Patriarchal Rhetoric Driving Capital Rape Statutes*, 78 ST. JOHN’S L. REV. 1119, 1156 (2004).

193. *Id.* (noting that while new studies cast some doubt on the “conventional wisdom” that fighting back is more dangerous than not, it is still clear that “in cases where the rapist is a stranger, fighting back significantly increases the risk of death and severe injury to w[i]myn”).

194. The evidence on this point is conflicting. *See* Mary P. Koss et al, *Stranger and Acquaintance Rape: Are There Differences in the Victim’s Experience?*, 12 PSYCHOL. WOMEN Q. 1, 2–3, 21 (1988) (noting that previous studies have found that women tend to respond more passively and are less likely to use physical resistance when raped by an acquaintance, but finding no significant difference in resistance patterns between victims of stranger and acquaintance rape (with the exception of response by yelling or running away, employed more often in stranger rape)).

195. *Id.* at 21.

196. *See Patriarchal Stories, supra* note 87, at 440–41.

attack.¹⁹⁷ In any case, demanding proof of resistance in the face of social pressures that deter it resulted in the same unfair Catch-22 that binds women in sexual harassment cases.

While the “resistance” requirement in rape statutes has been eradicated, most states’ statutes still require the prosecution to demonstrate the element of force in order to show rape.¹⁹⁸ Feminist scholars have noted that requiring proof of force is in practice nearly the same as requiring the victim to show resistance.¹⁹⁹ after all, what force is needed against a victim who offers no resistance?²⁰⁰ Thus, “most statutory attempts to diminish the resistance requirement, without simultaneously discarding the force requirement, are merely ‘semantic.’”²⁰¹ If the two elements are two sides of the same coin,²⁰² then ceasing to demand proof of resistance has only allowed the force requirement to take over as a vehicle for victim-blaming through the juxtaposition of *normatively expected* feminine behavior (i.e. passivity) with *legally expected* behavior (i.e., resistance).

However, just as repealing the resistance requirement did not stop resistance from entering the discussion through the element of force, doing away with the force requirement would not necessarily remove it from the jurors’ minds. “[E]ven if neither resistance nor force were a required element of the crime, police, prosecutors, and juries would still need to decide whether the woman consented, and in doing so would still attach great weight, in acquaintance rape cases, to the degree of force and resistance.”²⁰³ Thus, removing the force element is not a sufficient statutory reform if the goal is to conceptualize rape as merely sex without consent, or consent as an affirmative standard. We must also provide something else in its place: statutory guidance on acquaintance rape and the definition of consent.

197. See Koss, *supra* note 127, at 206 (discussing the greater prevalence of “hidden rape” among women raped by acquaintances).

198. Anderson, *supra* note 134, at 631–32.

199. Estrich, *supra* note 80, at 1091 (noting “definitions accorded to force and consent may render ‘reasonable resistance’ both a practical and legal necessity” even where resistance is officially not required by statute).

200. Vetterhoffer, *supra* note 8, at 1240 (“Any time force is an element of rape, it will surely be lacking if the victim did not first resist at least to some degree, since force would be unnecessary without initial resistance.”). *But see* State in Interest of M.T.S., 609 A.2d 1266, 1269 (N.J. 1992) (holding that the repeal of the resistance requirement implied that proof of penetration alone was sufficient to establish force).

201. *Id.* at 1240 n.85 (quoting David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 356 (2000)).

202. ESTRICH, *supra* note 80, at 58–66.

203. Bryden & Lengnick, *supra* note 8, at 1291.

ii. Recognizing Acquaintance Rape and Defining Consent

While some jurisdictions have relaxed the force requirement by interpreting "constructive force" or "psychological force" to suffice,²⁰⁴ the persistence of the requirement may have symbolic import as well. As the idea that force is required in the paradigmatic rape makes acquaintance rapes more difficult to prosecute,²⁰⁵ it follows that removing the force requirement from statutes even where it lacks "teeth" could help shift the notion of what a rape *is*, such that acquaintance rapes meet with less skepticism. However, in light of the concern that the force requirement would continue in practice to affect the inquiry into consent,²⁰⁶ measures would also have to be taken to stipulate what definition of consent should be used.

Another approach to the recognition of acquaintance rape involves creating entirely new statutory provisions to criminalize types of acquaintance rape explicitly. One such proposal seeks to criminalize post-penetration rape, in which consent to the sexual act is initially given but withdrawn before completion (hence, the act only becomes rape sometime after the initial penetration).²⁰⁷ Vetterhoffer notes that simply having such a statute in effect could help shift popular consensus on the definition of "real rape" by dispelling rape myths and "help[ing] victims become aware that their experience constitutes rape."²⁰⁸ In addition, the existence of a statute that specifically recognizes their assault as illegal could help victims of post-penetration rape, or acquaintance rape more generally, feel more confident that reporting the crime would do some good and, in turn, could increase reporting rates.²⁰⁹ At best, a

204. See *supra* notes 157–59.

205. See Bryden & Lengnick, *supra* note 8, at 1202–04.

206. *Id.* at 1291.

207. Vetterhoffer, *supra* note 8, at 1230–31. Illinois is the first state to adopt such a statute. *Id.* at 1243.

208. *Id.* at 1246–47.

209. *Id.* As noted before, rape cases most often fail to go forward because of a failure to report or a failure to prosecute. See Bryden & Lengnick, *supra* note 8, at 1214. These problems exemplify the interdependence of all aspects of the legal system in rape cases. If a prosecutor declines to prosecute, it may be because of fear of eventual non-cooperation by the victim or of eventual non-conviction by the jury. *Id.* at 1216; Dripps, *supra* note 18, at 975. If a victim does not report an assault or backs out of a decision to prosecute, it may reflect a lack of confidence that the prosecutor will take the claim seriously, or anxiety over the possibly traumatic experience of trial. Bryden & Lengnick, *supra* note 8, at 1224. Thus, at any given stage from report to verdict, the chances that a rape case will go forward decrease according to the attitudes (actual or perceived) of the actors at every other stage. Addressing the problems of underreporting and reluctance to prosecute, then, depends on addressing deficiencies in the statutes and standards governing sexual assault. According to Taslitz, the interaction of gender stereotypes with current rape statutes leaves the prosecution with "an often insurmountable burden" when trying to prove date rape, but "[a] substantive re-definition of date rape to include nonconsensual sexual intercourse where the man has not made reasonable communicative efforts to obtain the woman's consent restores an appropriate prosecution burden." *Two Concepts*, *supra* note 74, at 75. Additionally, the creation of statutes that expand the scope of rape to explicitly include acquaintance rape can increase reporting rates by alerting victims that their claims are legitimate. Vetterhoffer, *supra* note 8, at 1246–47 (noting the caveat that such reform statutes should receive sufficient publicity to

statute that weakens the rape myths jurors often rely on could lead to more acquaintance rape convictions not just because the jurors can match facts to a statute, but because of a deeper shift in perspective on the definition of rape. However, even with the enactment of more comprehensive statutes, jurors may continue to fall back on notions of consent that disadvantage the victim.²¹⁰ Thus, statutory reforms like eradicating the force requirement and explicitly prohibiting acquaintance rape should be coupled with the promotion of a clear and specifically victim-friendly definition of consent.

Some rape law reform advocates have already urged adopting an affirmative standard for consent. Proposals suggest “defin[ing] ‘rape’ as engaging in an act of sexual penetration with another person when the actor fails to negotiate the penetration with the partner before it occurs,”²¹¹ or limiting the definition of consent to “actual permission—nothing less than positive willingness, clearly communicated.”²¹² Andrew Taslitz argues for a negligence standard for determining consent via “‘reasonable’ communicative efforts”—the accused rapist must demonstrate that he made such efforts to determine the other’s consent prior to sexual contact.²¹³ The theme running throughout these proposals, the necessity of communication, combats the premise (developed in Parts I and II of this Comment) that men can simply “know” that a woman wants to have sexual contact. Further, endorsing the necessity and practicality of communication helps to erode the damaging gender stereotypes that support rape culture: as Taslitz explains,

[S]ociety wrongly views men as governed by mechanistic emotions, sex as an uncontrollable force for which men *are* not fully responsible, while viewing women as governed by evaluative emotions, sex as a rational choice for which women are fully responsible. Current legal definitions of rape and date rape create room for these cultural gendered conceptions of emotions to set the ground rules for rape trials. However, the evaluative view is more empirically accurate and morally desirable for *both* sexes. Communicative sexuality embraces these observations, treating both men and women as capable of controlling both their sexual desires and their resulting behavior.²¹⁴

Because of these emotional stereotypes, a danger that arises without a communicative model of consent is that jurors “will tolerate a great deal of male sexual aggression before a woman’s relenting becomes seen as

ensure that victims know about the new definitions). Various evidence reforms, discussed in Part IV.A.2, *infra*, could also increase prosecution (and thus, indirectly, reporting) rates by increasing jury friendliness to cases in which the victim was an acquaintance or defied gender norms by seeming sexually agentic.

210. Vetterhoffer, *supra* note 8, at 1259.

211. Anderson, *supra* note 134, at 1407.

212. SCHULHOFER, *supra* note 174, at 271.

213. *Two Concepts*, *supra* note 74, at 47.

214. *Id.* at 6.

involuntary and thus not consensual.”²¹⁵ Relatedly, perceptions of men as in the grip of, and women as aware of what will incite, irrational sexual desire fuel the kind of leniency embodied by the mistake of consent defense.²¹⁶ Applying the “reasonable communicative efforts” standard would make such a defense obsolete in most cases—by definition, if the communicative efforts were reasonable,²¹⁷ then there would be little possibility of mistake absent outright miscommunication.

A final benefit of the “communicative sexuality” framework is that it reinforces women’s autonomy and men’s responsibility. Under this standard, “[e]ven if a man believes that a woman is ‘loose,’ he must ask. Even if a juror concludes that the offender reasonably believed that his victim consented, he must ask. Her race and social status do not change his obligations. . . . Any man who fails to ask merits punishment”²¹⁸ Because the proposed framework would hold a man responsible for ascertaining consent in any context, this standard holds tremendous promise for changing the outcomes in rape cases involving women who were acquainted with the attacker or who were interpreted as inappropriately sexually agentic. However—readers should recognize a theme by now—no one reform executed on its own is likely to effect much change in the legal handling of rape.²¹⁹ With that in mind, Taslitz emphasizes that changing the standard for determining consent should be accompanied by procedural reforms as well as social ones, such as “cur[ing] our unwise popular notions of gendered sexual emotions,” in order to maximize positive change.²²⁰

215. *Id.* at 29.

216. *See id.* at 30–31; *see* *People v. Mayberry*, 15 Cal.3d 143, 153-56 (1975) (affording an instruction on mistake of fact as to consent where “[the woman’s] ‘act’ and admitted failure to resist [the defendant] after the initial encounter or to attempt to escape or obtain help might have misled him as to whether she was consenting. . . . [T]here was some evidence ‘deserving of . . . consideration’ which supported his contention that he acted under a mistake of fact as to her consent both to the movement and to intercourse.”).

217. To concretize the standard, the jury would be instructed that in terms of “reasonable communicative efforts” to seek consent, “reasonableness” depends on “the questions and demeanor of a sensitive person.” (*Two Concepts*, *supra* note 74, at 70.) In brief, a “sensitive person” is a person who demonstrates awareness, appreciation, and accommodation of another’s needs in the context of possible sexual interaction. The jury instruction would indicate that the required “sensitivity” could be shown by the defendant making “express verbal inquiries” of his partner and proceeding only after the receipt of “‘yes’ answers.” *Id.*

218. *Two Concepts*, *supra* note 74, at 64.

219. *See, e.g.*, Bryden & Lengnick, *supra* note 8, at 1381 (noting that while “conviction rates cannot easily be changed by waving a legal wand. . . . attitudinal changes, perhaps indirectly helped along by the reforms, may achieve the desired result”); Vetterhoffer, *supra* note 8, at 1258–59 (admitting that “rape reform efforts in general do not tend to increase the incidence of rape convictions” and the argued-for post-penetration rape statute probably will not, on its own, either).

220. *Two Concepts*, *supra* note 74, at 64, 75.

2. Evidentiary Issues

a. Rape Shield Laws

Among the “first wave” rape law reforms adopted in the 1970s were the rape shield laws (at the federal level and in most states²²¹), intended to address the predicament of victims during trial. As the principal sponsor of the federal rape shield law put it, many victims, “[b]ullied and cross-examined about their prior sexual experiences, . . . [found] the trial almost as degrading as the rape itself.”²²² The federal version makes inadmissible “evidence offered to prove that a victim engaged in other sexual behavior” or “evidence offered to prove a victim’s sexual predisposition,” subject to certain exceptions, including most notably that “evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct” is admissible to prove consent.²²³ Coverage of state rape shield statutes varies, with most allowing evidence of prior sexual conduct with the defendant and barring evidence of the victim’s sexual conduct with anyone else.²²⁴

In spirit, rape shield statutes represent a much-needed reform that shifts the focus away from the victim’s character and gender stereotypes about sexual agency. In practice, however, the effectiveness of rape shield laws is dubious. For example, at the judge’s discretion, defense attorneys can often circumvent the shield to get prejudicial evidence before the jury regardless.²²⁵ Evidence that the victim was a sex worker often comes in “to provide a context” (i.e., to explain how she and the rapist met).²²⁶ Some judges even allow evidence of the victim’s history of sex work to prove consent.²²⁷ Allowing juries access to this information is detrimental to the victim’s rape case: according to one study, jurors’ willingness to convict a rapist when presented with evidence of the victim’s history of promiscuity, prostitution, or sexually transmitted disease is nearly cut in half, compared to when she has no sexual history or no evidence is presented.²²⁸ Clearly, the current application of rape shield laws provides an inadequate remedy for women whose sexual agency can be used against them. For victims having had previous sexual contact with the defendant, their assailants’ acquittal is practically written into the rule.²²⁹ The judge’s

221. All states now have a rape shield statute. See NAT’L DIST. ATTY’S ASS’N, RAPE SHIELD STATUTES (2011), <http://www.ndaa.org/pdf/NCPCA%20Rape%20Shield%202011.pdf>.

222. 124 CONG. REC. H34913 (Oct. 10, 1978) (Remarks of Elizabeth Holtzman).

223. FED. R. EVID. 412.

224. See RAPE SHIELD STATUTES, *supra* note 221.

225. Bryden & Lengnick, *supra* note 8, at 1287–88.

226. *Id.* at 1361.

227. *Id.* at 1360.

228. ADLER, *supra* note 163, at 101.

229. See FED. R. EVID. 412(b)(1)(B) (exception for prior sexual behavior with the accused); Bryden & Lengnick, *supra* note 8, at 1369 (“Evidence that the defendant and the complainant previously were lovers is extremely effective in persuading police not to investigate a rape complaint

admission, and the jurors’ use,²³⁰ of this information shows that a stronger evidentiary rule—or a different kind of reform—is needed to counteract the propensity to deny both classes of victims the laws’ protection.

b. Defendants’ Prior Acts

Federal Rule of Evidence 413, like rape shield laws, aims to shift focus away from the victim’s character by making the defendant’s prior similar acts available to the jury, an exception to the normal ban on propensity evidence.²³¹ This rule has been criticized not just by pro-defense thinkers who fear unfairness to the accused, but by rape law reform advocates who worry that the underlying assumption of Rule 413—that evidence of past sexual assault is highly probative because rape is something so depraved and pathological that only a small handful of men are likely to commit it—creates a misplaced feeling of exceptionalism around rape that is counterproductive to the feminist project of building awareness that rape is actually distressingly commonplace.²³² Although the image of a rapist is “a psychopathic, violent, sexually-compulsive (usually black) stranger[] . . . most men who rape adult women are neither mentally ill nor compulsive” and “there is no evidence that sex offenders are unable to control their actions. . . . In fact, men who rape are . . . essentially indistinguishable from the male population as a whole [except that they] have greater acceptance of rape myths, violence against women, and sexual stereotypes. Far from being mentally deviant, men who rape have simply internalized certain cultural and sex role norms.”²³³

From this perspective, the benefits of Rule 413 in individual cases are outweighed by its risks in the larger scheme: by “reinforcing the myth of the

and jurors not to believe it. Judges have also been known to take a dim view of such cases.”) (citations omitted).

230. Bryden and Lengnick point out, innovatively, that evidence of the victim’s promiscuity or prostitution or of her prior relationship with the defendant is actually ambiprobative—it could tend to prove either that she was more likely to have consented, or more likely to have been raped. Bryden & Lengnick, *supra* note 8, at 1363–64, 1370. This is because statistically, sex workers and “sexually adventurous women” are more likely than other women to suffer rape, a fact which should establish if anything that a complaint from one of these women is more likely than average to be credible. *Id.* at 1362–63. Likewise, given the high proportion of women who are raped by their current or former partners, the fact of a prior relationship with the defendant could in fact tend to bolster the victim’s claim that he raped her. *Id.* at 1370–71. However, when an inference in either direction is possible, if the evidence is let before the jury, then the jury must choose which inference sounds the strongest. Because of the persistent and pervasive beliefs about promiscuity and date rape, it is unlikely that jurors would choose the pro-victim inference in the case of such ambiprobative evidence. Such evidence would, in that case, be better left excluded. As a failsafe, though, jury selection and instruction measures should also be explored to limit the probability that jurors will rely on sexist stereotypes to misuse the evidence before them.

231. FED. R. EVID. 413.

232. See Christina E. Wells & Erin Elliott Motley, *Reinforcing the Myth of the Crazy Rapist: A Feminist Critique of Recent Rape Legislation*, 81 B.U. L. REV. 127, 139–41, 173 (2001).

233. *Id.* at 154 (citations and internal quotations omitted). For more discussion of how race factors into stereotypes about rapists, see *Two Concepts*, *supra* note 74, at 35–43.

crazed rapist,” the rule may make securing convictions more difficult when the accused does not resemble the stereotypical rapist, as in acquaintance rape cases. There is some evidence that this concern is not unfounded. While some judges have applied the Rule 403 balancing test to admit evidence under Rule 413 in cases of stranger rape,²³⁴ others have declined to admit such evidence where acquaintance rape is involved.²³⁵ However, this does not conclusively recommend the abandonment of Rule 413. While rape “is hard to prove in a particular instance, especially where the woman has violated norms of proper gendered behavior, a pattern of prior abuse makes the claim of present abuse more plausible. In other words, the jury may start to judge the offender rather than the victim.”²³⁶

Shifting focus to the defendant is a crucial step indeed. If Rule 413 were understood as a device to enlighten the jury as to how this defendant has approached sexual encounters in the past, then past acts of rape could be admitted to show a pattern of not taking care to ascertain consent—or, more coldly, not caring whether there *is* consent.²³⁷ Thus, combined with an understanding of consent as the defendant’s affirmative responsibility, Rule 413 holds promise for both classes of women who face special difficulty in rape cases: those raped by acquaintances and those perceived to violate gender norms. To use this rule most effectively, though, the jury might need a bit more help.

c. Expert Testimony

Expert testimony on contextual factors in rape cases would help the jury better understand the dynamics framing a specific incident, such as why a survivor’s delay in reporting does not mean the report is false.²³⁸ In the absence of such guidance, prevalent gender stereotypes frame the jurors’ consideration of evidence and taint it with sexism.²³⁹ Donna Shestowsky’s discussion of the effects of expert testimony in sexual harassment cases concluded that “many perceptions about sexual harassment are infused with sex-stereotypes. . . . and the reasons why a victim may be reluctant to report the harassment are often poorly understood.”²⁴⁰ Sexual harassment cases in which the jury was denied access to expert testimony generally resulted in worse outcomes for the plaintiff,²⁴¹ likely because deliberations occurred in the context of sexist

234. See, e.g., *United States v. Peters*, No. 96-2286, 1998 WL 17750, at *3 (10th Cir. 1998).

235. *United States v. Jackson*, CR 95-388-FR, 1996 WL 444968, at *4 (D. Or. July 22, 1996).

236. *Two Concepts*, *supra* note 74, at 69.

237. See *Willfully Blinded*, *supra* note 7, at 408.

238. See *Two Concepts*, *supra* note 74, at 73.

239. See *id.*

240. Donna Shestowsky, *Where is the Common Knowledge? Empirical Support for Requiring Expert Testimony in Sexual Harassment Trials*, 51 STAN. L. REV. 357, 384 (1999).

241. See *id.* at 367–84.

assumptions rather than an informed understanding of the effects of sexual violence.²⁴²

Returning to Taslitz’s notion of the “Catch-22” of normative femininity, it is easy to see how rape victims are similarly disadvantaged by the absence of expert testimony. If a victim does not comply with jurors’ preconceived notions about how a woman should act before, during, or after a rape, acquittal is likely.²⁴³ However, as this Comment has shown, other concurrently held notions of proper gendered behavior might influence women to act this way—for instance, a woman not wishing to appear frigid might not firmly resist unwanted contact.²⁴⁴ To avoid trapping victims in this bind, expert testimony in rape trials should provide jurors with stereotype-challenging information and explanations of the processes behind our behavior and expectations. Taslitz lists several crucial functions an expert in a rape trial could perform:

- discuss rape survivor demographics, explaining that women of all ages and backgrounds are raped;
- explain why a “true” victim might delay reporting a crime or that acquaintance rape is common;
- debunk the myth that only deviants commit rape;
- testify about the rapist-victim relationship;
- answer juror concerns about why a woman might engage in “alluring” conduct and yet have no interest in sexual intercourse, or how a date rapist can isolate a victim and overcome her resistance without the need for bruising force.²⁴⁵

Most compellingly, Taslitz suggests that experts testify to jurors directly about their biases. Since “[c]ognitive research demonstrates that well-learned stereotypes persist ‘long after a person has sincerely renounced prejudice[,]’ . . . [m]aking jurors aware of *why* such stereotypes continue to have a grip on their thinking despite their best intentions does offer hope of loosening that grip.”²⁴⁶ To that end, expert testimony should educate jurors about the different ways we view men’s and women’s sexualities, how race factors into our gender biases, and why these thought processes are problematic.²⁴⁷

242. *See id.* at 380–84.

243. *See* Bryden & Lengnick, *supra* note 8, at 1202–04.

244. *See Patriarchal Stories*, *supra* note 87, at 440–41.

245. *Two Concepts*, *supra* note 74, at 73. Any proposed expert testimony could alternatively be presented as a jury instruction, which could be the more effective model since “judicial instructions may carry more authority than expert testimony, and judges might therefore be even more successful than experts at combating misperceptions about sexual harassment.” Shestowsky, *supra* note 240, at 384–85. However, since experts are more capable of assessing research in their area of specialty and judges are not necessarily free of sexist bias in any greater measure than jurors, perhaps experts, rather than judges, may be better suited to delivering this kind of information. *Id.* at 385.

246. *Two Concepts*, *supra* note 74, at 73.

247. *Id.*

Shestowsky's examination concluded that "[i]f educational institutions and the media become more involved in correcting the misperceptions about sexual harassment, then an accurate common knowledge . . . might eventually develop. Until such public awareness and understanding sufficiently develops . . . expert testimony in sexual harassment trials is imperative."²⁴⁸ Thus, while expert testimony may be a satisfactory interim strategy for educating the jury, this kind of help likely comes too late. As Taslitz noted, it takes time to overcome biases,²⁴⁹ and expert testimony offered once in the courtroom can only reach so deep. Expanding the use of expert testimony in sexual harassment and rape cases, then, should accompany more direct routes to address the jury, as well as larger-scale efforts that engage the media and educational institutions in breaking down our biases.

3. *Juries*

Jurors, at the end of the day, are just people. Every point of wariness raised in this Comment about sexist stereotypes, endorsement of rigidly gendered norms, and dichotomous beliefs about sexuality (including rape myths) becomes an obstacle once at the door of the jury, even if it were temporarily surmounted at an earlier phase of the process. As Taslitz's example of modifying the standard for consent illustrates, the success of any of the reforms heretofore discussed (if success is equivalent to increased conviction rates²⁵⁰) depends on the extent to which the effects of that reform can reach the jury:

[G]iven current social mores, a jury might readily decide that a man's ignoring a "no" was consistent with his reasonable belief that she consented. The reasonableness standard, as currently articulated, . . . produces a sound result only if the jury itself is reasonable. . . . If it isn't, the reasonableness standard simply invites the worst abuses of cultural stereotyping and ingrained sex bias that rape reformers have tried so long to escape. The reasonableness formula can succeed . . . only if concrete reforms . . . move beyond that formula to specify *which* beliefs about consent count as reasonable.²⁵¹

Educating the jury through introduction of expert testimony has already been discussed. This section will explore possibilities for decreasing juror bias by eliminating biased jurors, first through jury selection, then through removing the jury from the equation altogether.

248. Shestowsky, *supra* note 240, at 384 (citations omitted).

249. *Two Concepts*, *supra* note 74, at 73.

250. Importantly, not all rape reform advocates see increased conviction rates as the ultimate goal. For a discussion of the possibility of restorative justice as a remedy in rape cases, see generally Alletta Brenner, *Resisting Simple Dichotomies: Critiquing Narratives of Victims, Perpetrators, and Harm in Feminist Theories of Rape*, 36 HARV. J.L. & GENDER 503 (2013).

251. *Willfully Blinded*, *supra* note 7, at 385 (citations and internal quotation marks omitted).

a. Jury Selection

Linda Fairstein expressed the crux of the trouble afflicting the stalled rape law reform movement quite well: “Although our laws now permit us to prosecute them, not until we are able to inform and educate the public—the men and women who serve on our juries—will we be able to convict more of the men who are guilty of acquaintance rape.”²⁵² There is, however, another option: cull the herd. Taslitz favors more rigorous processes of jury selection to boost fairness in the consideration of victims’ rape complaints.²⁵³ With a goal of “select[ing] those jurors least in the grip of subordinating cultural tales” about gender, Taslitz argues for the implementation of special voir dire procedures that may include bias testing.²⁵⁴ Such tests would seek to discern which jurors would be capable of fairly applying the law in rape trials, and which jurors rate “so high on those relevant personality traits and attributes that they are likely to fall prey to rape myths.”²⁵⁵ Following testing, jurors registering such high gender bias that they risk misapplying the law would be stricken for cause.²⁵⁶ Race-biased jurors, who might be led by the race of the defendant or victim to employ racially inflected gender stereotypes,²⁵⁷ would be subject to the same types of procedures.²⁵⁸ Excluding potential jurors who demonstrate endorsement (conscious or not) of hostile or benevolent sexist ideologies, rape myths, or racial biases would ideally leave the victim with a jury able to assess her claim of rape according to its merits rather than her behavior.

b. Jury Bypass

Tightening jury selection as a solution to biased deliberations, however, depends on an adequate supply of sufficiently enlightened jurors for its effectiveness. Donald Dripps, arguing for a still more radical approach, notes the stark divide between the “elite opinion” of judges, legislators, and academics and the “popular opinion” of everyone else—the potential jury pool.²⁵⁹ While “elite” thinkers praise sexual autonomy and condemn sexual aggression, “popular” opinion conditions women’s autonomy on sexually

252. LINDA A. FAIRSTEIN, *SEXUAL VIOLENCE: OUR WAR AGAINST RAPE* 136 (1993).

253. *Two Concepts*, *supra* note 74, at 72.

254. *Id.* at 71–72.

255. *Id.* at 72.

256. *Id.*

257. *Id.* at 36–38 (discussing stereotypes of black men as especially aggressive and sexual, and noting that “at least some criminal justice system actors hold Black males *more* responsible for rape when the victims are White but *less* responsible when the victims are Black. . . . [P]art of the explanation for this effect [is] that jurors . . . were influenced by stereotypes of black women as more likely to consent to sex or as more sexually experienced and hence less harmed by the assault.” (citations and internal quotations omitted)).

258. *See id.* at 72.

259. Dripps, *supra* note 18, at 958.

passive behavior while admiring sexual aggressiveness in men.²⁶⁰ Dripps sees little hope of changing popular opinion or mitigating its impact with well-drafted evidentiary rules,²⁶¹ so he proposes bypassing popular opinion in rape cases altogether.²⁶²

When circumventing the right to jury trial, the maximum possible penalty that can result is six months in jail.²⁶³ Thus, in jurisdictions that have made non-consensual sex (with no showing of force) punishable in its own right, these cases could be optionally adjudicated by special tribunals with the authority to assign a penalty of up to six months in jail.²⁶⁴ Dripps hopes that this procedure would protect both victims of acquaintance rape and victims who might appear promiscuous or reckless to a jury: under this approach, “[d]efense efforts to characterize the defendant’s disregard of his victim’s will could not so easily be painted as somehow justified by her misconduct, or earned by his prior intimacy with her.”²⁶⁵

Dripps’s proposal embraces wholeheartedly Fairstein’s position that, until we change public opinion, most other practical reform measures will be of limited use.²⁶⁶ One can draft the most faithfully pro-victim statute, and it will not matter a bit if the jury still convicts or acquits according to the same old biases. Indeed, two scholars conducting a thorough review of the literature conclude that most implemented rape law reforms have likely had “little to no effect” on the ultimate results in rape cases.²⁶⁷ However, not all of the reforms discussed in this section have been enacted; some have merely been proposed. It is possible that the success of some measures is bound up with the passage of others, and the seemingly marginal returns up until this point are due to missing steps. In this way, the foregoing list of possible solutions is the lawyer’s “If You Give a Mouse a Cookie.”²⁶⁸ If you remove the force requirement, then you will need to define consent. If your definition rests on reasonableness, then you will need to instruct the jury. If your instruction conflicts with popular opinion, then you will need to intensify your voir dire. If your voir dire reveals pervasive gender bias—then what do you do?

Assuming the average rape law reform enthusiast will not be satisfied by Dripps’s interim solution of six-month sentences for rapists in difficult-to-

260. *Id.*

261. *Id.* at 971.

262. *Id.* at 960.

263. *Id.*

264. *Id.* at 976–77 (noting the objection that six months is so short as to trivialize the offense of non-consensual sex, but countering that currently so many offenders spend no time at all in jail that this option is better than, effectively, nothing).

265. *Id.* at 976.

266. *See generally* FAIRSTEIN, *supra* note 252.

267. *See* Bryden & Lengnick, *supra* note 8, at 1290–91.

268. *See generally* LAURA NUMEROFF, *IF YOU GIVE A MOUSE A COOKIE* (1985) (chronicling the ever-emerging needs of a small mouse whose attainment of one goal merely triggers the next challenge).

prosecute cases, one must trudge onward with broader social reform efforts in hopes that these will change popular opinion on gender, sex, and rape. Implicit gender beliefs, as explained in Part I, are susceptible to change when the mind is presented with counter-stereotypic information.²⁶⁹ Because the structures that rest on ambivalent sexism and gender norms are so strong, it is likely that potential jurors experience many stereotype-confirming stimuli when they step out in the world. Part of the rape law reformer’s battle, then, is to increase the relative proportion of norm-destabilizing representations—to challenge the complacency of public opinion in its certainty that gender is naturally and necessarily as it seems.²⁷⁰ In that vein, the next section advocates broader social reform that strikes closer to the roots of the failures to report, prosecute, and convict rapists: looking back to Part I, these following suggestions attempt to transform outcomes by targeting ambivalent sexism, gender differentiation, and coercive social norms for men and women.

B. Prevention

The previous section reviewed proposals for practical reforms to facilitate the prosecution of sexual assaults at every phase in the criminal justice system. However, response covers only the end of the story. Truly addressing the problem of systemic sexual violence requires a deeper approach: one that targets the conditions that perpetuate a culture in which the sexual assault of women is tolerated as commonplace, or even celebrated as a sexual victory by the assailant. This raises the question: How can we shift public opinion such that juries respect women’s autonomy enough to convict their rapists, men empathize with women enough not to treat them as mere sexual instrumentalities, and society adopts “the radical notion that women are people”?²⁷¹ To implement meaningful change, we must begin at the beginning—before the characters of “rapist” and “survivor” ever even enter the story. We must back up to the point before “men” and “women” became the taken-for-granted cast of characters.

269. See Dasgupta & Asgari, *supra* note 40 at 647.

270. See BUTLER, *supra* note 13, at 216, 218 (“[I]t is important not only to understand how the terms of gender are instituted, naturalized, and established as presuppositional but to trace the moments where the binary system of gender is disputed and challenged, where the coherence of the categories are put into question, and where the very social life of gender turns out to be malleable and transformable. . . . If gender is performative, then it follows that the reality of gender is itself produced as an effect of the performance. Although there are norms that govern what will and will not be real, and what will and will not be intelligible, they are called into question and reiterated at the moment in which performativity begins its citational practice. One surely cites norms that already exist, but these norms can be significantly deterritorialized through the citation. They can also be exposed as non-natural and nonnecessary when they take place in a context and through a form of embodying that defies normative expectation.”).

271. Marie Shear, *Media Watch: Celebrating Women’s Words*, NEW DIRECTIONS FOR WOMEN, May/June 1986, at 6.

1. Embracing “Gender Trouble”

Part I of this Comment attempted to explain how ambivalent sexism lies at the root of women’s troubles under rape culture. By way of recapitulation, ambivalent sexism is made up of the symbiotic combination of hostile and benevolent sexism. While the two expressions of sexism may look different in practice, they in fact grow out of the same premises: (1) women and men are fundamentally different (complementary gender differentiation), (2) women are fundamentally good but also weak and, as such, need and deserve men’s protection (paternalism), and (3) women and men are meant to complement one another in a heterosexual relationship (heterosexuality).²⁷² Really, these last two are outgrowths of the first premise: that a clear line exists that differentiates between men and women. It is this one notion that then generates behavioral norms for members of each gender category, expectations that these rules will be followed, and punishments for violating the norms, by being (for example) promiscuous and therefore, “unladylike.”²⁷³ The ideology that men and women are—and must be—separate imposes these social requirements that people act in accordance with the norms of their gender.

Prior to this normative coercion, however, is an even less visible one: the ideology that there *are* such things as men and women, that they are the *only* things, and that each of us is either one or the other.²⁷⁴ West and Zimmerman, in their seminal work on the sociology of gender, describe gender as an “accomplishment,” a series of “doings” that is “undertaken by women and men whose competence as members of society is hostage to its production.”²⁷⁵ Moreover, the entire process of doing gender “cast[s] particular pursuits as expressions of masculine and feminine ‘natures.’”²⁷⁶ In this way,

doing gender . . . renders the social arrangements based on sex category accountable as normal and natural. . . . [T]he institutional arrangements of a society can be seen as responsive to the differences—the social order being merely an accommodation to the natural order. Thus if, in doing gender, men are also doing dominance and women are doing deference . . . the resultant social order, which supposedly reflects “natural differences,” is a powerful reinforcer and legitimator of hierarchical arrangements.²⁷⁷

This account of gender as a reified construction endowed with the verisimilitude of *necessity* because of its naturalness helps to explain how the practice of rigid gender differentiation persists. In addition, if “dominance” and

272. *Ambivalent Sexism Inventory*, *supra* note 5, at 493.

273. *See supra* notes 25–28 and accompanying text.

274. *See* BUTLER, *supra* note 13 (discussing the existence of nonbinary identities and the ways in which binary categories are produced and reified).

275. West & Zimmerman, *supra* note 42, at 126.

276. *Id.*

277. *Id.* at 146 (citations omitted).

"deference" are enacted as part of doing gender, it is easy to see how ambivalent sexism depends on gender differentiation. Both hostile and benevolent sexism involve men's dominance over women—something that seems by West and Zimmerman's account to be built into the very concept of gender itself.

Judith Butler plays on this idea of "doing gender" in *Undoing Gender*, in which she delves deeply into the idea of gender as a performative process, thus "non-natural and non-necessary,"²⁷⁸ but supremely coercive, such that those falling (or desiring to fall) outside the traditional understandings of what it means to be a man or a woman are rendered "unintelligible" and may even question whether they are human.²⁷⁹ This is powerful motivation indeed to stay within the bounds of normative gender. While Butler's discussion of these more severe existential consequences bears more strongly on those who are transgender, participate in drag, or are otherwise far afield of hegemonic gender norms,²⁸⁰ the grave threat of social retaliation arguably constrains men and women who already keep much closer to their respective norms as well.²⁸¹ By the same token, Butler's revelation that there is hope for change²⁸² applies to the relatively norm-compliant men and women as well as to those on the edge of social "unintelligibility."

This hope for change lies in the "question of social transformation": the paradox that, while the performative nature of gender requires that it be "done" with reference to (if not necessarily in compliance with) norms, the use of familiar norms in a subversive context has the potential to destabilize and alter those norms.²⁸³ In other words, individuals have the power to fight back against coercive gender norms by playing with them: as in drag performance, where norms of femininity are "cited" by men in a new context,²⁸⁴ the monolithic power of a feminine prescriptive stereotype can be undermined by women subversively engaging with its content as well. "Butch" and "femme" women stand out as an example. By enacting an opposition between masculinity and femininity that is similar to the relationships between heterosexual women and men, but doing so as a pair of women, the fact of butch-femme culture revealed the "nonnecessary" status of heterosexual couples as the "so-called 'originals'" in those oppositional roles.²⁸⁵ Thus, in showing how the "original" is "as performative as the copy . . . , dominant and nondominant gender norms are equalized."²⁸⁶

278. BUTLER, *supra* note 13, at 218.

279. *Id.* at 217–18.

280. *Id.* at 217.

281. *See* Kivel, *supra* note 26.

282. *See* BUTLER, *supra* note 13, at 217–18.

283. *Id.* at 218.

284. *Id.*

285. *Id.* at 209.

286. *Id.*

Because dominant norms can be challenged by advancing subversive uses of those norms, there is a way out from under the prescriptive gender stereotypes that help perpetuate rape culture: as a society, we must make room for more alternative renditions of gender. Importantly, these genders are not “new”: as Butler notes, they “have been existing for a long time, but they have not been admitted into the terms that govern reality.”²⁸⁷ Transgender individuals, in a sense, defy gender stereotypes by definition.²⁸⁸ To the extent that one identifies, presents, or alters one’s body to conform to the conventions of a gender not associated with one’s assigned sex at birth, that person transgresses a social boundary in a way that can expand the limits of the category that holds them.²⁸⁹ Similarly, those with queer sexualities could be said to break gender stereotypes by that fact alone, if sexual desire for a woman is part of the norms of masculinity, and vice versa.²⁹⁰ Butler’s interpretation of butch and femme identities as revealing the performative nature of heterosexual relationships presents a compelling argument that identities that queer the gender or sexuality paradigm have the potential, if legitimized, to undermine the hegemony of the normative status quo.

Because of the marginalization of these communities, however, the law has work to do if the hegemony of binary gender is to be weakened. While America has seen many recent victories in the realm of marriage equality,²⁹¹ activists are quick to point out that this is far from the most important issue facing communities with nonnormative genders or sexualities.²⁹² Encouragingly, several protections for transgender individuals have recently been enacted, including lifting the ban on Medicare coverage for sex

287. *Id.* at 219.

288. See Ilona M. Turner, Comment, *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 CALIF. L. REV. 561 (2007) (arguing that victims of employment discrimination on the basis of their transgender status are *per se* victims of sex-stereotyping discrimination).

289. See BUTLER, *supra* note 13, at 209 (on the limits of categories: “There were many who asked whether they were women, and some asked it in order to become included in the category, and some asked it in order to find out whether there were alternatives to being in the category.” Obviously, trans men and trans women may both fit this scenario, albeit from different sides.)

290. Turner, *supra* note 288, at 571 n.66. *But see* Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2d Cir. 2005) (refusing to “bootstrap” protection for orientation into Title VII via the gender stereotype argument).

291. See, e.g., United States v. Windsor, 570 U.S. 12 (2013) (striking down section 3 of the Defense of Marriage Act); Jack Healy, *Appeals Court Rejects Utah’s Ban on Gay Marriage, Prodding Supreme Court*, N.Y. TIMES, June 25, 2014, <http://www.nytimes.com/2014/06/26/us/us-appeals-court-rejects-utahs-ban-on-gay-marriage.html> (noting as well that Arkansas, Michigan, Idaho, and Indiana had recently overturned bans).

292. See, e.g., Rickke Mananzala, Soniya Munshi, Nadia Qurashi, Elana Redfield, & Dean Spade, *Law Reform and Transformative Change: A Panel at CUNY Law*, 14 CUNY L. REV. 21 (2010) (discussing safety of LGBT youth of color, immigration status, and racial and economic justice in the queer community as concerns larger than marriage equality); *At LGBT Conference Leaders Warn Against Too Much Focus on Marriage Over Other Issues*, THE AM. INDEP. INST., <http://americanindependent.com/209998/at-lgbt-conference-leaders-warn-against-too-much-focus-on-marriage-over-other-issues> (last visited Oct. 22, 2014).

reassignment surgery²⁹³ and guaranteeing the rights of transgender students in California to participate in school activities.²⁹⁴ However, LGBT individuals receive no formal federal protection from employment discrimination,²⁹⁵ and hate crimes on the basis of sexual orientation and gender identity are still shockingly common.²⁹⁶ Meanwhile, intersex individuals,²⁹⁷ representing perhaps the best rebuttal to the fiction of “naturally” binary sex, are routinely surgically mutilated as children to bring their bodies into conformity with a stereotypically “male” or “female” appearance.²⁹⁸ Butler envisions a world in which “those who understand their gender and their desire to be nonnormative can live and thrive not only without the threat of violence from the outside but without the pervasive sense of their own unreality.”²⁹⁹ Clearly, more legal protections must be established and enforced to ensure such a place.

While destabilizing coercive gender norms is obviously crucial for those whose bodies, identities, and gender expressions completely reject the current binary framework, it is also beneficial to those who mostly do fit comfortably into the categories of men and women. While gender norms certainly hurt queer, nonbinary, and transgender people more than those with cisgender, binary identities,³⁰⁰ as this Comment has argued, the strong prescriptive norms that grow out of the ideology of gender differentiation can be harmful to everyone. Decreasing the pressure on young men to live up to a certain image of masculinity may decrease the incidence of rape by men involved with fraternities or sports teams, where displays of masculinity via (sometimes non-consensual) sex are commonplace.³⁰¹ Removing women from the double bind of “ladylike” behavioral expectations, on the one hand, and the norm of passive receptivity, on the other, would hopefully do real work to cure juror bias in rape cases where the victim’s behavior would have run afoul of one of those norms.

293. NAT’L CTR. FOR TRANSGENDER EQUAL., MEDICARE AND TRANSGENDER PEOPLE (2014), available at <http://transequality.org/PDFs/MedicareAndTransPeople.pdf>.

294. *CA Governor Brown Signs Historic Transgender Students Bill into Law*, TRANSGENDER LAW CTR., <http://transgenderlawcenter.org/archives/8756> (last visited Oct. 15, 2014).

295. Some courts have interpreted Title VII to extend protection to transgender plaintiffs under a “sex stereotyping” theory, but no statutory language secures this protection in other jurisdictions. Some courts have explicitly excluded sexual orientation from protection under the same theory. *See supra* notes 341 & 343 and accompanying text.

296. NAT’L COAL. OF ANTI-VIOLENCE PROGRAMS, LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER AND HIV-AFFECTED HATE VIOLENCE IN 2012 (2013) (reporting over 2,000 instances of hate violence in each of the years 2011 and 2012).

297. *What Is Intersex?*, INTERSEX SOC’Y OF N. AM., www.isna.org/faq/what_is_intersex (last visited Oct. 22, 2014).

298. Anne Tamar-Mattis, *Exceptions to the Rule: Curing the Law’s Failure to Protect Intersex Infants*, 21 BERKELEY J. GENDER L. & JUST. 59, 64–67 (2006).

299. BUTLER, *supra* note 13, at 219.

300. *Id.* at 55 (“The social punishments that follow upon transgressions of gender include the surgical correction of intersexed persons, the medical and psychiatric pathologization . . . of ‘gender dysphoric’ people, the harassment of gender-troubled persons on the street or in the workplace, employment discrimination, and violence.”)

301. *See Willfully Blinded*, *supra* note 7, at 408–09.

With “rules” of gender differentiation less ruthlessly imposed, the ideologies that permit punishment for stepping outside the lines hopefully will begin to fall away. “Undoing gender” may mark the undoing of ambivalent sexism, as well.

With the goal of destabilizing gender norms to dismantle ambivalent sexism, three other areas of possible reform are next discussed: reproductive rights, media representations, and sex education.

2. Reproductive Autonomy

Glick and Fiske connect the female reproductive system to the system of patriarchy by reciting that women’s biological responsibility for carrying and feeding infants likely justified their relegation to domestic duties and association with the home.³⁰² Given that association with the home is related to de-agentifying stereotypes,³⁰³ and that feminist scholars have likewise linked the reproductive burden to limited life opportunities,³⁰⁴ perhaps it is not surprising that as early as 1970, Shulamith Firestone urged for reproduction to occur outside the womb so as to free women from the “means of reproduction.”³⁰⁵

Indeed, to the extent that pregnancy and childbirth hang over the heads of only those born with female reproductive anatomy, disparities in reproductive capacity continue to drive the disproportionate burdening of women by contraception and abortion restrictions. The right to abortion has been gradually eroding since the *Roe v. Wade* decision in 1973,³⁰⁶ first subjected to the “undue burden” standard articulated in *Casey*,³⁰⁷ then facing procedure-specific restrictions under *Carhart*.³⁰⁸ Legislatively, twenty-five states have enacted Targeted Regulation of Abortion Providers (TRAP) laws, which set unnecessary standards for abortion clinics.³⁰⁹ The standards do not improve patient care but may result in the closure of clinics unable to meet them.³¹⁰

302. *Ambivalent Sexism Inventory*, *supra* note 5, at 492.

303. *See supra* notes 46–52 and accompanying text.

304. *See generally* SHULAMITH FIRESTONE, *THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION* (1970) (arguing that the biological division of labor between the sexes in reproduction is the root of class conflict and women’s domination by men); BELL HOOKS, *FEMINISM IS FOR EVERYBODY: PASSIONATE POLITICS* 29 (2000) (noting in the context of reproductive rights that “[i]f women do not have the right to choose what happens to our bodies we risk relinquishing rights in all other areas of our lives.”).

305. FIRESTONE, *supra* note 304, at 7, 10.

306. *Roe v. Wade*, 410 U.S. 13 (1973).

307. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

308. *Gonzales v. Carhart*, 550 U.S. 124 (2007) (banning intact dilation and extraction past certain anatomical landmarks).

309. GUTTMACHER INSTITUTE, *State Policies in Brief: Targeted Regulation of Abortion Providers* (as of October 15 2014); Olivia Becker, *Abortion Clinics Are Closing Because Their Doorways Aren’t Big Enough* (June 26, 2014), <https://news.vice.com/article/abortion-clinics-are-closing-because-their-doorways-arent-big-enough>.

310. *Id.*

Most recently, the Supreme Court upheld the right of religious employers to refuse to provide insurance coverage for certain contraceptive methods (believed by the employers to be abortifacients)³¹¹ and struck down Massachusetts’s “buffer zone” law that protected those entering or exiting abortion clinics from harassment by pro-life protestors.³¹²

These efforts to restrict access to abortion and contraception place women in danger of a bodily invasion that biological men will never experience: unwanted pregnancy. The place of this risk in the context of ambivalent sexism is complicated. Single women who become pregnant (or seek contraception to avoid this) are derided as sluts—women who have forsaken the “ladylike” domain—while women who welcome pregnancies in the context of a heterosexual marriage are seen as fulfilling their calling and are generally socially rewarded under benevolent sexism. However, even in the context of marriage or otherwise committed relationships, perpetrators of domestic violence frequently sabotage their partners’ contraception, forcing pregnancy as a further means of control.³¹³ Restrictions on abortion and contraception echo and reinforce that point of control: because pregnancy is a danger that women are subject to, and men subject them to, taking agency away from women by restricting access to preventative or remedial health care colludes in the control of women by men.

This type of control, however, is not inevitable. To decrease the ability of rapists and abusers to use gendered reproductive differences against their victims, any statute that limits a woman’s right to control her own reproduction should be repealed, any case law overturned. The law should seek as much as possible to minimize the consequences of gender differentiation in reproduction when they leave women vulnerable to harm, as here. The law cannot mandate Shulamith Firestone’s brave new world,³¹⁴ but it can ensure that women have unobstructed access to control over their own “means of reproduction.”

3. *Gender on the Screen*

As discussed in Part II, representations in the media have a powerful sway over viewers.³¹⁵ For example, even small amounts of exposure to non-verbal clips of television shows caused viewers to show a spike in racial bias.³¹⁶ As the media examples identified in Part II revealed, movies, music videos, and song lyrics are at times boiling over with gender bias. Apart from evidence of

311. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

312. *McCullen v. Coakley*, 134 S. Ct. 2518 (2014).

313. Shane M. Trawick, Comment, *Birth Control Sabotage as Domestic Violence: A Legal Response*, 100 CALIF. L. REV. 721, 730–31 (2012).

314. See FIRESTONE, *supra* note 304, at 10 (arguing that in order to escape male domination, women must at least temporarily circumvent their reproductive differences, including gestation and birth of babies).

315. See *supra* notes 54–77 and accompanying text.

316. Weisbuch & Ambady, *supra* note 54, at 1106; Weisbuch et al., *supra* note 56, at 1711.

rape myths transmitted through the media,³¹⁷ nearly every mainstream piece of media portrays some degree of gender differentiation just by virtue of using men and women characters and making no efforts to queer those roles. Thus, knowing what we know about the transmission of bias, the gender stereotype-suffused media could be fertile ground for social reform.

If the images we see on a screen have the potential to deepen or challenge our associations—and, thus, our ideologies—then gender-conscious viewers should encourage the media to increase the portrayals of counter-stereotypic characters or dynamics in hopes that more viewers will be exposed to alternative images of gender. The Netflix series, *Orange is the New Black*, set in a women’s prison, has by some accounts succeeded in telling different gendered stories than those usually portrayed on television.³¹⁸ Because the show features almost exclusively female characters, including several queer women, one trans woman, and many women of color, viewers are exposed to a wider *range* of women characters—some of whom conform to norms, and some of whom do not. Lea DeLaria, who plays a butch lesbian on the show, is confident that the diversity of the characters is helping to create LGBT acceptance.³¹⁹

A popular show that has met with some viewer backlash, on the other hand, is HBO’s *Game of Thrones*. Viewers have criticized the show for its staggering disparity in female versus male nudity,³²⁰ as well as for its especially brutal treatment of women characters (including the creation of a rape in the storyline that was extraneous to the text³²¹). In these ways, the show may perpetuate certain gender norms—women are frequently on display but vulnerable to victimization, while men are aggressive, in war as in sex.

The anti-pornography wing of feminism has embraced Weisbuch and Ambady’s notion of the bias-reifying effects of the media³²² for decades. And, facially, why not? If the objectification of women in advertisements or on network television potentially leads to sexist biases, it is certainly arguable that the overt sexualization—and to some, degradation—of women in pornography carries even greater risks of bias-transmission. Thus flow the complaints of feminist scholars like Catharine MacKinnon and Andrea Dworkin that the

317. See *supra* notes 79–83 and accompanying text.

318. Jaimie Etkin, *Big Boo Is The Butch Lea DeLaria Has Been Waiting To Play Her Whole Life*, BUZZFEED (June 16, 2014, 1:48 PM), <http://www.buzzfeed.com/jaimieetkin/big-boo-orange-is-the-new-black-lea-delaria>.

319. *Id.*

320. Kristin Iversen, *Where Are All the Penises?: Why the Lack of Male Nudity on Game of Thrones is a Problem*, BROOKLYN MAG. (Apr. 11, 2014, 12:05 PM), <http://www.bkmg.com/2014/04/11/where-are-all-the-penises-why-the-lack-of-male-nudity-on-game-of-thrones-is-a-problem/>.

321. Sonia Saraiya, *Rape of Thrones: Why are the Game of Thrones showrunners rewriting the books into misogyny?*, A.V. CLUB (Apr. 20, 2014, 9:45 PM), <http://www.avclub.com/article/rape-thrones-203499>.

322. See Weisbuch & Ambady, *supra* note 54.

treatment pornography accords women, gender, and sexual dynamics does violence both real and symbolic.³²³

MacKinnon is, under a generous reading, skeptical of the First Amendment protection extended to pornography.³²⁴ MacKinnon contends that “the liberal defense of pornography as human sexual liberation . . . is a defense not only of force and sexual terrorism, but of the subordination of women” wherein “[p]lay conforms to scripted roles, fantasy expresses ideology not exemption from it, and admiration of natural physical beauty becomes objectification.”³²⁵ While this viewpoint may well apply to a swath of the porn industry, the answer to the concerns raised by MacKinnon’s critique is probably not censorship. Indeed, MacKinnon and Dworkin proposed an ordinance that would define pornography as a form of sex discrimination and prohibit its production, exhibition, and distribution as such.³²⁶

It would be naïve to believe that any feminist movement could completely eradicate the depiction of women in sexualized contexts—and near-sighted to think that one should. For two reasons, this Comment parts ways with MacKinnon here (if not before). First, some women experience sex work “as both an economically and sexually liberating option.”³²⁷ Especially in the case of prior sexual abuse, if voluntary sex work is “the first time that they have experienced the notion of ‘consent’ as at all meaningful,”³²⁸ then other feminists should certainly not paternalistically deprive women in this circumstance of their empowerment.³²⁹ This position draws on a “sex-positive” approach, believing that “sexual freedom is an essential component of women’s freedom.”³³⁰ This freedom must include the freedom to consent as well as to

323. See, e.g., CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 195–214 (1989); see generally ANDREA DWORKIN, PORNOGRAPHY: MEN POSSESSING WOMEN (1981).

324. MACKINNON, *supra* note 323, at 204–08.

325. *Id.* at 198.

326. See ANDREA DWORKIN & CATHARINE A. MACKINNON, PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN’S EQUALITY 138–42 (1988).

327. ELIZABETH BERNSTEIN, TEMPORARILY YOURS: INTIMACY, AUTHENTICITY, AND THE COMMERCE OF SEX 105 (2007) (discussing prostitution, but the point is analogous in pornography).

328. *Id.*

329. Cf. GAIL DINES, PORNLAND: HOW PORN HAS HIJACKED OUR SEXUALITY xii (2010) (expressing skepticism that women who emulate looks or actions seen in porn are truly “empower[ed]”); DWORKIN, *supra* note 323, at 148 (analogizing the idea that a woman could be a willing participant in pornography to the idea of Jews going willingly into gas chambers during the Holocaust).

330. See NEERU TANDON, FEMINISM: A PARADIGM SHIFT 67 (2008) (“[S]ex-positive feminists oppose legal or social efforts to control sexual activities between consenting adults, whether these efforts are initiated by the government, other feminists, opponents of feminism, or any other institution.”). A sex-positive perspective is taken in this Comment on the ground that paternalistically quashing women’s sexual expression seeks to turn a “yes” into a “no,” which is perhaps not as dangerous, but just as denigrating, as telling women their “no” really means “yes.” The law has not historically had a sex-positive orientation, but the Oregon law on sex education provides in part that “sexuality education materials, instructional strategies, and activities” shall not use “shame or fear

withhold consent. Second, the fact of the sex work itself can subvert gender norms,³³¹ as well as the resulting media representations in the case of pornography. “Protecting” women from pornography, on the other hand, can act in concert with the norms that this section argues should be undermined, effectively barring women from engaging in this variety of “unladylike” conduct. In the interest of overcoming rigid gender differentiation, we should empower women to take ownership of their sexuality and the representations thereof to ensure that these images “subjectify” rather than objectify women, giving them power over the story they tell about their gender and sexuality. This strategy aims to use the medium of pornography as transformative—allowing for women to assume a role in the process, as well as to create a product that destabilizes gender norms that would otherwise cabin notions of women’s proper expressions of sexuality.

In fairness to MacKinnon, perhaps at the time her critique of pornography was written, the possibility of a feminist subversion of porn was beyond the realm of practical possibility—maybe even unthinkable.³³² Now, however, there *is* such possibility, and feminist actors and producers are creating porn with women-friendly images and narratives as well as processes.³³³ One such producer explains that, in contrast to mainstream pornography, “[f]eminist porn explores ideas about desire, beauty, pleasure, and power through alternative representations . . . depicts sexual consent and agency, and prioritizes female pleasure.”³³⁴ Responding to the concerns of Dworkin and her ilk, Taormino emphasizes that while “[f]eminist pornographers don’t want to do away with sexual power dynamics[,] many of us want to explore them in an explicitly consensual and more diverse, nuanced, non-stereotypical way.”³³⁵ That is, while pornography and other sexualized representations of women are capable of reproducing the damaging ideologies that underlie de-agentification and

based tactics,” defined as “terminology, activities, scenarios, context, language, and/or visual illustrations that are used to devalue, ignore, and/or disgrace students who have had or are having sexual relationships.” OR. ADMIN. R. 581-022-1440(1)(q), (8) (2014).

331. BERNSTEIN, *supra* note 327, at 78 (noting that sex work advocacy group COYOTE believes that sex work is a transgressive act that helps women “leap over the rigidly enforced good girl/bad girl” divide).

332. CATHARINE A. MACKINNON, *ONLY WORDS* 15 (1993) (The very idea of pornography, as MacKinnon described it, was bound up with the dominance of men over women, and that dominance infected the process of production as well as the finished product. “In pornography, women are gang raped so they can be filmed. . . . [The] women are hurt and penetrated, tied and gagged Only for pornography are women killed to make a sex movie”).

333. See Anna Breslaw, *So, What Is Feminist Porn? Find Out From a Woman Who Makes It*, COSMOPOLITAN MAG. (Nov. 6, 2013, 5:50 PM), <http://www.cosmopolitan.com/celebrity/news/tristan-taormino-feminist-porn-interview?click=smart&kw=ist&src=smart&mag=CO> (transcribing an interview with Tristan Taormino, a director and producer of feminist pornography); see also *THE FEMINIST PORN BOOK: THE POLITICS OF PRODUCING PLEASURE* (Tristan Taormino et al. eds., 2013).

334. Breslaw, *supra* note 333 (interviewing Taormino).

335. *Id.*

contribute to rape culture,³³⁶ this result is not inevitable. A concerted effort to change ideologies around gender and sexuality should sooner *use* the medium of pornography as a conduit for norm-subversion than attack it wholesale. By decoupling feminism from the sex-negative rhetoric of the anti-porn movement, women will be in a far better position to claim sexual agency and counter the normative script of silence; by giving women more "opportunities to say 'yes,'"³³⁷ we can strike down the trope of women as sexual "gatekeepers" whose only option (other than passive receptivity) is to say "no."

4. Learning to Ask

Education, both in school and of the general public, is perhaps the most direct route to changing public perceptions of gender stereotypes, sex, and rape. One scholar proposes that the best way to keep the next generation from falling prey to rape myths is to teach them about "the definition of rape, the statistics of date rape among teenagers, why men and women are silent victims and rarely report rape, rape trauma syndrome, the role of socialization, steps to use to prevent rape, and how to help a rape survivor."³³⁸

Some public displays and events have been set up to do just that. For example, a series of posters appears on college campuses and in other public places depicting young men alongside one of several quotes that describe his decision to respect a refusal of consent.³³⁹ Known as the "My Strength Is Not For Hurting" campaign, the featured text includes "[W]hen she said no, I said okay," and "[W]hen I wanted her, I asked her, and I took no for an answer."³⁴⁰ These posters, specifically aimed at acquaintance rape situations, can help teach young men about the importance of asking for consent instead of assuming its presence.

A list satirizing popular "rape prevention tips" (e.g., avoid walking alone at night) also provides internet users with ten ways for *men* to avoid committing a rape.³⁴¹ Among these words of wisdom include: "If you pull over to help a woman whose car has broken down, remember not to rape her," and "Use the buddy system! If you are not able to stop yourself from assaulting

336. See DWORKIN, *supra* note 323, at 137–38 ("The rape of women who appear to 'really like it that way' by camera is the first definition of the female as victim in contemporary society.").

337. *Un-Memorizing the "Silence is Sexy" Date Script*, QUEER GUESS CODE (Mar. 22, 2013), <http://queerguesscode.wordpress.com/2013/03/22/un-memorizing-the-silence-is-sexy-date-script/> (advocating for explicit, affirmative consent in sexual situations as a means not only to combat rape but to afford women more opportunities to be agentic with respect to sex).

338. Sarah Gill, Comment, *Dismantling Race and Gender Stereotypes: Using Education to Prevent Date Rape*, 7 UCLA WOMEN'S L.J. 27, 71 (1996).

339. *Saying Goodbye to "My Strength Is Not For Hurting"*, MEN CAN STOP RAPE (Dec. 14, 2011), <http://mencanstoprape.blogspot.com/2011/12/saying-goodbye-to-my-strength-is-not.html> (noting the "My Strength Is Not For Hurting" campaign was officially retired in 2011).

340. *Id.*

341. *10 Top Tips to End Rape*, RAPE CRISIS SCOTLAND, <http://www.rapecrisisscotland.org.uk/campaigns/10-top-tips-to-end-rape/> (last visited Oct. 22, 2014).

people, ask a friend to stay with you while you are in public.”³⁴² These materials capitalize on the problematic prevalence of rape myths in the discussion around rape prevention, recasting assumptions about men’s aggression and women’s blameworthiness for their victimization. They send the important messages that men are responsible for stopping rape, and they are up to the task.

Consciousness-raising efforts are evident as well from feminist demonstrations such as “Slutwalk,” a march to challenge the victim-blaming attitude that a person’s behavior or appearance can justify his or her victimization.³⁴³ At these marches, women (and some men) carry signs explaining the circumstances of their sexual assault along with the assertion, “I wasn’t asking for it.”³⁴⁴ A photograph of a Slutwalk attendee standing nude to the waist with the words “*still* not asking for it” written on her torso³⁴⁵ powerfully addresses the presumption that there are circumstances in which explicit consent is unnecessary. Demonstrations like Slutwalk show that is untrue—that a woman can transgress gender norms against sexual agency and it still does not give anyone the right to rape her, nor does it count as consent.

Formal sex education, however, lags behind. Popular sexuality columnist Dan Savage likens most American sex education to a poorly taught driver’s education course: students are taught in technical terms how the reproductive “machinery” works (if they are even taught that), but they are not actually taught what they need to know in order to—euphemistically—drive.³⁴⁶ If this is true, then even relatively comprehensive sex education without a discussion of consent is comparable to teaching a student how to drive, but leaving out the importance of heeding traffic lights. Only twenty-two states and the District of Columbia require by statute that public schools teach sex education, while only nineteen states require that the sex education that *is* offered involve training in “avoiding coercion.”³⁴⁷ Nineteen may sound like a decent showing in terms of including consent in sex education curriculum, but some of those statutes, such as Alabama’s, dispense with the topic of consent by covering “[i]nformation

342. *Id.*

343. See Vanessa Pinto, *Slutwalk SF Says No to Victim Blaming*, HUFFINGTON POST (Sept. 14, 2012, 5:42 PM), http://www.huffingtonpost.com/vanessa-pinto/slutwalk-sf-says-no-to-vi_b_1882979.html.

344. See Andy Thornley, *Hundreds of Women Attend ‘Slut Walk’ Protest*, DEMOTIX (Sept. 22, 2012), <http://www.demotix.com/photo/1469303/hundreds-women-attend-slut-walk-protest>.

345. *Still Not Asking For It*, FLOWERPOWER (Jan. 6, 2013), <http://flowerpower.wordpress.com/2013/01/06/still-not-asking-for-it/>.

346. Dan Savage, *Sex Dread*, in AMERICAN SAVAGE: INSIGHTS, SLIGHTS, AND FIGHTS ON FAITH, SEX, LOVE, AND POLITICS (2013).

347. SEX AND HIV EDUCATION, THE GUTTMACHER INST. 1, 4 (2014), available at http://www.guttmacher.org/statecenter/spibs/spib_SE.pdf (Those states are Alabama, Arizona, Colorado, Delaware, Illinois, Maryland, Michigan, Mississippi, Missouri, New Mexico, North Carolina, Oregon, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, and West Virginia, plus the District of Columbia).

concerning the laws prohibiting sexual abuse, the need to report such abuse, and the legal options available to victims of sexual abuse” and “[i]nformation on how to cope with and rebuff unwanted physical and verbal sexual exploitation by other persons.”³⁴⁸ Thus, even when a state purports to teach its students about sexual consent, too often the focus may be on the consequences of a *completed* sexual assault, or on the responsibilities (or “life skills,”³⁴⁹ more palatably) of a potential victim to “rebuff” that unwanted contact him- or herself. Other states, such as Oregon, place the focus more correctly upon teaching consent to facilitate learning to avoid *committing* sexual assaults: the relevant portions of this statute demand that sex education “teach[] that no form of sexual expression, or behavior is acceptable when it physically or emotionally harms oneself or others” and that “it is wrong to take advantage of or exploit another person.”³⁵⁰

While heartening, Oregon’s mandate of consent-conscious sex education is the exception rather than the rule. In order to promote this critical appreciation for the importance of consent, *every* state should amend its statute to require instruction of this type in sex education. (Of course, that would first require every state to mandate at least a modicum of sex education in the first place—which twenty-eight³⁵¹ do not.) In addition to expanding official school curricula, it is crucial that parents take an active role in helping their children learn about consent and communication. Even in interactions where sex is not mentioned at all, children are absorbing information and lessons—about gender, communication, respect, boundaries, and self-assertion—that they will one day apply in the course of a sexual exchange. The editors at The Good Men Project³⁵² created a detailed set of instructions about how to talk to children about consent starting at an early age.³⁵³ By age thirteen, the editors recommend that parents talk to their children clearly and specifically about sex and consent, but prior to this, the foundations for understanding the importance of consent can (and should) be laid by teaching kids the importance of the word “no,” helping them cultivate empathy, reminding them to ask before touching or hugging a friend, and letting them decide for themselves (within reason) how they would like to dress or play.³⁵⁴

348. ALA. CODE § 16-40A-2(c)(5)-(6) (2014).

349. See THE GUTTMACHER INST., *supra* note 347, at 4 (using the column heading “life skills” to indicate which states provide for “avoiding coercion” in their sex education).

350. OR. ADMIN. R 581-022-1440 (6)(m) (2014).

351. See THE GUTTMACHER INST., *supra* note 347.

352. *About Us*, THE GOOD MEN PROJECT (last visited Oct. 22, 2014), <http://goodmenproject.com/about/>. The Good Men Project is a website designed to foster a conversation about enlightened manhood—aiming, as it were, to create “good men” through cultural discussion of the problems with and potentials for modern masculinity. *Id.*

353. *The Healthy Sex Talk: Teaching Kids Consent, Ages 1-21*, THE GOOD MEN PROJECT (Mar. 20, 2013), <http://goodmenproject.com/families/the-healthy-sex-talk-teaching-kids-consent-ages-1-21/>.

354. *Id.*

This education must begin early because the damaging patterns it is intended to prevent begin early. Recently, a six-year-old boy was suspended from his elementary school in Colorado for sexual harassment, precipitated by his unwanted kissing of a female classmate's hand.³⁵⁵ The boy had been suspended once before for kissing the same girl on the cheek, indicating that his unwanted physical intrusion on the girl's personal space was already becoming a recurring pattern.³⁵⁶ His mother, as well as many other local parents, considered the suspension (and particularly the use of the term "sexual harassment") to be extreme and unfitting. One comment went so far as to call the school's response "sexual discrimination against little boys."³⁵⁷ The boy's mother indignantly assured sources that the girl in question was "fine with it,"³⁵⁸ referring to the kiss, and other commentators agreed, essentially endorsing the adage that "boys will be boys." However, one feminist blogger pointed out that "the girl he kissed without permission is . . . also [six years old] and not interested in his touching her. The hard and unpleasant part, for many, is the idea that her right not to be involved in his working through learning self-control is legitimate."³⁵⁹ Indeed, the failure to comprehend this right echoes the pervasive sexist beliefs that underlie much of rape law, upholding the right of boys (and men) to "be boys" even when the consequence is infringement of another's autonomy.

Teaching consent should not be difficult. After all, it is not much more than basic communication, attentiveness, and respect. However, the backdrop of such efforts will always be implicit bias and sexist ideology, which are the same obstacles faced when teaching consent to the jury in a rape case. However, with the combination of direct efforts, such as jury instructions and sex education in schools, with the indirect efforts discussed in this section, there is cause to hope that different messages about consent will be transmitted in the future than those taught today.

CONCLUSION

During my first year of law school, a colleague pithily informed me that if ever my arguments for an affirmative standard for consent proved successful, "You're going to make a lot of rapists out there." Had I been able to overcome my shock and find the words at the time, I would have told him that it would not be the law (and certainly not *me*, or others advocating for it) spontaneously

355. Kelly Wallace, *6-year-old Suspended for Kissing Girl, Accused of Sexual Harassment*, CNN (Dec. 12, 2013, 1:01 PM), <http://www.cnn.com/2013/12/11/living/6-year-old-suspended-kissing-girl/>.

356. Soraya Chemaly, *No, It's Not OK to 'Steal Kisses' – Here's Why*, HUFFINGTON POST (Dec. 16, 2013, 4:36 PM), http://www.huffingtonpost.com/soraya-chemaly/no-its-not-ok-to-steal-kisses-heres-why_b_4454920.html.

357. *Id.*

358. Wallace, *supra* note 355.

359. Chemaly, *supra* note 356.

creating rapists out of previously good men. Rather, it would be the individuals themselves who, in electing to go forward with sexual contact without their partner's clear consent, made themselves into rapists. This is not to suggest that sexual assault usually begins with the assailant deliberately resolving to commit rape, or that the systemic problem of rape can be solved just by changing the statutes. On the contrary, this Comment has argued that the ideologies of ambivalent sexism that promote the social acceptability of rape are pinned to the ontology of gender differentiation, a set of processes and norms that seem so natural that it is often difficult to detect anything unusual about the attached beliefs. The ideologies that convince some men that it is okay to rape, or okay to rape certain women (like "sluts," or their girlfriends), or that what they are doing is not rape at all, are the same ideologies that convince juries to acquit these men, police and prosecutors to let them slide, and victims not to report in the first place. So, rape prevention and rape law reform may be accomplished by the same means: attacking those ideologies by destabilizing the ground on which they rest.

That ground, again, is the system of binary gender differentiation and the corresponding behavioral norms it imposes on men and women. As elaborated by ambivalent sexism, the differentiation of genders corresponds to a differentiation into high-agency and low-agency categories, overarching norms that shape the smaller, more concrete, and visible rules of society. Men should be strong.³⁶⁰ They should be sexually aggressive.³⁶¹ They should be breadwinners. Women should be passive: receptive, but not assertive. They should have babies and tend to the home. They should not be promiscuous, but nor should they deny men access to their bodies.³⁶² These are the norms that, working together, leave women perceived as promiscuous and women raped by acquaintances with particularly poor prospects for prevailing on their claims.

The solution to the problems wrought by binary gender differentiation is to undermine the binary. Given the enormity and apparent persistence of binary gender, this prospect may seem prohibitively daunting. However, when coercive gender norms depend at least in part on the appearance of naturalness for their power, the understandings of gender they enforce are "put into crisis" by any data that challenges the status quo.³⁶³ The counter-stereotypic performances that the system of binary gender differentiation seeks to quash are powerful precisely because of their potential to expose that system as a process of essentialization, naturalization, and reification that can be interrupted and overthrown. Thus, Judith Butler urges us to "trace the moments where the binary system of gender is disputed and challenged, where the coherence of the categories are put into question, and where the very social life

360. See Kivel, *supra* note 26, at 70.

361. See *Willfully Blinded*, *supra* note 7, at 408–09.

362. See *Patriarchal Stories*, *supra* note 87, at 441.

363. BUTLER, *supra* note 13, at 214.

of gender turns out to be malleable and transformable.”³⁶⁴ Change will occur when we find the cracks in the wall of gender hegemony and exploit them.

In proposing social reforms, I have tried to outline how each one contributes to the destabilization of taken-for-granted gender norms and aims to bring about a more equitable state of affairs. The visible instances of people subverting these norms, from stay-at-home dads to feminist porn stars, will make it more difficult for adherents of now-popular biases to justify their judgments as reflecting what is “natural” or “necessary.” As the process progresses, juries should become less critical of the promiscuous victim and more exacting of the man who attacked her. However, merely broadening the confines of two restrictive, non-overlapping boxes does nothing to protect those who would step even further outside the current lines—those of us who are queer, genderqueer, trans, or intersex. While this Comment has invoked the project of “undoing gender” as a solution to sexual violence as it affects women, its intended beneficiaries truly were the members of these communities: those who, as Butler recognized, need space for their bodies and identities in order to survive. But there is a nexus. When Butler wrote that “this differential effect of ontological presuppositions on the embodied life of individuals has consequential effects,”³⁶⁵ the referred-to effects included violent means of enforcing gender norms against those who transgress them.³⁶⁶ Sexual violence is certainly one means of punishing such transgression (as evidenced by the awful phenomenon of “corrective rape” of queer women and trans people³⁶⁷). To the extent that the rape of non-queer, non-trans women who defy some feminine norms still reflects punishment for their deviation, there is an amount of shared suffering.

While my argument asserts that even cisgender and heterosexual men and women will benefit from erosion of the binary differentiation scheme of gender, Butler’s subjects demand it. Moreover, the “gender-troubled”³⁶⁸ among us are key to the process. On destabilizing the “ontology” of gender, Butler suggested that “drag can point out . . . that (1) this set of ontological

364. *Id.* at 216.

365. *Id.* at 214.

366. *Id.* at 6 (“The harassment suffered by those who are ‘read’ as trans or discovered to be trans cannot be underestimated. They are part of a continuum of the gender violence that took the lives of Brandon Teena, Mathew Shephard, and Gwen Araujo. And these acts of murder must be understood in connection with the coercive acts of ‘correction’ undergone by intersexed infants and children that often leave those bodies maimed for life, traumatized, and physically limited in their sexual functions and pleasures.”).

367. See Janice Ristock, *Sexual Assault in Intimate Same-sex Relationships*, in *INTIMATE PARTNER SEXUAL VIOLENCE: A MULTIDISCIPLINARY GUIDE TO IMPROVING SERVICES AND SUPPORT FOR SURVIVORS OF RAPE AND ABUSE* 259, 266 (Louise McOrmond-Plummer et al. eds., 2014) (defining “corrective rape” as “a means of ‘curing’ LGBT individuals of their nonheteronormative, nonconforming sexual orientation and/or gender identity”).

368. BUTLER, *supra* note 13, at 55.

presuppositions is at work, and (2) that it is open to rearticulation,”³⁶⁹ and “indeed, much more than drag, transgender [existence] . . . not only mak[es] us question what is real, and what has to be, but [shows] us how contemporary notions of reality can be questioned, and new modes of reality instituted.”³⁷⁰ Any transgression advocated in Part IV.B, from abortion to sex work, is then a smaller-scale effort to institute those new modes of reality.

This Comment has shown that legal reforms alone are not sufficient to eradicate the problems of rape culture. While statutory, evidentiary, jury selection, and jury instruction measures are positive steps, those so far have been shown to be largely ineffective.³⁷¹ If the resistance to tangible change in outcomes comes down to juror attitudes about gender, consent, and rape, then jury education is the most important reform for which we can advocate. Biases are tenacious, and so much of this “education”—if it is to be effective—must take place far before a juror sets foot in the courtroom. Therefore, education in the broader course of life, through exposure to ideas and individuals who challenge gender norms, is perhaps the best chance to decrease juror bias. Furthermore, gender norms can only be undermined to a limited extent as long as a basic binary differentiation, into uncomplicated categories of women and men, seems necessary. The most compelling evidence that the gender binary is neither natural nor necessary are the living, breathing people around us who toy with—or altogether eschew—the divide every day. Feminist advocates should seek to shape the law to accommodate and protect those with nonnormative genders and sexualities—not only as an end in itself, but as a means of delegitimizing the gender-based norms that support rape culture through destabilizing gender in the first instance.

*“If you have come here to help me, then you are wasting your time.
But if you have come because your liberation is bound up with mine,
then let us work together.” –Lilla Watson³⁷²*

369. *Id.* at 214.

370. *Id.* at 217.

371. See Bryden & Lengnick, *supra* note 8, at 1228–29 (noting that “rape reporting rates are generally unresponsive to changes in a particular jurisdiction’s rape law, even when those changes signal a desire to reduce victim blaming in rape trials” and “most reforms do not appear to have affected conviction rates”) (citations omitted).

372. The original source of this quote is unknown. One source reports that Watson prefers it to be attributed to “Aboriginal activists group, Queensland, 1970s.” *Attributing Words*, U.S. AGAINST EQUINE SLAUGHTER (Nov. 3, 2008), <http://unnecessaryevils.blogspot.com/2008/11/attributing-words.html>.

