

RAPE BEYOND CRIME

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ABSTRACT

Public health experts agree that sexual violence constitutes a significant public health issue. Yet criminal law dominates rape law almost completely, with public health law playing at best a small supporting role. Recent civil law developments, such as university disciplinary proceedings, similarly fixate on how best to find and penalize perpetrators. As a result, rape law continues to spin its wheels in the same arguments and obstacles.

This Article argues that, without broader cultural changes, criminal law faces a double bind: rape laws will either be ineffective or neglect the importance of individual culpability. Public health law provides more promising terrain for rape prevention because it is a strong legal framework that can engage the complex causes of rape, including the social norms that promote sexual aggression. While criminal law can only punish bad behavior, public health interventions can use the more effective prevention strategy of promoting positive behaviors and relationships. They can also address the myriad sexual behaviors and social determinants that increase the risk of rape but are outside the scope of criminal law. Perhaps most importantly, public health law relies on evidence-based interventions and the expertise of public health authorities to ensure that laws and policies are effective.

Transforming rape law in this way provides a framework for legal feminism to undertake the unmet challenge of “theorizing yes,” that is, moving beyond how to protect women’s right to refuse sex and toward promoting and exploring positive models of sex. Criminal law is simply incapable of meeting this challenge because it concerns only what sex

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should not be. A public health framework can give the law a richer role in addressing the full spectrum of sexual attitudes and behaviors.

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INTRODUCTION

Rape poses a special problem for the law. Legal scholars and lawmakers agree that rape is a horrific crime and that traditional rape law was underinclusive and unfair to victims.¹ Yet there is little

1. See *infra* Part I.A. “Rape” and “sexual assault” are legal terms, referring to criminal offenses defined in statutes. Use of these terms can vary based on jurisdiction. Compare N.Y.

consensus on how best to reform rape law, and efforts have yielded disappointing results.² Forced or coerced sex remains widespread and difficult to prosecute, particularly when the victim knows the defendant.³

This meager progress is unsurprising: legal scholars have undertaken a task destined to fail. We have made rape law almost exclusively the provenance of criminal law, a framework of prohibition and punishment. Criminal law is inherently ill suited to meet the challenges rape poses, most notably rape's entrenchment in a culture that views sex as antagonistic—something to be taken or won from a partner.

This Article argues that, absent a broader change in this culture, criminal law faces a double bind: rape laws will be either ineffective or unjust. The facts of any given rape case must be interpreted by judges and jurors steeped in a culture of gender stereotypes and rape myths. Yet rape law cannot avoid this problem by forcing prosecutors, juries, and judges to ignore these social norms. Even the most despicable beliefs can be relevant to determining a defendant's mens rea—whether the defendant knew the victim did not consent or was reckless or negligent as to the victim's nonconsent.⁴ The problem is not merely that social norms thwart effective prosecution; if we truly care about culpability, sometimes they *must*, because social and cultural norms are integral to a defendant's mens rea. Social norms and cultural cognition

PENAL LAW § 130.35 (McKinney 2009) (using the term “rape”), with N.J. STAT. ANN. § 2C:14-2 (West 2016) (using the term “sexual assault”). The terms may also be used to refer to something broader than what the law prohibits—a normative conception of what *ought* to be punishable.

This Article uses both “sexual assault” and “rape.” It uses both the descriptive and normative meanings of the terms in different contexts; it analyzes both the criminal law's difficulty enforcing laws that define rape in a particular jurisdiction, while also discussing rape law in a normative sense. Furthermore, the Article uses terms such as “sexual aggression,” “sexual violence,” and “unwanted sex” to acknowledge that the concept of rape occurs within a larger context of issues related to sex, aggression, and consent that may be broader than the legal definition of rape.

2. See *infra* Part I.A.

3. See Katharine K. Baker, *Why Rape Should Not (Always) Be a Crime*, 100 MINN. L. REV. 221, 235–36 (2015); David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1251–52 (1997); David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73, 73 (2002); Cassia Spohn & David Holleran, *Prosecuting Sexual Assault: A Comparison of Charging Decisions in Sexual Assault Cases Involving Strangers, Acquaintances, and Intimate Partners*, 18 JUST. Q. 651, 682 (2001); see also SUSAN BROWN MILLER, *AGAINST OUR WILL* 351–52 (1975) (stating that police are more likely to consider stranger rapes founded than acquaintance rapes). For statistics on the prevalence of forced sex, see *infra* notes 66–78.

4. See *infra* Part I.B.2.

can therefore render toothless even the most progressive criminal law rape reforms.⁵ Rape law reform is bound to fail unless it directly addresses the culture that accepts and promotes sexual aggression.

The answer is not to scale back the law's approach to rape, but rather to change its dimensions. This Article proposes that we reconceptualize rape law as public health law, with criminal law serving a complementary role. Public health experts agree that sexual violence constitutes a significant public health issue.⁶ Yet, among legal scholars and lawmakers, criminal law dominates rape law almost completely, with public health law playing at best a small supporting role. This Article inverts that dynamic.

A public health framework is far better suited than criminal law to address the complex factors that encourage sexual violence and coercion. Public health law's focus is evidence-based prevention. While criminal law determines whether bad behavior should be punished, public health strategies focus on identifying and establishing healthful behavior among communities and populations. It is broad in scope, integrating several areas of law from education law to environmental law. Indeed, public health law encompasses any area of law that seeks to improve the health and well-being of the population.⁷

Public health law provides a strong legal framework to analyze and engage the complex causes of rape. In particular, public health law can change the social norms that promote sexual violence and thwart its successful prosecution. Changing the paradigm of rape law can help meet the challenge posed by Katherine Franke's seminal work *Theorizing Yes*.⁸ As Franke notes, feminist legal scholarship has

5. See *infra* Part I.B.1.

6. See *infra* Part II.A.

7. While public health law was traditionally limited to issues such as disease control and quarantine, it has expanded significantly in recent years. Public health laws and policies are those that promote the well-being of populations and communities. They can encompass laws and policies as diverse as school curricula promoting condom use, the monitoring of racial disparities in health outcomes, and the regulation of the insurance market. See *infra* Part II.A. The concept of health itself is no longer limited to the absence of disease, but encompasses "a state of complete physical, mental, and social well-being and not just the absence of sickness or frailty." CTRS. FOR DISEASE CONTROL & PREVENTION, SOCIAL DETERMINANTS OF HEALTH: DEFINITIONS, <http://www.cdc.gov/nchstp/socialdeterminants/definitions.html> [https://perma.cc/24FK-C2PU]; WHO Definition of Health, WORLD HEALTH ORG., <http://www.who.int/about/definition/en/print.html> [https://perma.cc/62YL-6RJB]; see *infra* Part II.A.

8. See generally Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181 (2001) (moving feminist legal theory in a direction to explore and protect sexual pleasure by allowing women to say "yes" instead of protecting women through the right to say "no").

stressed protection from sex through prohibition, championing women's right to say "no."⁹ Yet it has failed to thoroughly explore what it might mean to say "yes," what can be good and right about sex, and whether the law can and should further protect sexual pleasure.¹⁰ Criminal law is simply incapable of meeting this challenge because it concerns only what sex should *not* be. In contrast, a public health framework can explore positive models of sex. It can also give the law a richer role in addressing the full spectrum of sexual attitudes and behaviors, including those that should not be criminal but nonetheless contribute to sexual aggression.

The unwarranted assumption that rape law should be primarily criminal law has thus far dominated legal scholarship.¹¹ Under this assumption, scholars have debated how to define the harm of rape;¹² the meaning and role of force and consent in creating an *actus reus* (the conduct requirement of an offense);¹³ the role of culpability and how

9. *See id.* at 197–98.

10. *See id.* at 182, 198–201.

11. *See Baker, supra* note 3, at 221 (noting that scholars, lawmakers, and advocates have converged on criminal law to address rape, but suggesting this may change in the context of campus rape); Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 582–85 (2009) (discussing feminism's focus on the criminalization of rape).

12. *See, e.g.,* STEPHEN J. SCHULHOFER, UNWANTED SEX 99–112 (1998) (arguing that rape infringes on sexual autonomy); ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS 89–118 (2003) (analyzing the unique harm of rape); Michelle J. Anderson, *All American Rape*, 79 ST. JOHN'S L. REV. 625, 634–43 (2005) (discussing different views of the harm of rape); Michal Buchandler-Raphael, *The Failure of Consent: Re-Conceptualizing Rape as Sexual Abuse of Power*, 18 MICH. J. GENDER & L. 147, 199–215 (2011) (arguing that rape is sexual abuse of power); Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1148–49 (1986) (considering the unique indignity and harm of rape); Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372, 1425–27 (2013) (arguing that rape is a violation of the right to self-possession); Deborah Tuerkheimer, *Rape On and Off Campus*, 65 EMORY L.J. 1, 40–45 (2015) (arguing that rape is a violation of sexual agency).

13. *See, e.g.,* SCHULHOFER, *supra* note 12, at 17–45, 254–82 (discussing force and consent in rape law); WERTHEIMER, *supra* note 12, at 119–43 (analyzing the concept of consent to sex); Michelle J. Anderson, *Negotiating Sex*, 78 S. CAL. L. REV. 1401, 1407–27 (2005) (analyzing the shortcomings of consent and proposing an alternative model); Baker, *supra* note 3, at 226–35 (discussing force and consent in rape law); Craig T. Byrnes, *Putting the Focus Where It Belongs: Mens Rea, Consent, Force, and the Crime of Rape*, 10 YALE J.L. & FEMINISM 277, 286–94 (1998) (same); Joshua Dressler, *Where We Have Been and Where We Might Be Going: Some Cautionary Reflections on Rape Law Reform*, 46 CLEV. ST. L. REV. 409, 415–30 (1998) (analyzing different conceptions of force and consent in rape law); Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1793, 1804 (1992) (arguing that rape law should eliminate the conjunction between force and consent and proposing a commodity theory of sex); Estrich, *supra* note 12, at 1105–32, 1178–84 (analyzing force and consent in rape law); Tuerkheimer, *supra* note 12, at 6–39 (same).

to define mens rea (the mental state requirement of an offense);¹⁴ and the balancing of effective prosecution with defendants' rights.¹⁵ Legal feminism has similarly adopted the language of criminal law as the primary—if not sole—means of discussing rape.¹⁶

While some legal scholarship has noted the shortcomings of the criminal law framework, these works have failed to offer a compelling alternative.¹⁷ The rare proposed alternatives focus on additional

14. See, e.g., SUSAN ESTRICH, REAL RAPE 90–100 (1987) (proposing a negligence standard); SCHULHOFER, *supra* note 12, at 258–60 (discussing problems in defining the mens rea of rape); Byrnes, *supra* note 13, at 293–99 (proposing a “negligence toward the will” standard); Dressler, *supra* note 13, at 430–40 (expressing concerns about the erosion of the mens rea requirement); Estrich, *supra* note 12, at 1096–105, 1178–84 (discussing rape law’s approach to mens rea and proposing a negligence standard). See generally Robin Charlow, *Bad Acts in Search of a Mens Rea: Anatomy of a Rape*, 71 FORDHAM L. REV. 263 (discussing problems in defining the mens rea of rape).

15. See generally Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51 (2002) (analyzing rape shield laws and their exceptions); Katharine K. Baker, *Once a Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563 (1997) (same); Richard I. Haddad, Note, *Shield or Sieve? People v. Bryant and Rape Shield Laws in High-Profile Cases*, 39 COLUM. J.L. & SOC. PROBS. 185 (2005) (same).

16. Gruber, *supra* note 11, at 583–85. There is no one definition of feminism, and strands of feminism differ significantly in their concepts of gender equality and the strategies they adopt to address it. See *id.* at 603 n.112 (describing different forms of feminism and their ideologies). This Article uses the term “feminism” broadly to refer to an ideology founded on principles that support women’s autonomy and seek to eliminate substantive social, economic, political, and cultural gender inequalities. See *id.*

17. For relevant examples, see generally Katharine K. Baker, *What Rape Is and What It Ought Not to Be*, 39 JURIMETRICS J. 233 (1999) [hereinafter Baker, *What Rape Is*]; Baker, *supra* note 3; Gruber, *supra* note 11. Aya Gruber and Katharine Baker are particularly notable for their criticism of the criminal law model. Gruber criticizes the feminist focus on criminal law and calls for feminists to reassess their continued involvement in rape reform. See generally Gruber, *supra* note 11. Gruber’s work eloquently explores the tension between feminist tenets and feminism’s focus on stricter criminal sanctions for rape. The piece, however, stops short of providing an alternative legal framework for rape.

Baker has argued that criminal law reform will be ineffective absent a change in the social norms that encourage rape. See generally Baker, *What Rape Is*, *supra*. She proposed that social norms could be changed by the use of Title IX civil actions on college campuses and the use of shaming sanctions in college settings. See Baker, *supra* note 3, at 264–80; Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 695–714 (1999) [hereinafter Baker, *Sex, Rape, and Shame*].

Baker’s compelling work focuses on sanctions, which this Article argues are poor tools to change social norms. As with criminal law, those who make determinations of responsibility will continue to be influenced by social norms; they will similarly be reluctant to place blame on a perpetrator who was acting within social conventions, and may instead look to the victim’s responsibility for resisting sexual activity, particularly if the victim was drinking or consented to some sexual contact. See *infra* Part I.B. Moreover, sanctions lack the ability to explore positive sexual attitudes and behaviors and to address the range of sexual behavior that is problematic but nonetheless inappropriate for sanction.

prohibitive or punitive measures, such as university disciplinary proceedings.¹⁸ These civil law approaches face the same deficiencies that plague criminal law. Their effectiveness will be inevitably impaired by the fact that they must be meted in a culture that accepts gender stereotypes and rape myths. Penalizing measures are poor tools for prevention, as they do little to deter sexual aggression and even less to change the culture that encourages it. Nor can they provide a model of positive behavior or address the full spectrum of sexual behaviors and relationships that increase the risk of rape. We need a more fundamental shift in our understanding of rape law to engage these problems.

This Article proposes a new framework for rape law that will add depth and breadth to rape law scholarship. A public health law framework challenges legal scholars and lawmakers to explore how laws and policies should address the complex cultural and social causes of rape and other sexual aggression. Public health law also affords a framework for legal scholars—and in particular feminist legal scholars—to consider how legal interventions can address the cultural attitudes and behaviors that contribute to sexual violence, rather than simply delineating those that merit criminal punishment.

This Article does not argue for rape decriminalization—on the contrary, it envisions a legal dynamic that will bolster the efficacy of criminal laws prohibiting rape. Our justice system cannot prosecute offenses effectively absent a change in deeply entrenched social norms that normalize sexual aggression. Public health interventions, however, can help shift the norms that thwart criminal prosecution—norms that criminal law has long been ineffective in changing.

Title IX and campus sanctions also lack the scope necessary to address rape and the social norms that encourage and allow it. See Baker, *supra* note 3, at 276–77. Nearly half of rapes in the United States occur before a victim is eighteen. See *infra* note 67 and accompanying text. Focusing on universities also systematically excludes the poor and racial and ethnic minorities, who are often at higher risk for sexual assault and yet underrepresented in higher education. See KATE HARDING, ASKING FOR IT: THE ALARMING RISE OF RAPE CULTURE—AND WHAT WE CAN DO ABOUT IT, at xii (2015); Tuerkheimer, *supra* note 12, at 5.

18. Katharine Baker explores Title IX's potential for civil actions on college campuses and the use of shaming sanctions on college campuses to change the social norms that encourage acquaintance rape. See *supra* note 17.

Allegra McLeod proposes that social institutional reform could increase transparency and accountability in ways more likely to hold perpetrators of sexual abuse accountable. See Allegra M. McLeod, *Regulating Sexual Harm: Strangers, Intimates, and Social Institutional Reform*, 102 CALIF. L. REV. 1553, 1605–20 (2014). Like Baker, McLeod focuses almost exclusively on prevention through the use of punishment—or the threat thereof—to deter. See *id.*

A public health approach is also particularly well suited to address sexual assault because of the way that these social norms and conventions obscure the problem itself and do so in a way criminal law alone cannot resolve. Social norms do not thwart the effective prosecution of offenses such as assault and murder because these actions are widely accepted as harmful and wrong. In contrast, rape—and acquaintance rape in particular—concerns behavior that is not widely accepted as criminal or harmful.¹⁹ We can therefore accomplish neither prevention nor successful prosecution without shifting these social norms.

It is an opportune time to shift the legal discourse of rape. Lawmakers and the media are giving rape, particularly acquaintance rape on college campuses, unprecedented attention.²⁰ Federal law requires colleges to take affirmative steps to respond to allegations of sexual assault,²¹ and states have passed or proposed laws that require universities to use affirmative-consent standards in campus disciplinary hearings.²² The White House recently convened a task force on campus rape and launched a media campaign against sexual assault.²³ The

19. See *infra* Part I.B.

20. See Janet Halley, *The Move to Affirmative Consent*, 42 SIGNS 257, 257 (2016); Tuerkheimer, *supra* note 12, at 6–14; Jake New, *The “Yes Means Yes” World*, INSIDE HIGHER ED (Oct. 17, 2014), <https://www.insidehighered.com/news/2014/10/17/colleges-across-country-adopting-affirmative-consent-sexual-assault-policies> [<https://perma.cc/Q8UV-9V8H>].

21. See 20 U.S.C. §§ 1681–1686 (2012); U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE, at i (2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<https://perma.cc/ZF4M-AXY5>]; see also Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ., to Colleagues (Apr. 4, 2011) [hereinafter Dear Colleague Letter], <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/JZ9J-WTX9>] (explaining the responsibilities of educators “to respond promptly and effectively to sexual violence against students” as required by federal law).

22. *E.g.*, S. 967, 2013–2014 Leg., Reg. Sess. (Cal. 2014) (codified at CAL. EDUC. CODE § 67386 (West 2015)); see Halley, *supra* note 20, at 257 (compiling laws); Tuerkheimer, *supra* note 12, at 6–10 (describing increased attention to consent standards on campuses); New, *supra* note 20 (discussing measures passed by California and New York and proposed by legislators in New Hampshire and New Jersey that adopt an “affirmative consent” standard for campus sexual-assault policy).

23. Memorandum from President Barack Obama to the Heads of Executive Departments and Agencies, Establishing a White House Task Force to Protect Students from Sexual Assault (Jan. 22, 2014), <https://www.whitehouse.gov/the-press-office/2014/01/22/memorandum-establishing-white-house-task-force-protect-students-sexual-a> [<https://perma.cc/6KZ4-C453>]; see Tanya Somanader, *President Obama Launches the “It’s on Us” Campaign to End Sexual Assault on Campus*, WHITE HOUSE BLOG (Sept. 19, 2014, 2:40 PM), <https://www.whitehouse.gov/blog/2014/09/19/President-Obama-launches-its-US-campaign-ebd-sexual-assault-campus> [<https://perma.cc/UL73-JKXD>].

American Law Institute is at long last redrafting the anachronistic Model Penal Code provisions on rape.²⁴ Meanwhile, the nation intently watched the coverage of rape trials involving students from Steubenville High School, St. Paul's School, Stanford University, and Vanderbilt University.²⁵

Despite this increased attention, rape law remains locked in a prohibition-based model. Legal scholars, advocates, and lawmakers continue to fixate on how best to find and punish perpetrators—how to reform criminal law or create effective and fair university disciplinary proceedings.²⁶ The Rape Abuse and Incest National Network's much-awaited recommendations to a White House task force stressed the importance of criminal proceedings and specifically warned against efforts to address the underlying cultural causes against rape.²⁷ The song gets louder, but the tune remains the same.

Part I of this Article argues that the framing of rape law as first and foremost criminal law will continue to be ineffective given prevailing social and cultural norms. Specifically, it explores the law's dubious progress in creating criminal statutes that address rape—particularly acquaintance rape—effectively and justly. Absent significant change to our culture's current gender and sexual norms, juries interpret the law in accordance with social norms that embrace

24. See MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213 (AM. LAW INST., Proposed Amended Version 2016), <https://www.ali.org/projects/show/sexual-assault-and-related-offenses/> [<https://perma.cc/NH9L-UF5G>]; see also Kimberly Kessler Ferzan, *Consent, Culpability, and the Law of Rape*, 13 OHIO ST. J. CRIM. L. 397, 414, 429 (2016) (analyzing proposed Model Penal Code provisions).

25. See Jess Bidgood, *Owen Labrie of St. Paul's School Is Found Not Guilty of Main Rape Charge*, N.Y. TIMES, Aug. 29, 2015, at A9; Richard A. Oppel, Jr., *Ohio Teenagers Guilty in Rape that Social Media Brought to Light*, N.Y. TIMES, Mar. 17, 2013, at A10; Marina Koren, *Why the Stanford Judge Gave Brock Turner Six Months*, ATLANTIC (June 17, 2016), <http://www.theatlantic.com/news/archive/2016/06/stanford-rape-case-judge/487415/> [<https://perma.cc/88ZP-B79F>]; Jessica Luther, *A Look at the Vanderbilt Rape Case that Left a Community Reeling*, SPORTS ILLUSTRATED (Feb. 10, 2015), <http://www.si.com/college-football/2015/02/09/vanderbilt-rape-case-brandon-vandenburg-cory-batey> [<https://perma.cc/6VQ6-BPJ6>]; Jeannie Suk, *St. Paul's School and the New Definition of Rape*, NEW YORKER (Nov. 3, 2015), <http://www.newyorker.com/news/news-desk/st-pauls-school-and-a-new-definition-of-rape> [<https://perma.cc/RDG4-BD5Q>].

26. See Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1999–2004 (2016); Jeb Rubinfeld, *Mishandling Rape*, N.Y. TIMES, Nov. 16, 2014, at SR1; Michelle Goldberg, *Why the Campus Rape Crisis Confounds Colleges*, NATION (June 5, 2014), <http://www.thenation.com/article/why-campus-rape-crisis-confounds-colleges> [<https://perma.cc/Z35U-TR8L>].

27. See Letter from the Rape, Abuse, & Incest National Network to the White House Task Force to Protect Students from Sexual Assault (Feb. 28, 2014), <https://rainn.org/images/03-2014/WH-Task-Force-RAINN-Recommendations.pdf> [<https://perma.cc/DX8T-ALC7>].

rape myths, thwarting even the most progressive of criminal law reforms. Juries cannot simply ignore these social norms because they may be integral to a defendant's mens rea.

Part II sets forth an alternative framework: a public health law approach to rape. First, this Part argues that public health law is well suited to deal with the challenges that rape poses, contrasting its strengths with the shortcomings of criminal law. Next, it examines public health law interventions that could comprise this new rape law framework, and how this approach would enrich feminist legal scholarship by providing a framework in which to meet the challenge of "theorizing yes." Finally, the Article addresses possible criticisms of the public health approach.

I. THE FAILURE OF CRIMINAL LAW

A. *Criminal Law's Dubious Progress*

1. *Struggling with Legal Standards.* In the United States, rape law is criminal law.²⁸ To some degree, this makes sense. Rape deserves criminal punishment. Punishment can also serve a deterrent effect, preventing future rapes.²⁹ Criminalization in some form is therefore warranted by retributivism—the dominant theory of criminal law, which focuses on desert—as well as utilitarianism, which focuses on social utility.

Traditional rape law recognized and protected only a particular paradigm: a virtuous woman who fights to her utmost against a pathological and violent stranger.³⁰ It was limited to unlawful intercourse by a man against a woman who was not his wife by force or threat and against her will.³¹ Taken as a whole, these laws enforced norms of male dominance over female sexuality and simply ignored or

28. See Baker, *What Rape Is*, *supra* note 17, at 234; Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 835 (1988); Gruber, *supra* note 11, at 586–602.

29. See Baker, *What Rape Is*, *supra* note 17, at 234 (discussing the failure of deterrence in rape law).

30. See David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 320–21 (2000); Dressler, *supra* note 13, at 410–11, 415–18; Dripps, *supra* note 13, at 1780–83; Estrich, *supra* note 12, at 1090–91, 1094; Gruber, *supra* note 11, at 587–88; Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Towards Feminist Jurisprudence*, 8 SIGNS 635, 648–49 (1983).

31. See WERTHEIMER, *supra* note 12, at 11.

rejected queer sexuality.³² Rape was a crime against male ownership, be it a father's ownership of his daughter's virtue or a husband's sole and unassailable right to his wife's body.³³ Unwanted and even forcible sex that did not upset this model of ownership was simply not rape. Nor did rape law acknowledge the rape of men or same-sex rape.³⁴

Lawmakers, advocates, and legal scholars—particularly feminists—have made significant efforts to reform these laws.³⁵ Disagreement persists about how to define the actus reus and mens rea of rape. While both the types of proposals and their success in reforming laws have varied among jurisdictions, modern rape law reflects common themes in how it defines its actus reus and mens rea.³⁶

Force was an essential component of the actus reus in traditional rape law and remains influential.³⁷ The requirement that the defendant use or threaten force to achieve intercourse created a corresponding requirement that the woman physically resist sex or else prove that she reasonably feared resistance would result in injury.³⁸ Legal scholars and advocates have leveled several legitimate criticisms of the force

32. See Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259, 1288–90 (2011); Gruber, *supra* note 11, at 587–90; see also CATHARINE A. MACKINNON, *TOWARDS A FEMINIST THEORY OF THE STATE* 171, 172–73 (1989) (discussing rape's historical definition as a crime against male exclusive access and female monogamy).

33. See MACKINNON, *supra* note 32, at 172–75; Baker, *supra* note 3, at 225–27; Capers, *supra* note 32, at 1288–89; Dripps, *supra* note 13, at 1780–83; William N. Eskridge, Jr., *The Many Faces of Sexual Consent*, 37 WM. & MARY L. REV. 47, 56 (1995) (discussing the marital rape exception); see also BROWNMILLER, *supra* note 3, at 16–18, 29 (stating that “[a] crime committed against her body became a crime against the male estate”).

34. See Capers, *supra* note 32, at 1290; Eskridge, *supra* note 33, at 55–59; see also Elizabeth J. Kramer, Note, *When Men Are Victims: Applying Rape Shield Laws to Male Same-Sex Rape*, 73 N.Y.U. L. REV. 293, 311–18 (1998) (discussing dismissive attitudes toward same-sex rape).

35. See Baker, *supra* note 3, at 228–32; Eskridge, *supra* note 33, at 58–59; Gruber, *supra* note 11, at 591–92.

36. See Bryden, *supra* note 30, at 322–23; Estrich, *supra* note 12, at 1133–61.

37. See SCHULHOFER, *supra* note 12, at 2–3; Dripps, *supra* note 13, at 1783; Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729, 745 (2010); MacKinnon, *supra* note 30, at 649–50; Stephen J. Schulhofer, *Rape in the Twilight Zone: When Sex Is Unwanted But Not Illegal*, 38 SUFFOLK U. L. REV. 415, 416 (2005).

38. See Bryden, *supra* note 30, at 356–60; Estrich, *supra* note 12, at 1099–1121; see also Gruber, *supra* note 11, at 588–89 (discussing the historical necessity of a woman's forceful resistance to support a claim of rape); Kahan, *supra* note 37, at 745 (same); MacKinnon, *supra* note 30, at 650 (exploring contexts in which forceful resistance may not necessarily indicate lack of consent, and in which lack of forceful resistance may not necessarily indicate the presence of consent).

and resistance requirements.³⁹ They shift the focus from the defendant's actions to whether the victim properly took the required—and often dangerous—steps to avoid unwanted sex.⁴⁰ The resistance requirement also requires the victim to place herself in danger, as resistance is often met with increased force and injury. It fails to account for the many victims who freeze from fear or anxiety rather than fight back against an attacker,⁴¹ and courts' narrow interpretations of the force requirement are also dismissive of the fear and intimidation that permeate many relationships.⁴²

Because of these flaws, modern rape law and legal scholarship have attempted to shift the focus from force to consent.⁴³ “Legal consent,” as Peter Westen has termed it, applies only when a partner acquiesces to sex under circumstances the law deems sufficiently free and voluntary.⁴⁴ In general, rape law reform has focused on two approaches to consent: (1) “no means no” and (2) “yes means yes.”

39. See Bryden, *supra* note 30, at 322, 355 (noting that virtually all modern rape scholars want to modify or abolish the force requirement).

40. See BROWNMILLER, *supra* note 3, at 360–61, 373; Estrich, *supra* note 12, at 1099–1121; Gruber, *supra* note 11, at 589, 593–94; MacKinnon, *supra* note 30, at 650. *But see* Bryden, *supra* note 30, at 365–68 (arguing that the risk of injury from resisting is overstated).

41. See Grace Galliano, Linda M. Noble, Carol Puechl & Linda A. Travis, *Victim Reactions During Rape/Sexual Assault: A Preliminary Study of the Immobility Response and Its Correlates*, 8 J. INTERPERSONAL VIOLENCE 107, 108 (1993); *see also* BROWNMILLER, *supra* note 3, at 358 (exploring how the initial stages of a rape often dictate the woman's level of resistance); MacKinnon, *supra* note 30, at 650 (“Women are socialized to passive receptivity . . . [and may] submit to survive.”); Lynn Hecht Schafran, *Rape Is a Major Public Health Issue*, 86 AM. J. PUB. HEALTH 15, 16 (1996) (exploring the psychological state of “frozen fright”).

42. *See, e.g.*, State v. Alston, 312 S.E.2d 470, 476 (N.C. 1984); *see also* Dressler, *supra* note 13, at 418 (criticizing the *Alston* decision due to the lack of concern given to the victim's psyche); Estrich, *supra* note 12, at 1108–12 (same).

43. *See* Anderson, *supra* note 13, at 1404 (demonstrating that academic proposals for rape reform assert that rape should be defined as sex without consent); Vivian Berger, *Rape Law Reform at the Millennium: Remarks on Professor Bryden's Non-Millennial Approach*, 3 BUFF. CRIM. L. REV. 513, 514–15, 519–29 (2000) (discussing the definition of consent as the challenge of modern rape reform); Lois Pineau, *Date Rape: A Feminist Analysis*, 8 LAW & PHIL. 217, 218 (1989) (noting that “the criteria for consent continues to be the central concern of discourse on sexual assault”). Some scholars, however, reject both force and consent as an adequate basis for *actus reus*. *See, e.g.*, Anderson, *supra* note 13, at 1414–21.

44. *See* PETER WESTEN, THE LOGIC OF CONSENT 6–10, 107–09 (2004); Heidi M. Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY 121, 122–23 (1996) (discussing the circumstances in which an individual's acquiescence should be deemed to constitute consent, both morally and legally). In the context of rape law, legal scholars such as Stephen Schulhofer have argued that consent serves to protect an individual's “sexual autonomy”—the ability to choose when and under what circumstances to have sex (positive sexual autonomy) or to not have sex (negative sexual autonomy). *See* SCHULHOFER, *supra* note 12, at 99–113. *But see* Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805

“No means no” allows that verbal resistance, rather than physical resistance, should be sufficient to establish nonconsent.⁴⁵ Some legal scholars have criticized this approach for criminalizing too much, citing research that partners may express “token resistance” when they do really want to have sex.⁴⁶ Others argue that “no means no” puts the burden on the partner who does not want to have sex—the partner who may be frozen in fear.⁴⁷

In contrast, the “yes means yes” or “affirmative consent” standard shifts the burden to the defendant to determine whether his partner affirmatively consents to sex.⁴⁸ It rejects the notion that a person can proceed on the assumption that his partner wants sex absent evidence to the contrary and requires instead that an individual look for

passim (1999) (proposing the concept of sexual agency rather than sexual autonomy); Deborah Tuerkheimer, *Sex Without Consent*, 123 YALE L.J. ONLINE 335, 339 (2013) [hereinafter Tuerkheimer, *Sex Without Consent*] (same); Deborah Tuerkheimer, *Slutwalking in the Shadow of the Law*, 98 MINN. L. REV. 1453, 1493–96 (2014) [hereinafter Tuerkheimer, *Slutwalking*] (same); see also Rubinfeld, *supra* note 12, at 1379 (arguing that the harms and wrongs of rape are not fully captured by the use of a sexual autonomy framework).

Lawmakers and scholars continue to debate under what circumstances unwanted sex should be considered nonconsensual under the law, such as unwanted sex in which a partner succumbs to badgering, unwanted sex in exchange for something of value, or unwanted sex within relationships that are abusive or have power imbalances. See, e.g., SCHULHOFER, *supra* note 12, at 107–08, 111–13, 114–253 (discussing different reasons women may consent to sex and the dilemmas they pose for rape law); Beverly Balos & Mary Louise Fellows, *Guilty of the Crime of Trust: Nonstranger Rape*, 75 MINN. L. REV. 599, 609–17 (1991) (analyzing consent in “dominance relationships”); Anne C. Dailey, *The Psychodynamics of Sexual Choice*, 57 ARIZ. L. REV. 343, 350–80 (2015) (discussing consent in the context of adult incest, a therapist-client relationship, and a sadomasochistic relationship); MacKinnon, *supra* note 30, at 646–47 (arguing that women do not have a real choice to have sex with men because of the systemic dominance of men); Robin L. West, *Legitimizing the Illegitimate: A Comment on Beyond Rape*, 93 COLUM. L. REV. 1442, 1452–59 (1993) (discussing consent to sex in exchange for safety from abuse or economic security).

45. See Estrich, *supra* note 12, at 1182–84 (arguing for a “no means no” standard); see also Anderson, *supra* note 26, at 1950.

46. See, e.g., Bryden, *supra* note 30, at 388–90; Dressler, *supra* note 13, at 433–36; Douglas N. Husak & George C. Thomas III, *Date Rape, Social Convention, and Reasonable Mistakes*, 11 LAW & PHIL. 95, 113–23 (1992); Kahan, *supra* note 37, at 731, 746–49.

47. See SCHULHOFER, *supra* note 12, at 269–73; Anderson, *supra* note 13, at 1412; Berger, *supra* note 43, at 513, 520–24. Dressler, for example, is a proponent of “no means no” and argues that women who do not desire sex have a burden to let their opposition be known. See Dressler, *supra* note 13, at 414 (“[Women] have as much responsibility to express their feelings about intimacy as the male has the duty to make reasonable efforts to learn a female’s wishes.”). Dressler’s approach allows the law to presume that sex is consensual unless a woman fulfills her burden of letting her partner know she does not desire sex. See *id.*

48. See *State ex rel. M.T.S.*, 609 A.2d 1266, 1277 (N.J. 1992); SCHULHOFER, *supra* note 12, at 269–73; Anderson, *supra* note 13, at 1412. In *State ex rel. M.T.S.*, the New Jersey Supreme Court interpreted a statute’s force requirement to include any sex that lacks “affirmative and freely-given permission.” See *M.T.S.*, 609 A.2d at 1277.

evidence of his partner's voluntary engagement.⁴⁹ The affirmative-consent standard has gained the most traction in laws specifying standards for university disciplinary codes and has thus far rarely been employed in criminal law.⁵⁰ Critics of affirmative consent argue that the concept is overinclusive and lacks clarity.⁵¹

The second component of a rape offense is mens rea: the mental state an individual must have to be found guilty. A central tenet of retributivist theory is that criminal law should not punish behavior unless it causes or risks harm and unless the defendant acts with a blameworthy state of mind.⁵² The dominant theory of criminal justice in both scholarship and practice therefore places an enormous emphasis on the defendant's mens rea.⁵³ In the context of rape, mens rea issues rarely arise with regard to the sexual act itself, as most defendants are aware that they are engaging in a sexual act.⁵⁴ Rape law struggles, however, with how to determine whether a defendant had a culpable state of mind toward the victim's nonconsent.⁵⁵

49. See Baker, *What Rape Is*, *supra* note 17, at 241.

50. See *supra* note 22.

51. See, e.g., Anderson, *supra* note 13, at 1412–14; Dressler, *supra* note 13, at 425. For example, Beverly Balos and Mary Louise Fellows argue that consent cannot be freely given in an abusive relationship. See Balos & Fellows, *supra* note 44, at 609–11. Vivian Berger criticizes this stance as “yes means no.” See Berger, *supra* note 43, at 522; see also Bryden, *supra* note 30, at 350–55 (discussing consent in the context of abusive relationships).

52. See LARRY ALEXANDER & KIMBERLY KESSLER FERZAN WITH STEPHEN J. MORSE, *CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW* 298, 300–02 (2009); R.A. DUFF, *ANSWERING FOR CRIME* 168–71 (2007); Paul H. Robinson, *Imputed Criminal Liability*, 93 *YALE L.J.* 609, 656 (1984); see also DOUGLAS HUSAK, *OVERCRIMINALIZATION* 155–77 (2008) (arguing that this tenet is not being adhered to, creating an overcriminalization problem); Guy Ben-David, *Cognitive Void in Relation to Attendant Circumstances as Subjective Mens Rea*, 18 *NEW CRIM. L. REV.* 418, 453 (2015) (discussing general culpability principles); Kimberly Kessler Ferzan, *Self-Defense and the State*, 5 *OHIO ST. J. CRIM. L.* 449, 478 (2008) (expressing uncertainty as to whether the overinclusivity of the rule of imminence in self-defense is acceptable to retributivist thinkers).

53. See MICHAEL MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 83 & n.1 (1997); Michael T. Cahill, *Retributive Justice in the Real World*, 85 *WASH. U. L. REV.* 815, 823 (2007); Russell L. Christopher, *Deterring Retributivism: The Injustice of “Just” Punishment*, 96 *NW. U. L. REV.* 843, 845–47, 846 n.6 (2002); Dressler, *supra* note 13, at 431; Estrich, *supra* note 12, at 1095 (explaining that the mens rea requirement helps avoid unjust convictions); Douglas N. Husak & George C. Thomas III, *Rapes Without Rapists: Consent and Reasonable Mistake*, 11 *PHIL. ISSUES* 86, 86–87 (2001); Matthew Haist, Comment, *Deterrence in a Sea of “Just Deserts”: Are Utilitarian Goals Achievable in a World of “Limiting Retributivism”?*, 99 *J. CRIM. L. & CRIMINOLOGY* 789, 799–804 (2009).

54. See Charlow, *supra* note 14, at 268; Estrich, *supra* note 12, at 1095–96; Pineau, *supra* note 43, at 218.

55. See Bryden, *supra* note 30, at 324–25; Charlow, *supra* note 14, at 268; Estrich, *supra* note 12, at 1096.

For decades, rape law had a counterintuitive approach to mens rea. Traditional rape law had no formal mens rea requirement, and American legislatures and courts often drafted or construed rape law to lack a specific mens rea requirement.⁵⁶ Ordinarily, this would make prosecution much easier.⁵⁷ In the context of rape, however, legislatures often used narrow actus reus requirements to approximate a guilty mindset.⁵⁸ For example, the force requirement served as a proxy for mens rea by limiting the offense only to those who clearly knew that their partner was not consenting.⁵⁹

Rape law reforms and scholarship struggle with how to rectify rape law's problematic approach to mens rea. Legislatures and scholars debate what types of mental states as to consent merit punishment; that is, whether the law should require intent, knowledge, recklessness, or negligence.⁶⁰ If recklessness and negligence are punished, the law must also determine what it means to be reckless or negligent as to nonconsent—namely, what it means to grossly deviate from the “reasonable person” standard.⁶¹

2. Data on Rape Contradict the Assumptions Underlying Criminal Law. Even as lawmakers and scholars grapple with these questions, criminal law remains a weak tool for addressing rape in the United States, particularly rapes that do not fit the paradigm of the evil stranger and innocent victim.⁶² “Acquaintance rape” cases, for

56. See Bryden, *supra* note 30, at 325; Charlow, *supra* note 14, at 273–76; Estrich, *supra* note 12, at 1095–98; Husak & Thomas, *supra* note 46, at 98.

57. See Estrich, *supra* note 12, at 1098.

58. See Dressler, *supra* note 13, at 431–32 (arguing that mens rea issues were only a problem before reform); Kahan, *supra* note 37, at 743 (showing that mens rea has little practical consequence if force is required).

59. See Bryden, *supra* note 30, at 340 (arguing that a good-faith mistake in consent will be rare if the law requires a defendant to have overcome the victim's resistance with force); Estrich, *supra* note 12, at 1098–99 (noting that rapes effected by use of force render a defense that the victim consented implausible); see also Larry Alexander, *You Got What You Deserved*, 7 CRIM. L. & PHIL. 309, 311 (2013) (arguing that evidence of a partner's consent bears on the recklessness of the defendant's conduct more than on the existence of consent).

60. See, e.g., Alexander, *supra* note 59, at 310–18 (discussing recklessness and mistake); Byrnes, *supra* note 13, at 293–99 (proposing a “[n]egligence [t]oward the [w]ill” standard); Dressler, *supra* note 13, at 438–39 (arguing for a reasonable belief standard); Estrich, *supra* note 12, at 1097–1105 (arguing for a negligence standard); Pineau, *supra* note 43, at 218 (discussing the reasonable belief standard).

61. See generally Husak & Thomas, *supra* note 46 (discussing reasonableness as to beliefs in consent); Pineau, *supra* note 43 (arguing for reasonableness from a woman's perspective). For a discussion of reasonableness in the context of recklessness and negligence, see *infra* Part I.B.2.

62. See Gruber, *supra* note 11, at 594–95, 639–40.

example, which occur when the defendant knows the victim, are the most common type of rape in the United States. Yet they are also the cases that police are least likely to investigate and that prosecutors are least likely to pursue, and, ultimately, those in which juries are least likely to convict.⁶³ Rape—and specifically acquaintance rape and rape involving intoxication—remains exceedingly difficult to prosecute.⁶⁴ Criminal law and scholarship often ignore the rape of men by women and rape in the context of queer relationships.⁶⁴ As a result, rape remains undeterred, underreported, and underprosecuted.⁶⁵

A 2011 survey by the Centers for Disease Control and Prevention (CDC) demonstrated the high prevalence of rape and contradicted many common misconceptions. Rape by physical force or the use of alcohol or drugs to incapacitate the victim is quite common among women: approximately 20 percent experienced this type of rape or an attempt thereof in their lifetime.⁶⁶ It also occurs largely among minors, with 42.2 percent of women who were raped by force or intoxication victimized before age eighteen.⁶⁷ In addition, the survey results showed that 13 percent of women reported experiencing sexual coercion—unwanted sexual penetration after being pressured in a nonphysical way—in their lifetime.⁶⁸

63. See Baker, *supra* note 3, at 235–36; Bryden & Lengnick, *supra* note 3, at 1251–52; Lisak & Miller, *supra* note 3, at 73; Spohn & Holleran, *supra* note 3, at 682; see also BROWN MILLER, *supra* note 3, at 351–52 (stating that police are more likely to find allegations of stranger rapes to be founded than allegations of acquaintance rapes).

64. See Baker, *What Rape Is*, *supra* note 17, at 234; Bryden, *supra* note 30, at 318; Gruber, *supra* note 11, at 597–98, 600.

64. See Michelle Davies, *Male Sexual Assault Victims: A Selective Review of the Literature and Implications for Support Services*, 7 *AGGRESSION & VIOLENT BEHAV.* 203, 204–06 (2002); Alletta Brenner, Note, *Resisting Simple Dichotomies: Critiquing Narratives of Victims, Perpetrators, and Harm in Feminist Theories of Rape*, 36 *HARV. J.L. & GENDER* 503, 526–28, 527 n.106 (2013); see also Kim Shayo Buchanan, *Engendering Rape*, 59 *UCLA L. REV.* 1630, 1632–45 (2012) (writing in the context of prison rape).

65. See NAT'L VICTIM CTR., *RAPE IN AMERICA: A REPORT TO THE NATION* 5 (1992); Baker, *What Rape Is*, *supra* note 17, at 234; Bryden, *supra* note 30, at 318; Gruber, *supra* note 11, at 585, 627; MacKinnon, *supra* note 30, at 651.

66. See NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, *THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY 17–18* (2010) [hereinafter *CDC SURVEY*], https://www.cdc.gov/violenceprevention/pdf/nisvs_report_2010-a.pdf [<https://perma.cc/KZ5W-RYGG>].

67. See *id.* at 2, 25. Another study found that 60.4 percent of female victims and 69.2 percent of male victims were first raped before age eighteen. See Kathleen C. Basile, Jieru Chen, Michele C. Black & Linda E. Saltzman, *Prevalence and Characteristics of Sexual Violence Victimization Among U.S. Adults, 2001–2003*, 22 *VIOLENCE & VICTIMS* 437, 443 (2007).

68. *CDC SURVEY*, *supra* note 66, at 2, 19.

The survey data also contradict the notion that women do not rape men, and that male-against-male rape is not a problem.⁶⁹ Nearly 5 percent of men reported that they were made to penetrate someone else during their lifetime.⁷⁰ The perpetrator was female in nearly 80 percent of forced penetrations.⁷¹ Sexual coercion was even more common, with 6 percent of men reporting sexual coercion in their lifetime.⁷² 84 percent of these victims reported a female perpetrator.⁷³ Of the men who reported being victims of rape, 93 percent identified the perpetrator as male.⁷⁴ This high rate is perhaps unsurprising given that other types of sexual violence were distinguished from rape, which was limited to penetration of the victim.⁷⁵

In contrast to the paradigmatic stranger rape, rape is overwhelmingly perpetrated by someone the victim knows, and usually by an intimate partner. In the context of rape by force or incapacitation, more than half of female victims reported being raped by an intimate partner and over 40 percent by an acquaintance.⁷⁶ Where men were forced to penetrate another, the perpetrator was an intimate partner or acquaintance nearly 90 percent of the time.⁷⁷ An intimate partner was the perpetrator of sexual coercion for 75 percent of female victims and 70 percent of male victims.⁷⁸

In sum, despite criminal law reform, rape remains a significant problem that contradicts common assumptions. It is widespread among women, but also occurs among men. Women sexually coerce men and force penetration. Despite the prominent focus on campus rape, a substantial portion of it occurs before the victims are college aged.⁷⁹

69. For a discussion of the issue in the context of prison rape, see Shayo Buchanan, *supra* note 64, at 1632–45. The *CDC Survey*, perhaps reflecting this bias, distinguished forced penetration of another as a category distinct from rape. CDC SURVEY, *supra* note 66, at 2, 19.

70. See CDC SURVEY, *supra* note 66, at 2, 19.

71. *Id.* at 24.

72. *Id.* at 19.

73. *Id.* at 24.

74. *Id.* Perpetrators were also overwhelmingly male for female rape victims (98.1 percent). *Id.*

75. See *id.* at 2, 19.

76. *Id.* at 1–2, 21.

77. *Id.* at 22–23.

78. *Id.*

79. It is also more prevalent among racial groups that are underrepresented in college. While 18.8 percent of white women experienced rape, the numbers were as high as 22 percent among African American women, 26.9 percent among First Nations women, and 33.5 percent among multiracial women. *Id.* at 2–3, 20–21.

Perpetrators are rarely strangers and are far more likely to be intimate partners. These results—particularly the prevalence of intimate-partner sexual violence—challenge the notion that most rape is the product of a few serial rapists.⁸⁰

The results also demonstrate that rape occurs in a larger environment of sexual intimidation. More than one in four women and approximately one in nine men have experienced some form of unwanted sexual contact in their lifetime. For both men and women, perpetrators of this unwanted sexual contact were intimate partners or acquaintances approximately 70 percent of the time.⁸¹ Nearly one in three women and nearly one in eight men experienced some type of noncontact unwanted sexual experience in their lifetime.⁸²

B. The Double Bind of Criminal Law and Rape

1. *Social Norms Render Rape Law Ineffective.* Although reforming the criminal law of rape is necessary, this single step is decidedly insufficient. The words of statutes themselves are unlikely to effect real change in the reporting, prosecution, or prevention of rape without significant change to the underlying culture in which those statutes are interpreted and applied.⁸³ Social norms about sex, consent, and gender roles encourage an adversarial approach to sex and consent and perpetuate myths about rape.⁸⁴ Whatever the text of the law, it is

80. This assumption was popularized by a 2002 study that attributed campus rape to small numbers of repeat offenders. See Lisak & Miller, *supra* note 3, at 78–79; see also Amelia Thomson-Deveaux, *What if Most Campus Rapes Aren't Committed by Serial Rapists?*, FIVETHIRTYEIGHT (July 13, 2015), <http://fivethirtyeight.com/features/what-if-most-campus-rapes-arent-committed-by-serial-rapists/> [<https://perma.cc/Q6LZ-36LC>] (describing the widespread popularity of the study's results and its use by authorities). A subsequent study of campus rape concluded that the small group of repeat offenders constituted a significant minority of those who committed rape in college. Kevin M. Swartout et al., *Trajectory Analysis of the Campus Serial Rapist Assumption*, 169 J. AM. MED. ASSOC. PEDIATRICS 1148, 1148 (2015).

81. See CDC SURVEY, *supra* note 66, at 22–23.

82. See *id.* at 2.

83. See Baker, *What Rape Is*, *supra* note 17, at 236 (“Society, through language and other systems of meaning, defines what sex is just as it defines what rape is.”); Estrich, *supra* note 12, at 1093 (“[T]he problem has never been the words of the statutes as much as our interpretation of them.”); Gruber, *supra* note 11, at 630–33 (discussing the cultural messages and pressures that women and men receive); Schulhofer, *supra* note 37, at 415 (“Part of the reason [the law is unsuccessful in preventing rape] is that fundamental change in our culture is still very incomplete.”).

84. See Estrich, *supra* note 12, at 1093; Gruber, *supra* note 11, at 597–98, 630–33; Pineau, *supra* note 43, at 222; see also Tracy N. Hipp et al., *Justifying Sexual Assault: Anonymous Perpetrators Speak Out Online*, PSYCH. VIOLENCE ONLINE, 2015, at 4, <http://dx.doi.org/10.1037/>

highly likely that these social norms will continue to thwart its practical effect.

Rape law is particularly stymied by the common understanding that sex is something to be negotiated or won from partners, specifically from women by men.⁸⁵ The idea that sex with a woman is something that an aggressive, sexual male achieves is deeply embedded in our understanding of sex, rape, femininity, and masculinity.⁸⁶ It characterizes men as driven by a strong natural sex drive that women have a responsibility to resist.⁸⁷ A man's ability to obtain sex from a woman—to “score”—is a measure of his masculinity and self-worth.⁸⁸ This understanding pits women against men in a “mating dance,” where women are the gatekeepers to sex and men the pursuers.⁸⁹

a0039998 [http://perma.cc/55WU-6A46] (giving examples of “sexual scripts” at work in first-person narratives of rape and sexual assault).

85. See AM. COLL. HEALTH ASS'N, SHIFTING THE PARADIGM: PRIMARY PREVENTION OF SEXUAL VIOLENCE 8 (2007) [hereinafter SHIFTING THE PARADIGM]; Baker, *supra* note 3, at 230, 247; Jill Filipovic, *Offensive Feminism: The Conservative Gender Norms That Perpetuate Rape Culture, and How Feminists Can Fight Back*, in YES MEANS YES: VISIONS OF FEMALE SEXUAL POWER AND A WORLD WITHOUT RAPE 13, 17–19 (Jaclyn Friedman & Jessica Valenti eds., 2008); Gruber, *supra* note 11, at 631; Hipp et al., *supra* note 84, at 4.

86. See SCHULHOFER, *supra* note 12, at 256; Estrich, *supra* note 12, at 1093; see also HARDING, *supra* note 17, at 1 (stating that we live in a culture that rewards men for having sex with as many random women as possible); Baker, *Sex, Rape, and Shame*, *supra* note 17, at 670 (stating a similar proposition); Filipovic, *supra* note 85, at 18–19 (stating that male sexuality is aggressive and that sex is something that men “do” to women); Hipp et al., *supra* note 84, at 4 (describing rape perpetrators' citing of sexual scripts, in particular that men desire sex and are supposed to initiate it, and that women have weaker sex drives or resist male advances); MacKinnon, *supra* note 30, at 635 (arguing that the difference between men and women is the dominance/submission dynamic that defines the relationship); Brad Perry, *Hooking Up with Healthy Sexuality: The Lessons Boys Learn (and Don't Learn) About Sexuality and Why a Sex-Positive Rape Prevention Paradigm Can Benefit Everyone Involved*, in YES MEANS YES, *supra* note 85, at 193–94 (recalling how, as a teenager, he got the message that sex was a one-sided affair where men were supposed to “get some”); Pineau, *supra* note 43, at 222 (stating a similar proposition); Shayo Buchanan, *supra* note 64, at 1640–42 (same).

87. See Filipovic, *supra* note 85, at 20; Hipp et al., *supra* note 84, at 5.

88. See HARDING, *supra* note 17, at 1; SCHULHOFER, *supra* note 12, at 256; Baker, *Sex, Rape, and Shame*, *supra* note 17, at 670–77; Estrich, *supra* note 12, at 1093; Filipovic, *supra* note 85, at 19; Hipp et al., *supra* note 84, at 4; MacKinnon, *supra* note 30, at 650; Perry, *supra* note 86, at 193; Pineau, *supra* note 43, at 222; see also Jeannie Suk, *Redistributing Rape*, 48 AM. CRIM. L. REV. 111, 111 (2011) (describing male rape of other men in prison as a way of proving masculinity and dominating the other man by making him “feminine”).

89. See Hipp et al., *supra* note 84, at 4 (“Denial of resistance . . . is the notion that women actually mean ‘yes’ when they say ‘no’ to sex. This belief is grounded in the idea that women should be resistant and reserved in sexual interactions and that men should persist in response to a woman's resistance.”); see also SCHULHOFER, *supra* note 12, at 256 (stating a similar proposition); Filipovic, *supra* note 85, at 19–20 (same); Gruber, *supra* note 11, at 630–32 (same); Perry, *supra* note 86, at 200–01 (same).

Women who want sex—or who do not object to sex—fulfill their role as gatekeepers by putting up some token resistance or passively acquiescing to sex.⁹⁰ This understanding of sex and consent therefore deems it normal and acceptable for men to persist, cajole, or simply continue despite a woman’s protests or disengagement.⁹¹ A woman who wants sex will eventually accede; a woman who does not want sex will actively and continuously resist absent serious threat of harm.⁹²

Social norms about women’s sexual activity also influence perceptions of rape. Women who have engaged in sexual activity, who have flirted with the perpetrator, or who were drinking at the time are often perceived as less likely to have been raped or responsible for their own rapes.⁹³ These women are also commonly perceived as untrustworthy complainants.⁹⁴ In particular, women of color, poor women, and sex workers—women who have historically been subject to stereotypes of hypersexuality—must overcome negative assumptions about their credibility.⁹⁵

90. See Baker, *supra* note 3, at 230; Filipovic, *supra* note 85, at 20.

91. Donald Dripps writes: “[M]any think the woman’s ‘no’ of less than dispositive significance. This attitude toward the evidence is wrong-headed, but deeply imbedded in social practice.” Dripps, *supra* note 13, at 1804 (comparing “back-seat bargaining on Prom Night” to haggling over jewelry); see also Baker, *supra* note 3, at 230 (stating that sexual scripts and norms dictate that men are supposed to be aggressive and women are supposed to be passive, with the woman saying no when she really means yes, and the man proceeding after this ambiguity); Gruber, *supra* note 11, at 630–33 (stating a similar proposition).

92. See Hipp et al., *supra* note 84, at 4 (describing perpetrators’ beliefs that women need to resist more if they truly do not want sex).

93. See BROWNMILLER, *supra* note 3, at 374; Baker, *Sex, Rape, and Shame*, *supra* note 17, at 682–84; Bryden, *supra* note 30, at 318–19; Gruber, *supra* note 11, at 595–96; Lisa Jervis, *An Old Enemy in a New Outfit: How Date Rape Became Gray Rape and Why It Matters*, in YES MEANS YES, *supra* note 85, at 163, 169; Andrew Taslitz, *Forgetting Freud: The Courts’ Fear of the Subconscious in Date Rape (and Other) Cases*, 16 B.U. PUB. INT’L L.J. 145, 155 (2007); Tuerkheimer, *Slutwalking*, *supra* note 44, at 1473. For studies on this phenomenon, see Hipp et al., *supra* note 84, at 1 (citing studies in which men state “that a man could assume that a woman wanted to have sex if she had previously engaged in consensual sexual contact, such as sexual touching or oral sex”); *id.* at 4 (citing victim blame where victim had flirted with them or had consensual sex with them previously). See also Gruber, *supra* note 11, at 595 n.78 (citing qualitative studies in which participants identify rape victims who dress “seductively” as partially responsible for their own rapes).

94. See Gruber, *supra* note 11, at 595–600.

95. See BROWNMILLER, *supra* note 3, at 365–67; Gruber, *supra* note 11, at 595–600; Samhita Mukhopadhyay, *Trial by Media: Black Female Lasciviousness and the Question of Consent*, in YES MEANS YES, *supra* note 85, at 151, 153–61; Tuerkheimer, *Slutwalking*, *supra* note 44, at 1483–84.

These social norms contribute to what some scholars and activists term “rape culture.”⁹⁶ This concept frames rape not as the isolated acts of individuals, but rather as part of a culture that fosters male sexual aggression and violence against women.⁹⁷ Rape culture encourages “[t]he attitude that men are entitled to anything from women, as they are people and [women] are the designated sex class.”⁹⁸

The role of these norms in sexual violence is evident from the research on those who commit rape. Risk factors for committing sexual assault include: being male; adherence to societal norms supportive of sexual violence, male superiority, and male sexual entitlement; and being raised in an emotionally unsupportive environment.⁹⁹ Perpetrators demonstrate feelings of entitlement to women’s bodies or the need to dominate women.¹⁰⁰ They cite sexual scripts—namely, that men always desire sex and are supposed to initiate sex, while women have weaker sex drives and are supposed to resist male partners’ advances.¹⁰¹ Perpetrators are often unaware that their actions were anything other than ordinary and acceptable behavior for seducing women.¹⁰²

A recent study demonstrates the connection between social norms promoting male aggression and female passivity and the pervasive

96. See NICOLA GAVEY, *JUST SEX?: THE CULTURAL SCAFFOLDING OF RAPE* 35 (Jane Ussher ed., 2005); HARDING, *supra* note 17, at 1, 6; *Rape Culture*, BLACKWELL ENCYCLOPEDIA OF SOCIOLOGY (George Ritzer ed., 2007); TRANSFORMING A RAPE CULTURE pmb. (Emilie Buchwald, Pamela Fletcher & Martha Roth eds., 2005); see also Dan Subotnick, “Hands Off”: *Sex, Feminism, Affirmative Consent, and the Law of Foreplay*, 16 S. CAL. REV. L. & SOC. JUST. 249, 252 (2007) (discussing the concept of “rape culture”); Emily Suran, *Title IX and Social Media: Going Beyond the Law*, 21 MICH. J. GENDER & L. 273, 277–78 (2014) (discussing the history of the term “rape culture”).

97. See SHIFTING THE PARADIGM, *supra* note 85, at 7, 10; TRANSFORMING A RAPE CULTURE, *supra* note 96, at 1.

98. Elizabeth Lopatto, *Rape Culture Is a Public Health Issue*, FORBES (May 24, 2014), <http://www.forbes.com/sites/elizabethlopatto/2014/05/24/rape-culture-is-a-public-health-issue/#13cc0c2ac7c1> [<https://perma.cc/7MDJ-TS2E>]; see also Filipovic, *supra* note 85, at 18–19 (arguing that society sees sex as something that men “do” to women); Hipp et al., *supra* note 84, at 5 (describing attitudes that lead to rape, including the view of women as objects that exist for sexual gratification); *id.* at 6 (describing sexual scripts that contribute to victim blaming and the objectification of and hostility toward women as components of “what some would describe as rape culture”).

99. See SHIFTING THE PARADIGM, *supra* note 85, at 7; Denise A. Hines, *Predictors of Sexual Coercion Against Women and Men: A Multilevel, Multinational Study of University Students*, 36 ARCHIVES OF SEXUAL BEHAV. 403, 416–18 (2007); Hipp et al., *supra* note 84, at 2.

100. See Hipp et al., *supra* note 84, at 2; Perry, *supra* note 86, at 201–02.

101. See Baker, *Sex, Rape, and Shame*, *supra* note 17, at 674–75; Hipp et al., *supra* note 84, at 4, 6; Perry, *supra* note 86, at 201–02.

102. See Baker, *What Rape Is*, *supra* note 17, at 234–35; Perry, *supra* note 86, at 202.

acceptance of using force to obtain sex. The study reported nearly one-third of men surveyed stated that they intended to use force to achieve sex.¹⁰³ Yet the majority of these men expressed that they had no intention to “rape a woman,” indicating that most men who force women into sex do not view it as rape.¹⁰⁴ These men did not demonstrate high levels of hostility toward women.¹⁰⁵ Instead, they demonstrated high levels of attitudes objectifying women and embraced the idea that men should exhibit sexual dominance over women.¹⁰⁶ To them, using force to obtain intercourse was not an act of rape, but rather an expression of masculinity and accomplishment.¹⁰⁷ Based on their findings, researchers hypothesized that these men might perceive women’s “no” as token resistance consistent with gender norms and consider force as an acceptable means to achieve sex.¹⁰⁸

An even more recent study examines anonymous online content to demonstrate how these norms contribute to rape. In 2012, Reddit.com asked individuals in its community who had committed rape to discuss their motivations, thoughts, and feelings about the encounters.¹⁰⁹ The responses later became the basis for a qualitative study on rape.¹¹⁰ One man explained why he persisted with sex despite his partner’s verbal protest: “At the time I had this impression that girls didn’t want to be seen as sluts or whores so they would pretend that they didn’t want to have sex when really they did.”¹¹¹ Another similarly described misjudging his partner’s desire and assuming she was engaging in token resistance: “I was horny and I misjudged the girl completely, thought she was just being reserved.”¹¹² Another anonymous poster described overcoming his girlfriend’s verbal and physical resistance through persistent badgering.¹¹³ He did not realize that she felt violated until he discovered her crying in another room.¹¹⁴

103. Sarah R. Edwards, Kathryn A. Bradshaw & Verlin B. Hinsz, *Denying Rape but Endorsing Forceful Intercourse: Exploring Differences Among Responders*, 1 VIOLENCE & GENDER 188, 190 (2014).

104. *See id.*

105. *See id.* at 191–92.

106. *See id.*

107. *See id.*

108. *See id.*

109. *See* Hipp et al., *supra* note 84, at 1.

110. *See id.*

111. *Id.* at 4.

112. *Id.*

113. *See id.*

114. *Id.*

He acknowledged some responsibility, but also insisted that she maintained some degree of responsibility for not resisting him sufficiently.¹¹⁵

Such widely accepted norms restrict the ability of rape reform to have meaningful impact. They entrench ideas that a woman who is not fighting has consented, regardless of her words or other actions, and that a man who persists regardless of a woman's protests or frozen submission has acted reasonably.¹¹⁶ When a woman does not fit the paradigm of the chaste and resistant rape victim, judges and juries interpreting terms like "force" and "consent" are likely to dismiss charges.¹¹⁷

Assumptions about gender roles and sex also hinder the prosecution of rape that does not fit the male-perpetrator/female-victim paradigm. The myth that men always want sex makes it difficult for male rape victims to receive justice.¹¹⁸ Men who are raped by women are nearly invisible in the criminal justice system and legal scholarship.¹¹⁹ Men who are raped by other men also find their claims ignored.¹²⁰ This is particularly true if the victims are queer; the perception of gay, lesbian, bisexual, or transgender men and women as

115. *See id.*

116. *See* SCHULHOFER, *supra* note 12, at 1–2; Estrich, *supra* note 12, at 1093; *see also* Baker, *Sex, Rape, and Shame*, *supra* note 17, at 683–84 (noting the prevalence of notions that, once a woman "entice[s]" a man, the man is absolved of guilt for failing to control his sexual urges); Gruber, *supra* note 11, at 630–33 (discussing cultural norms that treat sex, especially with an initially reluctant woman, as a victory); MacKinnon, *supra* note 30, at 650 (describing the ways in which dominance has become eroticized and that women are socialized to be passive recipients); Pineau, *supra* note 43, at 222 (discussing the ways in which sexual assault is portrayed as "masterful seduction" and submission as enjoyment).

117. *See* SCHULHOFER, *supra* note 12, at 1–2; Gruber, *supra* note 11, at 600; *cf.* Estrich, *supra* note 12, at 1093 (noting cultural norms perpetuating the view that males should be aggressive about sex and females should be passive about it); MacKinnon, *supra* note 30, at 650 (discussing the ways in which rape has become equated with force, even though the lack of force does not always indicate consent, and the presence of force does not always indicate a lack of consent); Pineau, *supra* note 43, at 222 (highlighting the difficulties of separating assault from seduction given modern social norms).

118. *See* Michelle Davies & Paul Rogers, *Perceptions of Male Victims in Depicted Sexual Assaults: A Review of the Literature*, 11 *AGGRESSION & VIOLENT BEHAV.* 367, 372 (2006); *see also* Filipovic, *supra* note 85, at 22 (noting that rape victims are almost always portrayed as women, which leaves men out of the narrative); Shayo Buchanan, *supra* note 64, at 1633–41 (highlighting that, even though the discourse of prison rapes focuses on sexual abuse perpetrated by men, men in prison report higher rates of victimization by female staff than male staff).

119. *See* Davies & Rogers, *supra* note 118, at 372; *see also* Shayo Buchanan, *supra* note 64, at 1633–41, 1667–72 (focusing on prison rape).

120. *See generally* Capers, *supra* note 32 (discussing the silence surrounding male-victim rape).

hypersexual clashes with any notion that their sexual interactions could be nonconsensual.¹²¹

These social norms continue to shape the practice of criminal law, even where the statutes explicitly reject them. Social norms shape juries' interpretations of the facts, a process known as "cultural cognition."¹²² Cultural cognition influences the significance that juries apply to particular facts.¹²³ In nearly every rape case, juries must infer facts where evidence is unclear or disputed and determine which facts are most relevant in light of the legal standard. For example, a juror must determine whether the defendant used "force" where the victim testifies that she was choked and the defendant testifies that he merely caressed her.¹²⁴ A jury must interpret whether a woman who whispered "no" expressed nonconsent where a defendant maintains that she did so while "amorously" and "passionately" moaning and responding to his advances.¹²⁵

These issues are particularly germane to establishing a defendant's mens rea. The common belief that men should be sexually aggressive and women offer token resistance encourages jurors to give credit to a defendant's alleged honest mistake that his partner consented.¹²⁶ Recklessness and negligence similarly integrate social norms and cultural cognition because they instruct jurors to consider what is reasonable behavior during sex and what is a gross deviation from that behavior.¹²⁷ The very notion of reasonableness—of what a reasonable person would do in the defendant's shoes—is inextricably intertwined with concepts of what we expect of men and women in sexual interactions.¹²⁸ A juror's conception of social roles, gender norms, and sexual interactions is therefore critical to these

121. See *id.* at 1269.

122. See Donald Braman, *Cultural Cognition and the Reasonable Person*, 14 LEWIS & CLARK L. REV. 1455, 1457–58 (2010); Kahan, *supra* note 37, at 732, 755–56.

123. See Kahan, *supra* note 37, at 755–56.

124. See *Rusk v. State*, 406 A.2d 624, 627–28 (Md. Ct. Spec. App. 1979) (en banc), *rev'd*, 424 A.2d 720 (Md. 1981); WERTHEIMER, *supra* note 12, at 21 (discussing the issue of whether Rusk had used "force" according to the statute's requirements); Estrich, *supra* note 12, at 1112–15 (discussing force in the context of *Rusk*).

125. See *Commonwealth v. Berkowitz*, 609 A.2d 1338, 1341 (Pa. Super. Ct. 1992) (per curiam), *aff'd in part, rev'd in part*, 641 A.2d 1161 (Pa. 1994); Kahan, *supra* note 37, at 738–40.

126. See *Baker*, *supra* note 3, at 230–31; Estrich, *supra* note 12, at 1095; Filipovic, *supra* note 85, at 20.

127. For a discussion of social norms, see *infra* Part I.B.2.

128. See SCHULHOFER, *supra* note 12, at 259; Husak & Thomas, *supra* note 46, at 101–10.

determinations.¹²⁹ A juror interrogating the reasonableness of a defendant's actions may well ask himself what he would have done.¹³⁰ The common belief that “no” is simply token resistance to open up “negotiations” will lead juries to dismiss charges against a man who ignores a woman's “no.”¹³¹

Cultural cognition is perhaps the most important determinant of how a juror will interpret the facts and law in these circumstances—even more important than the letter of the law. Dan Kahan's seminal study of cultural cognition in rape verdicts demonstrates this effect.¹³² In a mock-juror experiment, subjects read a detailed fact pattern modeled on Pennsylvania's *Commonwealth v. Berkowitz*¹³³ case.¹³⁴ In *Berkowitz*, the victim and defendant were college students who had socialized previously.¹³⁵ The victim had consumed a martini and was in

129. See SCHULHOFER, *supra* note 12, at 259; Husak & Thomas, *supra* note 46, at 101–10.

130. See Husak & Thomas, *supra* note 53, at 88–89.

131. See SCHULHOFER, *supra* note 12, at 259–60; Baker, *supra* note 3, at 246; Dripps, *supra* note 13, at 1804.

132. See generally Kahan, *supra* note 37 (discussing cultural cognition and its interaction with rape law).

133. *Commonwealth v. Berkowitz*, 609 A.2d 1338 (Pa. Super. Ct. 1992) (per curiam), *aff'd in part, rev'd in part*, 641 A.2d 1161 (Pa. 1994).

134. Subjects in the study were randomly assigned to one of five groups. One group was given no definition of rape, while the rest were given definitions of rape that extended over a significant range, including a standard that required force, nonconsent, and mens rea; a strict “no means no” standard requiring conviction if the defendant heard the word “no”; and a “yes means yes” standard defining consent as “words or overt actions indicating a freely given agreement to have sexual intercourse.” See Kahan, *supra* note 37, at 767–69. Specifically, the jurors were given a definition that required: (1) force (or the threat thereof), lack of consent, and a minimum mens rea akin to negligence; (2) force (or the threat thereof), lack of consent, but no mens rea requirement; (3) only lack of consent, defined as “words or overt actions indicating a freely given agreement to have sexual intercourse”; or (4) lack of consent, including a scenario “if the woman communicated by actions or words, including the word ‘no’ that she did not consent to sexual intercourse” and rejects a mistaken belief in consent if the defendant “knows that the woman has said ‘no.’” *Id.*

Across conditions, jurors were somewhat split on whether to convict, with 57 percent in favor of a guilty verdict and 43 percent in favor of acquittal. *Id.* at 774. Groups that were given no definition and those that were given a common law definition were both only slightly more willing to convict than acquit. *Id.* at 774–75. Both the affirmative consent or “no means no” standards increased the percentage willing to convict moderately, from 53 percent to the low-to-mid sixties. *Id.* A substantial portion of jurors therefore voted to acquit even in a jurisdiction where the law required conviction if the defendant heard a “no” and the defendant admitted to hearing the victim repeatedly say “no” and express her desire to leave. Jurors were similarly convinced that the victim provided “words or overt actions indicating a freely given agreement to have sexual intercourse.” *Id.* at 768–69, 774–75.

135. *Berkowitz*, 609 A.2d at 1339.

the defendant's room on her way to meet her boyfriend.¹³⁶ The defendant kissed her, straddled her, and fondled her, to which she replied "no" and that she had to meet her boyfriend.¹³⁷ She repeatedly said "no" and emphasized that she had to leave while the defendant undid his pants and tried to put his penis in her mouth. He then pushed her lightly onto the bed, straddled her, removed her sweatpants and underwear, and penetrated her while she said "no."¹³⁸ The victim stated that she did not physically resist or scream, and that, because the defendant was on top of her, she "couldn't like go anywhere" and "[i]t was like a dream was happening or something."¹³⁹ While it was undisputed that the victim said "no" repeatedly throughout the encounter, the defendant argued that she whispered it while "amorously" and "passionately" moaning, which he took to be acts of encouragement.¹⁴⁰

The experiment found that social norms about male persistence and female resistance clearly influenced juror decisions.¹⁴¹ A large majority of all respondents, 72 percent, agreed that "[b]y saying 'no' several times, [the victim] made it clear to [the defendant] that she did not consent to sexual intercourse."¹⁴² Yet, 66 percent "also agreed that 'if [the victim] had really meant not to consent to sexual intercourse' she 'would have tried to push [the defendant] off of her'" and 63 percent agreed that if she really meant not to consent she "would have tried to leave the dormitory room."¹⁴³ Despite the majority believing the victim made her nonconsent clear, the respondents were not convinced that the defendant had a culpable mens rea. Sixty-three percent agreed that the defendant "believed that [the victim] consented to sexual intercourse" and 46 percent agreed that "[g]iven all the circumstances, it would have been reasonable for [the defendant] to believe [the victim] consented to sexual intercourse."¹⁴⁴ Thus, despite crediting the victim's repeated "no," jurors were

136. *Id.* at 1339–40.

137. *Id.* at 1340.

138. *Id.*

139. *Id.*

140. *Id.* at 1341.

141. *See* Kahan, *supra* note 37, at 794 ("The evidence supports the hypothesis, then, that individuals are motivated to form perceptions of fact that assure a congenial relationship between the expressive judgment of the law and the norms these persons use to evaluate the character of the parties in an alleged acquaintance-rape scenario.").

142. *Id.* at 783 (first alteration in original).

143. *Id.* (emphasis omitted) (quoting survey language).

144. *Id.*

ambivalent about whether this truly constituted nonconsent absent physical resistance. They were also unconvinced that the defendant had a knowing or even negligent mens rea as to nonconsent.

But perhaps most startling was that cultural cognition exerted the strongest influence over a juror's likelihood to convict—stronger even than the letter of the law. Those who were more inclined to embrace hierarchical social orders that feature differentiation and stratification of social roles (including traditional gender roles) were far more likely to acquit the defendant than those with more egalitarian worldviews, regardless of the legal definition.¹⁴⁵ Statistical analysis demonstrated that these cultural views had a stronger impact on a juror's likelihood to convict or acquit than the legal definition of rape.¹⁴⁶ They also exerted a stronger influence than gender, age, income, education, religion, or political-party affiliation.¹⁴⁷

Cultural views also exerted a strong influence on jurors' perceptions of the facts. A hierarchical worldview produced a pro-defendant view of the facts, with jurors being more likely to find that “[d]espite what she said or might have felt after, [the victim] really did consent to sexual intercourse”; an egalitarian world view produced a more antidefendant view of the facts.¹⁴⁸ In contrast, legal definitions exerted minimal influence on jurors' perceptions of the facts. Legal definitions exerted influence only on jurors assigned to the strict “no means no” definition. However, given the facts of the case—in which it was undisputed that the victim said “no” and that the defendant heard it—this influence was surprisingly modest; the proportion of subjects who agreed that the defendant was guilty of rape increased by only 10 percent.¹⁴⁹ This suggests that even a strict “no means no” definition can be swallowed by the effect of cultural dispositions, particularly in communities where a hierarchical worldview dominates.¹⁵⁰

In sum, cultural norms severely undermine the effectiveness of rape law in a way that criminal law reform cannot fix. Moves toward more progressive laws, including “yes means yes” affirmative-consent

145. *See id.* at 781–82.

146. *See id.* at 780–83; 798–99.

147. *See id.* at 779 tbl.1, 782–83. Gender exerted meaningful effects only in conjunction with culture; its effect was to make women who embraced more traditional, hierarchical values *less* likely to convict than men with similar values. *See id.*

148. *Id.* at 787.

149. *See id.* at 796.

150. *See id.*

standards, will still be subverted by the influence of cultural norms. Effective prosecution of rape requires a more fundamental change—a shift in the underlying norms that perpetuate the use of force and coercion in sex and that encourage partners to ignore each other's desires and boundaries.

2. *Social Norms Are Intrinsic to the Mens Rea Determination.* The problems raised in the previous Section cannot be solved simply by encouraging juries to ignore dominant social norms. Not only *will* juries take social norms into account in rape cases but, to some extent, they *must*. Social and cultural norms are integral to the determination of whether a defendant had a culpable mens rea. Ignoring them would therefore mete out punishment disproportionate to a defendant's culpability.¹⁵¹

A common criticism of rape law is that it focuses on the perspective of the defendant and ignores that of the victim.¹⁵² Yet this focus is understandable and necessary in the context of mens rea. Mens rea requires the jury to examine the defendant's perspective and the facts available to him and determine whether he had a specific mental state as to nonconsent.¹⁵³

This is perhaps clearest where the prosecution must prove a mens rea of knowledge. As long as the defendant's belief was honest, even an unreasonable belief that his partner consented to the sexual act would not satisfy a mens rea of knowledge. During a sexual interaction, partners rely on cues from each other to determine consent or lack thereof.¹⁵⁴ An individual will look to the context of the interaction and surrounding circumstances, his own actions, and his partner's actions in order to determine whether his partner is consenting. Social norms and cultural cognition influence how defendants interpret these cues.¹⁵⁵

151. Sometimes laws are by nature overinclusive and criminalize activities that are not culpable. But such exceptions should be rare and undertaken only after critical analysis. See Margo Kaplan, *Rethinking HIV-Exposure Crimes*, 87 IND. L.J. 1517, 1555–56 (2012).

152. See HARDING, *supra* note 17, at 4; MacKinnon, *supra* note 30, at 652–54; see also SCHULHOFER, *supra* note 12, at 257 (discussing resentment among feminists stemming from the defendant-focused nature of rape law).

153. See SCHULHOFER, *supra* note 12, at 257. See generally Ben-David, *supra* note 52, at 444–45 (discussing the mens rea requirement in rape as it relates to non-consent).

154. See Husak & Thomas, *supra* note 46, at 101–10.

155. See *id.*; Kahan, *supra* note 37, at 750; see also SCHULHOFER, *supra* note 12, at 257–60 (examining the role of social norms in defendants' perception of victims' cues); Filipovic, *supra* note 85, at 20 (same).

They are therefore critical to determining whether a defendant had the requisite mens rea.

Unfortunately, dominant social norms discourage partners from reading cues of nonconsent. Men are socialized to view sex with women—even reluctant women—as a victory to be achieved.¹⁵⁶ They are taught to dismiss or ignore a woman’s signs of nonconsent and to perceive neutral or negative cues as indicators of either consent or an invitation to persuasion.¹⁵⁷ Studies show that men commonly misunderstand women’s actions and perceive sexual interest where there is none.¹⁵⁸ Meanwhile, our culture encourages men to persuade, coerce, or badger women who hesitate or resist rather than recognize that the need for these tactics is indicative of nonconsent.¹⁵⁹ They are also taught to infer future consent from past sexual consent.¹⁶⁰

Social conventions for women also increase the likelihood of miscommunication.¹⁶¹ Women are repeatedly taught to be polite, to equivocate, hide their feelings, and even simply “go through with sex” rather than outright reject advances in a way that leads to a confrontation.¹⁶² Women are also encouraged to hesitate even if they want sex, and to feign resistance in order to seem as though they have been persuaded.¹⁶³ Male consent is rarely a consideration; women are

156. See Baker, *supra* note 3, at 230, 247; Filipovic, *supra* note 85, at 19–20; Gruber, *supra* note 11, at 631.

157. See Baker, *supra* note 3, at 230–31, 246–47; Dripps, *supra* note 13, at 1804; Gruber, *supra* note 11, at 631–32; Husak & Thomas, *supra* note 53, at 94–96, 98–100; MacKinnon, *supra* note 30, at 652–54; Jeanna Bryner, *Clueless Guys Can’t Read Women*, LIVESCIENCE (Mar. 19, 2008), <http://www.livescience.com/4876-clueless-guys-read-women.html> [<https://perma.cc/5XH4-BX5B>]; see also Martie G. Haselton, *The Sexual Overperception Bias: Evidence of a Systematic Bias in Men from a Survey of Naturally Occurring Events*, 37 J. RES. PERSONALITY 34, 39–45 (2003) (providing research results on men’s tendency to perceive women’s sexual interest where there is none, and the connection with Western media);

158. See Baker, *supra* note 3, at 231; Dripps, *supra* note 13, at 1804; Gruber, *supra* note 11, at 631–32; Haselton, *supra* note 157, 39–45; Husak & Thomas, *supra* note 53, at 94–96, 98–100; MacKinnon, *supra* note 30, at 652–54.

159. See Baker, *supra* note 3, at 230–31, 234, 246–47; Gruber, *supra* note 11, at 631–32; Kahan, *supra* note 37, at 746.

160. See Dripps, *supra* note 13, at 1801.

161. See Baker, *supra* note 3, at 230–31, 246; Gruber, *supra* note 11, at 632–33.

162. Gruber, *supra* note 11, at 632–33 (internal quotations omitted); see Baker, *supra* note 3, at 230–31, 246; see also Hipp et al., *supra* note 84, at 4 (describing a perpetrator who assumed his partner was putting up token resistance “because of the playful/giggly nature” of the way she said “no, I can’t”).

163. See Gruber, *supra* note 11, at 632–33.

taught that men are inherently pleasure-seeking beings who always crave sex.¹⁶⁴

These stereotypes and social norms can influence whether a defendant formed the requisite mens rea of knowledge. A defendant who truly believes that his partner's silence was indicative of consent, rather than fear or shock, does not have the mens rea of knowledge as to nonconsent. Nor does a defendant who honestly believed that his coercion was welcome seduction.¹⁶⁵ While none of these mistaken beliefs make the victim any less harmed, they do affect the defendant's culpability. If a statute requires the mens rea of knowledge, these mistakes will, and often do, prevent conviction.¹⁶⁶

Legislatures may avoid some of these concerns by requiring a less culpable mens rea, such as recklessness.¹⁶⁷ Though recklessness does not require a defendant to be aware of nonconsent itself, it does require a certain awareness of the *risk* of nonconsent.¹⁶⁸ A defendant with an honest but mistaken belief that his partner consented is nonetheless reckless if he was aware of a substantial and unjustifiable risk that he was mistaken. For example, a defendant who hears his partner say "no" but decides he can convince her otherwise is aware of a risk that his partner is not consenting—he simply chooses to ignore this risk.¹⁶⁹ He may do so because he is indifferent to his partner's consent, or he may honestly believe that—despite the risk otherwise—his partner is consenting. But if the risk he was aware of rises to the level of "substantial and unjustifiable," even an honest belief in his partner's consent does not exculpate him.¹⁷⁰

164. See *supra* Part I.B.1; see *infra* Part II.C.3.

165. See SCHULHOFER, *supra* note 12, at 257; Filipovic, *supra* note 85, at 20.

166. See MacKinnon, *supra* note 30, at 652–53 (“[W]omen are also violated every day by men who have no idea of the meaning of their acts to women. To them, it is sex. Therefore, to the law, it is sex.”).

167. Some scholars and state laws instead focus on whether the defendant's mistaken belief about consent was reasonable. See, e.g., Bryden, *supra* note 30, at 326–29; Husak & Thomas, *supra* note 53, at 101. It is more appropriate to focus instead on whether a mistaken defendant was nonetheless reckless or negligent. The relevant questions are not whether his mistake is reasonable but whether he nonetheless had a culpable mental state such as recklessness or negligence. See MODEL PENAL CODE § 2.02 (AM. LAW INST. 1985); Alexander, *supra* note 59, at 310.

168. See Ben-David, *supra* note 52, at 444–45.

169. But see ALEXANDER & FERZAN, *supra* note 52, at 25–65 (arguing that we could fold both purpose and knowledge into the mens rea of recklessness).

170. See Alexander, *supra* note 59, at 310.

Yet cultural cognition and social norms may still prevent a defendant from forming a reckless mental state. Social norms and commonly accepted stereotypes about sex and gender often discourage partners, in particular men, from perceiving the risk of nonconsent.¹⁷¹ The belief that silence equals consent, for example, may prevent a man from even perceiving the risk of nonconsent. In many contexts—such as when a woman has indicated interest in him or sex—it also encourages him to perceive her verbal rejection as playful banter or token resistance to be overcome by seduction. These misperceptions are, of course, context specific; different scenarios will influence how an individual perceives his partner’s actions. Overestimating a woman’s sexual interest influences the defendant’s ability to form the mens rea of knowledge as well as the awareness of risk necessary for the mens rea of recklessness.¹⁷²

Where the defendant is aware of a risk his partner is not consenting, recklessness requires that the risk he perceives be both substantial and unjustifiable.¹⁷³ In general, a risk is considered substantial and unjustifiable if the defendant’s choice to disregard it was a “gross deviation from the standard of conduct” that a reasonable person would observe in his situation.¹⁷⁴ This standard assesses the reasonableness of the defendant’s conduct using both subjective and objective standards. The jury must consider the defendant’s “situation” as well as “the nature and purpose of the actor’s conduct and the circumstances known to him” and then assess his conduct using a reasonable person standard.¹⁷⁵

A reasonable person determination is in large part dependent on dominant social norms and cultural attitudes.¹⁷⁶ It looks to the ordinary

171. See MacKinnon, *supra* note 30, at 653 (“[M]en are systematically conditioned not even to notice what women want. They may have not a glimmer of women’s indifference or revulsion.”).

172. See *supra* note 157.

173. For a discussion of the concepts of “substantial and unjustifiable,” see JOEL FEINBERG, HARM TO OTHERS 187–93 (1984); Kaplan, *supra* note 151, at 1539–40; Paul H. Robinson, *Prohibited Risks and Culpable Disregard or Inattentiveness: Challenge and Confusion in the Formulation of Risk-Creation Offenses*, 4 THEORETICAL INQUIRIES L. 367, 372–77 (2003).

174. See MODEL PENAL CODE § 2.02 (AM. LAW INST. 1985); Robinson, *supra* note 173, at 377.

175. See MODEL PENAL CODE § 2.02; Robin Charlow, *Wilful Ignorance and Criminal Culpability*, 70 TEX. L. REV. 1351, 1377–79 (1992); Robinson, *supra* note 173, at 386–87.

176. See Braman, *supra* note 122, at 1468–80; Husak & Thomas, *supra* note 46, at 103–08.

person of average intelligence.¹⁷⁷ In the context of rape, the ordinary person's perspective is forged in a culture that "systematically condition[s]" men to either not see, underestimate, or ignore signs of nonconsent, that conditions women to equivocate, and that teaches both sexes that token resistance is common.¹⁷⁸ It is one thing to reject a defendant's perspective, but quite another to say that it grossly deviates from the standard of a reasonable person when over half of college men surveyed reported that women mean "yes" when they say "no."¹⁷⁹ As Katharine Baker notes, "Men, *understandably*, confuse women's passivity for consent because many men know that women can be passive even when they want to consent to sex. Men believe that women say no when they mean yes."¹⁸⁰

Similar problems arise even where the law requires mere negligence as to nonconsent.¹⁸¹ A defendant is criminally negligent where his failure to perceive a substantial and unjustifiable risk was a gross deviation from the standard of conduct of a reasonable person in the defendant's situation.¹⁸² Unlike recklessness, a mens rea of negligence can allow a guilty verdict even where the defendant was unaware of the risk of nonconsent. It determines the defendant's guilt

177. See Samuel Pillsbury, *Crimes of Indifference*, 49 RUTGERS L. REV. 105, 122 (1996); see also MODEL PENAL CODE AND COMMENTARIES § 2.02 cmt. at 242 (AM LAW INST., Official Draft and Revised Comments 1985) (stating that "the heredity, intelligence, or temperament of the actor would not be held material in judging negligence and could not be without depriving the criterion of all its objectivity").

178. See MacKinnon, *supra* note 30, at 652–54.

179. See Baker, *Sex, Rape, and Shame*, *supra* note 17, at 668; see also Kahan, *supra* note 37, at 750–51 (arguing that if we interpret ignoring a woman's words as de facto unreasonable and sufficient for liability, we will unjustly convict men who are acting reasonably and in good faith according to society's conventions); MacKinnon, *supra* note 30, at 643 (stating that men who rape are "expressing the images of masculinity . . . for which they are otherwise trained, elevated, venerated, and paid").

180. See Baker, *supra* note 3, at 246.

181. See SCHULHOFER, *supra* note 12, at 258 (discussing the negligence requirement for rape); Bryden, *supra* note 30, at 330 (same); see also ESTRICH, *supra* note 14, at 96–104 (proposing a negligence standard for rape).

182. See MODEL PENAL CODE § 2.02 (AM. LAW INST. 1985); see also SCHULHOFER, *supra* note 12, at 258 (describing the negligence requirement for rape). Negligence may be the strongest weapon for prosecutors, because, despite its reliance on social conventions, it does bring in the widest swath of conduct. But it is a genuine problem if criminal law must lean on negligence because of the mens rea problems that cultural and social norms create. There is legitimate debate about its use in criminal law. See ALEXANDER & FERZAN, *supra* note 52, at 70–71; SCHULHOFER, *supra* note 12, at 258–59; Husak & Thomas, *supra* note 46, at 98–99. See generally Kenneth W. Simons, *Culpability and Retributive Theory: The Problem of Criminal Negligence*, 5 J. CONTEMP. LEGAL ISSUES 365 (1994) (examining the propriety of negligence liability in criminal law).

based not on what he knew, but what he should have known.¹⁸³ Yet, as with recklessness, a negligence mens rea requires the jury to consider social and cultural norms in determining whether the defendant's failure to perceive the risk of his partner's nonconsent grossly deviates from a reasonable person standard.¹⁸⁴

This is not to argue that our dominant social norms are correct. On the contrary, they reflect deeply troubling stereotypes and attitudes. But the fact that these norms are so widely accepted and ingrained necessarily affects whether a defendant's mental state is considered to be knowing, reckless, or negligent. As long as these remain the dominant social norms, jurors will be both unwilling and logically unable to find a defendant to be culpable in many cases.¹⁸⁵

These obstacles, however, are not insurmountable. This Article argues that the law has a critical role to play in combating the cultural norms that encourage forced, coerced, and unwanted sex. Our mistake has been to focus primarily (indeed, almost exclusively) on criminal law to effect this change. Part II argues that public health law provides a far better framework to meet rape's challenges.

183. See MODEL PENAL CODE § 2.02; ALEXANDER & FERZAN, *supra* note 52, at 70–71; Ben-David, *supra* note 52, at 446–57.

184. Rape therefore raises a uniquely fundamental problem when it comes to the reasonable person. Case law and scholarship often debate whether juries should consider an individual's minority culture or idiosyncratic views when determining whether his actions were reasonable. See, e.g., R. Lee Strasburger, Jr., *The Best Interests of the Child?: The Cultural Defense as Justification for Child Abuse*, 25 PACE INT'L L. REV. 161, 162 (2013) (discussing a cultural defense in the context of determining what reasonable punishment is for child abuse). But rape law need not even reach this question to face thorny mens rea issues. In rape law, the problem is not merely a minority view, but rather the standard set by the dominant culture and the average person.

185. This problem cannot be neatly ignored by simply holding defendants to a higher standard of reasonableness. The recklessness and negligence standards require a “gross deviation” from the standard of conduct of a reasonable person. See MODEL PENAL CODE § 2.02. A person who acts in accordance with society's conventions is not, by definition, grossly deviating from those norms. The individual's actions may certainly be harmful and morally wrong. But they nonetheless may not meet the mental state requirements for recklessness or negligence. We cannot ignore the requirements for culpability when they do not suit us. See Kahan, *supra* note 37, at 750–51.

Nor is this issue easily resolved by redrafting the definition of consent. Statutes with a narrow definition of consent can reduce the role of mens rea: for example, a rape law may be drafted in which a victim's “no” must always equal nonconsent, and all that matters is whether the defendant had a culpable mens rea as to the word “no.” But reducing consent to a hard-and-fast rule has more drawbacks than benefits. Most notably, its lack of nuance would make it substantially over- and underinclusive. For example, victims commonly do not utter “no,” but instead freeze or remain silent.

II. RAPE BEYOND CRIME: A PUBLIC HEALTH LAW FRAMEWORK

A. *The Power, Mandate, and Characteristics of Public Health Law*

Public health law consists of the state's power and duties to assure conditions for people to be healthy.¹⁸⁶ Within this area are several defining characteristics germane to rape's unique challenges, most notably its (1) focus on the state's power to ensure health; (2) broad scope, which allows it to integrate several other areas of law; (3) use of partnerships with communities and multiple public and private institutions; (4) focus on populations, as opposed to individuals; (5) prevention-oriented mandate; and (6) requirement that interventions be evidence based.¹⁸⁷ This Section will describe these characteristics and how they form a powerful legal framework to achieve a broad set of public health goals.

The meaning of public health has changed significantly over the past century. Traditionally, public health law focused on the prevention of disease.¹⁸⁸ Infectious diseases, however, are no longer the leading causes of death, ceding that role to chronic diseases, accidental causes, and violence.¹⁸⁹ As the most common causes of death and injury have changed, so has the concept of public health. The World Health Organization's (WHO) definition of health, adopted by the CDC, is "a state of complete physical, mental, and social well-being and not just the absence of sickness or frailty."¹⁹⁰

186. See LAWRENCE O. GOSTIN & PETER D. JACOBSON, *LAW AND THE HEALTH SYSTEM* 12 (2006); Lawrence O. Gostin, *A Theory and Definition of Public Health Law*, 10 J. HEALTH CARE L. & POL'Y 1, 1 (2007); Pamela M. McMahon, *The Public Health Approach to the Prevention of Sexual Violence*, 12 SEXUAL ABUSE: J. RES. & TREATMENT 27, 28 (2000).

187. See GOSTIN & JACOBSON, *supra* note 186, at 14–17; Gostin, *supra* note 186, at 1.

188. See GOSTIN & JACOBSON, *supra* note 186, at 16; Camille M. Davidson, *What's Love Got to Do with It?: Examining Domestic Violence as a Public Health Issue Using Their Eyes Were Watching God*, 81 UMKC L. REV. 867, 893 (2013). The seminal 1905 case of *Jacobson v. Massachusetts*, for example, upholds state power to mandate vaccination. *Jacobson v. Massachusetts*, 197 U.S. 11, 27–30 (1905).

189. See Davidson, *supra* note 188, at 893; Wendy K. Mariner, *Law and Public Health: Beyond Emergency Preparedness*, 38 J. HEALTH L. 247, 258–61 (2005). Demographic breakdowns reveal disparities in causes of death. For example, homicide is the fifth leading cause of death among black men and the leading cause of death among black men ages fifteen to thirty-four. See CTRS. FOR DISEASE CONTROL & PREVENTION, *LEADING CAUSES OF DEATH BY AGE GROUP, RACE/ETHNICITY, MALES* (2013), http://www.cdc.gov/men/lcod/2013/race_ethnicitymen2013.pdf [<https://perma.cc/R27A-T3RL>]; CTRS. FOR DISEASE CONTROL & PREVENTION, *LEADING CAUSES OF DEATH BY AGE GROUP, BLACK MALES—UNITED STATES 1* (2013), <http://www.cdc.gov/men/lcod/2013/blackmales2013.pdf> [<https://perma.cc/2WTU-JRLY>].

190. See CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 7, at 1.

Public health law has responded by shifting its focus from responding to epidemics to creating conditions and promoting behaviors that enable populations to achieve this broader definition of health.¹⁹¹ This mandate requires public health law to use a broad range of legal interventions. Chronic disease, violence, and accidental injury involve multiple risk factors, and, unlike many infectious diseases, there is no single intervention likely to prevent or cure them.¹⁹² Instead, they require the coordination of several different laws, policies, and systems.¹⁹³

Public health law is therefore not cabined in a solitary category, but rather extends its reach into several areas of law. While many states have public health codes, nearly any type of law can be a public health law. As one commenter noted, public health law “might be equated with any public policy that serves in any way to prevent physical or mental harm or to maintain and improve health.”¹⁹⁴ Public health laws include, for example, education laws that mandate HIV-prevention information in health classes; environmental laws that improve air quality; employment laws that require safe working conditions; federal laws regulating the insurance market; laws that regulate firearm use and ownership; and criminal laws that prohibit driving while intoxicated.

The government has broad powers to enact these laws. A state’s police power gives it the authority to pass public health laws ranging from mandatory quarantine and vaccination to seatbelt use and water fluoridation requirements, to workplace standards and educational programs.¹⁹⁵ Congress may pass public health laws using its power of the purse, its power to tax, or its power under the Commerce Clause.¹⁹⁶

191. See GOSTIN & JACOBSON, *supra* note 186, at 22–25, 41–42 (discussing debates over the scope of public health); Davidson, *supra* note 188, at 893 (describing the evolution of public health law from its focus on disease eradication to its broader focus on promoting healthier lifestyles); Gostin, *supra* note 186, at 6–7 (discussing the importance of social justice to achieve public health goals); Mariner, *supra* note 189, at 258–61 (discussing the shift in attention of American public health law from disease eradication to the “full range of social determinants of health”).

192. See Mariner, *supra* note 189, at 258–61.

193. See Pamela M. McMahon, *The Public Health Approach to the Prevention of Domestic Violence*, 47 LOY. L. REV. 471, 472 (2001).

194. See Mariner, *supra* note 189, at 252.

195. See *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905); GOSTIN & JACOBSON, *supra* note 186, at 13–14, 85; Gostin, *supra* note 186, at 3–4.

196. See *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578–79 (2012).

The Patient Protection and Affordable Care Act (ACA)¹⁹⁷ and the Violence Against Women Act (VAWA),¹⁹⁸ for example, serve significant public health objectives. The White House can also create task forces to address public health issues under its executive authority.¹⁹⁹

Taking on the third characteristic identified above, public health law involves partnerships between numerous public, private, and community institutions. Unlike criminal law, which is meted out by a system specific to it, public health laws are interpreted and enforced by a wide range of actors and institutions. Local, state, and national health agencies monitor health conditions, assess risk factors, and recommend interventions. But they are hardly the only state actors that enforce public health law; rather, they act as “focal institutions at the center of a multisector ‘public health system.’”²⁰⁰ This system consists of multiple state actors, such as public schools that teach health curricula; agencies such as the Occupational Safety and Health Administration that ensure conditions for employee health and safety; environmental agencies that monitor environmentally related health risks and compliance with regulations; and agencies that enforce laws guaranteeing safe housing conditions.²⁰¹

Public health law also relies upon partnerships with numerous private and nonprofit institutions. Perhaps the most obvious among these are health care providers, which collect health information and diagnose and treat patients.²⁰² But less well-known are partnerships with other private institutions, such as those in the mass media that create campaigns to further public health goals. One example is the collaboration between the CDC, MTV, the Kaiser Family Foundation, and the Planned Parenthood Foundation to create *It's Your (Sex) Life*,

197. See Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

198. Violence Against Women Act, Pub. L. No. 103-322, §§ 40001–703, 108 Stat. 1796, 1902–55 (1994).

199. See, e.g., Memorandum from President Barack Obama to the Heads of Executive Departments and Agencies, Establishing a Task Force on Childhood Obesity (Feb. 9, 2010), <https://www.whitehouse.gov/the-press-office/presidential-memorandum-establishing-a-task-force-childhood-obesity> [<https://perma.cc/TJ49-S99E>].

200. See Gostin, *supra* note 186, at 5 (citing INST. OF MED., THE FUTURE OF THE PUBLIC'S HEALTH IN THE 21ST CENTURY 27 (2003)).

201. See *id.* at 5–6.

202. See *id.* at 5.

a public-information partnership that has helped increase safe sex practices among youth.²⁰³

Public health law also integrates partnerships with community organizations such as churches and civic organizations, which are well suited to assess community needs and ensure that interventions are culturally appropriate.²⁰⁴ Data collection and public health interventions are more likely to be successful with the active involvement and trust of the community.²⁰⁵ In turn, community organizations can use this collaboration to advocate for laws and policies that meet the needs of their population.²⁰⁶

Community engagement underscores the fourth and fifth characteristics of public health law: its focus on populations and prevention. Public health law abides by the legal maxim *salus populi est suprema lex*, the welfare of the people is the supreme law.²⁰⁷ To this end, public health law uses prevention strategies that target populations and communities. “Primary prevention,” a cornerstone of the public health framework, assesses risk factors and tailors interventions to prevent health problems before they manifest.²⁰⁸ It addresses the beliefs and norms that lead to problematic behavior, as well as social determinants of health such as poverty, racial discrimination, and housing.²⁰⁹

Primary prevention strategies also reflect the final characteristic identified above: public health law’s commitment to evidence-based laws and policies. In particular, primary prevention strategies must define a problem and identify risk factors using in-depth demographic collection, including data on the relationships between victims and

203. See Allison L. Friedman et al., *An Assessment of the GYT: Get Yourself Tested Campaign: An Integrated Approach to Sexually Transmitted Disease Prevention Communication*, 41 *SEXUALLY TRANSMITTED DISEASES* 151, 151 (2014).

204. See Gostin, *supra* note 186, at 5–6.

205. See *id.*

206. See *id.*

207. See GOSTIN & JACOBSON, *supra* note 186, at 13.

208. See SHIFTING THE PARADIGM, *supra* note 85, at 5, 7; McMahon, *supra* note 186, at 28 (noting that primary prevention focuses on stopping problem behavior before it starts).

209. See SHIFTING THE PARADIGM, *supra* note 85, at 5; Davidson, *supra* note 188, at 894–96; Mariner, *supra* note 189, at 252–54; Jonathan Todres, *Moving Upstream: The Merits of a Public Health Law Approach to Human Trafficking*, 89 *N.C. L. REV.* 447, 487 (2011). See generally *SOCIAL DETERMINANTS OF HEALTH* (Michael Marmot & Richard G. Wilkinson eds., 2d. ed. 2005) (exploring social determinants of health).

perpetrators.²¹⁰ Interventions should not only be based on this data, but also be tested and continually assessed to ensure effectiveness.²¹¹

This legal framework provides a valuable platform for addressing rape. Public health authorities such as the WHO and the CDC have long recognized rape and other forms of sexual violence as significant public health problems.²¹² The National Institute of Drug Abuse has urged that “it is imperative that rape be classified as a major public health issue in the United States.”²¹³ The American College Health Association has called sexual violence “a serious campus and public health issue,” and has recommended a public health approach based on prevention strategies that target the cultural myths that encourage rape.²¹⁴

Rape’s significance as a public health issue becomes particularly stark when its prevalence is compared to other widely accepted public health problems. While breast cancer affects about 12 percent of women,²¹⁵ CDC surveys have found that 20 percent of women have reported being the victim of rape or attempted rape by force or intoxication.²¹⁶ Thirteen percent of women have reported being victims of sexual coercion.²¹⁷ Nearly 5 percent of men have reported being forced to penetrate others, and 6 percent have experienced sexual coercion. In comparison, 4.5 percent of men will be diagnosed with colorectal cancer—the third most commonly diagnosed cancer and third leading cause of cancer death among men.²¹⁸

210. See McMahon, *supra* note 186, at 30; James A. Mercy et al., *Public Health Policy for Preventing Violence*, 12 HEALTH AFF. 7, 15–16 (1993); Todres, *supra* note 209, at 470–71.

211. See McMahon, *supra* note 186, at 30; Todres, *supra* note 209, at 470–71.

212. See CDC SURVEY, *supra* note 66, at 1; WORLD HEALTH ORG., WORLD REPORT ON VIOLENCE AND HEALTH 149–64 (2014); see also Schafran, *supra* note 41, at 15 (discussing violence as a public health problem); Todres, *supra* note 209, at 468–69 (arguing that human trafficking, as a form of violence, is a public health issue). Aside from being a public health concern in its own right, rape also increases the risk of other physical and mental health problems. See CDC SURVEY, *supra* note 66, at 1, 3, 7; Baker, *What Rape Is*, *supra* note 17, at 253–54; Schafran, *supra* note 41, at 15–16. Acquaintance rape may pose a higher risk of psychological harm because it impairs a victim’s ability to trust. See Schafran, *supra* note 41, at 16.

213. See Schafran, *supra* note 41, at 16 (quoting CRIME VICTIM RESEARCH AND TREATMENT CTR., RAPE IN AMERICA 13 (1992)).

214. See SHIFTING THE PARADIGM, *supra* note 85, at 5.

215. See NAT’L CANCER INST., BREAST CANCER RISK IN AMERICAN WOMEN, <http://www.cancer.gov/types/breast/risk-fact-sheet> [<https://perma.cc/CD2H-JYMP>].

216. See CDC SURVEY, *supra* note 66, at 18.

217. *Id.* at 17–19.

218. See NAT’L CANCER INST., SEER STAT FACT SHEETS: COLON AND RECTUM CANCER (2016), <http://seer.cancer.gov/statfacts/html/colorect.html> [<https://perma.cc/C43R-SXNB>].

Demonstrating that rape is a public health problem, however, does not prove that public health law should be the primary legal framework through which the law addresses rape. There are several areas of law that could provide legal frameworks to address rape, such as criminal law (the current dominant approach) and civil law (the current supplementary approach, primarily on college campuses). Why make public health law the primary framework for rape law?

The next Section argues that the characteristics of public health law described above create a legal framework uniquely well suited to tackling the challenges rape poses. Unlike criminal law, public health law can engage the complex causes of rape—causes that include cultural norms and attitudes as well as social determinants like inequality. It can use a more nuanced understanding of rape to create evidence-based legal interventions that effectively target rape's causes. These legal interventions are better suited to change behavior than criminal law because they can directly address the social norms and beliefs that encourage sexual aggression and instead provide positive models for sexual behaviors.

B. Transforming Rape Law: A Public Health Law Framework

1. *An Evidence-Based Approach.* Laws and policies that seek to prevent rape must be informed by rape's causes. Public health law provides a powerful framework to meet this challenge, in particular because of its focus on population-based prevention.²¹⁹ Primary prevention strategies begin by (1) defining the problem with in-depth demographic collection, including data on the relationships between victims and perpetrators and (2) identifying risk factors.²²⁰ Public health laws can use public health surveillance to collect data and identify what causes sexual violence in different populations and communities.²²¹

While it may seem passive when compared to criminal law deterrents, data collection is critical to an effective legal approach. It equips lawmakers with an evidence-based, nuanced understanding of

219. See Kathleen C. Basile, *A Comprehensive Approach to Sexual Violence Prevention*, 372 *NEW ENG. J. MED.* 2350, 2351 (2015); McMahon, *supra* note 186, at 31; Todres, *supra* note 209, at 452.

220. See McMahon, *supra* note 186, at 30; Todres, *supra* note 209, at 470–71.

221. See CDC SURVEY, *supra* note 66, at 4; McMahon, *supra* note 186, at 32; Hattie Rutenberg, *The Limited Promise of Public Health Methodologies to Prevent Youth Violence*, 103 *YALE L.J.* 1885, 1889–90 (1994); Todres, *supra* note 209, at 475.

the problem. Public health law can examine causes as diverse as community living conditions, economic factors, social messages, and peer and family influence.²²² In contrast, criminal law's narrower focus on punishment and individual culpability excludes careful consideration of the cultural norms and social determinants of criminal behavior.

This nuanced understanding is particularly relevant in the context of rape. As discussed in Part I.B, the cultural norms that promote and normalize sexual aggression make incidents of rape not only prevalent but also extremely difficult to prosecute. Public health law's focus on populations and evidence-based prevention provides a legal framework that requires lawmakers to consider how norms, beliefs, and social and economic systems promote sexual violence.²²³ This focus on evidence and data collection also helps ensure that rape-prevention interventions will be effective in practice.²²⁴ Primary prevention strategy requires that interventions are tested and proven effective.²²⁵

2. *Changing Behaviors by Changing Social Norms.* Rape is also particularly suited to a public health law framework because of the way that social norms and conventions obscure the problem itself. Other offenses, such as assaults and murders, are widely accepted as harmful and criminal. Social norms are less likely to thwart their prosecution. Public health interventions to prevent violent behavior ask: How can we prevent behavior that individuals know is unlawful and harmful? In contrast, sexual assault—and acquaintance rape in particular—concerns behavior that is not widely accepted as criminal or harmful.²²⁶ Criminal law cannot prosecute these offenses effectively absent a change in the dominant social norms. A public health approach is necessary to bring the harm of this behavior to the public consciousness, both for prevention and successful prosecution.

Public health law interventions, such as education laws and policies and media campaigns, can change social norms and attitudes that contribute to sexual aggression.²²⁷ In particular, they can address the social norms that normalize sexual aggression, encourage

222. See Todres, *supra* note 209, at 482–84.

223. See SHIFTING THE PARADIGM, *supra* note 85, at 3; Todres, *supra* note 209, at 452–53, 483–85.

224. See McMahon, *supra* note 186, at 30; Todres, *supra* note 209, at 454, 470–71.

225. See McMahon, *supra* note 186, at 30; Todres, *supra* note 209, at 470–71.

226. See *supra* Part I.B.

227. See CDC SURVEY, *supra* note 66, at 4; Todres, *supra* note 209, at 487.

individuals to ignore cues of nonconsent, and prevent them from realizing that their actions may constitute rape.²²⁸ As discussed above, a substantial number of men admit to using force or coercion during sex but do not characterize it as rape—they simply do not see themselves as rapists.²²⁹ Changing this understanding and behavior therefore requires a strong educational component to change attitudes about consent and gender roles. These educational components must be able to prompt individuals to analyze their own behavior rather than simply distinguish themselves as de facto “not rapists.”²³⁰

Public health interventions can also promote positive sexual practices, a more effective prevention strategy than merely trying to punish undesirable acts.²³¹ Educational programs that teach positive social norms and skills have been proven to materially reduce harmful behavior. One recent example is Fast Track, a childhood intervention for high-risk, aggressive first-grade children that follows them through tenth grade.²³² Fast Track provides academic tutoring, but is notable for its focus on teaching social skills and self-control.²³³ Studies tracking participants into early adulthood show compelling and lasting effects, with participants demonstrating significantly lower likelihood of violent crime, delinquency, drug-related crime, risky sexual behavior, substance abuse, and psychological problems.²³⁴ Further research credits Fast Track’s emphasis on social skills—teaching participants to regulate emotions and respect others—with preventing antisocial behavior in general and criminal behavior and arrests in particular.²³⁵

A public health framework can use legal interventions such as education laws and policies and media campaigns to change social norms and teach skills that prevent sexual aggression and rape. Such laws and policies can help the population foster healthy sexual norms and stress *good* sex—sex that involves communication, mutual respect,

228. For a discussion of these norms, see *supra* Part I.B. See also Alan D. Berkowitz, *Sexual Assault Prevention*, in 2 MEN AND MASCULINITIES: A SOCIAL, CULTURAL AND HISTORICAL ENCYCLOPEDIA 719, 719–20 (Michael Kimmel & Amy Aronson eds., 2004).

229. See *supra* notes 103–08 and accompanying text.

230. See Edwards et al., *supra* note 103, at 192.

231. See Todres, *supra* note 209, at 483–84, 489–90.

232. Kenneth A. Dodge et al., *Impact of Early Intervention on Psychopathology, Crime, and Well-being at Age 25*, 172 AM. J. PSYCHIATRY 59, 59 (2015); Lucy C. Sorensen & Kenneth A. Dodge, *How Does the Fast Track Intervention Prevent Adverse Outcomes in Young Adulthood?*, 87 CHILD DEV. 429, 429–30 (2016).

233. Sorensen & Dodge, *supra* note 232, at 430.

234. See Dodge et al., *supra* note 232, at 65, 67; Sorensen & Dodge, *supra* note 232, at 432.

235. Sorensen & Dodge, *supra* note 232, at 432, 442.

and mutual pleasure.²³⁶ It can help children, teenagers, and adults identify and reject the gender stereotypes that lead to the denigration of women, everyday sexism and objectification of women, and victim blaming in the context of sexual aggression.²³⁷ It can teach skills and behaviors such as identifying consent and distinguishing it from coerced acquiescence, talking openly about sex and boundaries with a partner, and identifying and respecting a partner's boundaries.²³⁸ Public health programs can also teach populations to identify when others engage in sexual assault or other abusive behavior and how to intercede.²³⁹

These interventions provide a powerful opportunity to address behaviors that contribute to rape but are outside the scope of criminal law. There are many behaviors and attitudes that contribute to rape culture and increase the risk of rape that are unsuitable for criminal punishment. For example, the CDC's surveillance of sexual violence includes behaviors that are often noncriminal, such as bartering for sex, pressuring another into sex by threatening to end the relationship, making untrue promises in exchange for sex, or the humiliation of a partner.²⁴⁰ Some of these may not rise to the level of criminalization or may be difficult to criminalize. Public health interventions can nonetheless address these behaviors as part of a spectrum of sexual violence.

Criminal law lacks public health law's ability to address the social norms that cause sexual violence.²⁴¹ Criminal law is, by nature,

236. See SHIFTING THE PARADIGM, *supra* note 85, at 5, 7–8; AL VERNACCHIO, FOR GOODNESS SEX (2014); Cara Kulwicki, *Real Sex Education*, in YES MEANS YES, *supra* note 85, at 305, 307–10; Perry, *supra* note 86, at 197–200, 202–07.

237. See Hipp et al., *supra* note 84, at 7; Kulwicki, *supra* note 236, at 307–10; Perry, *supra* note 86, at 197–200, 202–07; Todres, *supra* note 209, at 483–84 (discussing mentoring programs); see also Elizabeth Schroeder, *Could Sex Ed Prevent Another Steubenville?*, ANSWER: SEX ED, HONESTLY (Apr. 2, 2013), <http://answer.rutgers.edu/blog/2013/04/02/could-sex-ed-prevent-another-steubenville> [<https://perma.cc/BF58-FPQK>] (noting that sexuality education, especially if it begins early, can provide important lessons that combat gender stereotypes germane to “rape culture”).

238. See SHIFTING THE PARADIGM, *supra* note 85, at 8; Kulwicki, *supra* note 236, at 305, 307–10; Perry, *supra* note 86, at 197–200, 202–07.

239. See CDC SURVEY, *supra* note 66, at 4; SHIFTING THE PARADIGM, *supra* note 85, at 5–6; Todres, *supra* note 209, at 493–95; see also Piper Fogg, *Rape Prevention Programs Proliferate, but It's “Hard to Know” Whether They Work*, CHRON. OF HIGHER EDUC. (Nov. 15, 2009), <http://www.chronicle.com/article/Rape-Prevention-Programs/49151> [<https://perma.cc/L8ZB-WUGA>] (discussing an effective program aimed at men that casts them not as potential abusers, but rather “potential helpers” who can prevent assaults).

240. CDC SURVEY, *supra* note 66, at 17.

241. See *supra* Part I.B.

primarily reactive rather than preventive.²⁴² It does little to change the attitudes or conditions that lead to behavior besides providing a possible punishment²⁴³—one that is mostly responsive to social norms, rather than a force for changing them. Dan Kahan’s research explores how this “sticky norms” phenomenon thwarts rape law reform.²⁴⁴ Jurors balk at convicting defendants whose conduct aligns with accepted norms, even if the conduct is clearly unlawful.²⁴⁵ In the context of rape, “genuine societal ambivalence about the ‘no sometimes means yes’ norm”²⁴⁶ prompts jurors to “continue to treat verbal resistance as equivocal evidence of nonconsent.”²⁴⁷ This renders rape law reform ineffective at changing either legal outcomes or culture. Indeed, using criminal law to change cultural attitudes may unwittingly exacerbate the problem: jurors’ repeated unwillingness to convict sends a message that the conduct is acceptable or, at the very least, likely to go unpunished.

The sticky-norms problem is particularly difficult to resolve when it comes to rape. In other areas of law, it may be overcome by reducing the penalties for the crime so that jurors will be less hesitant to enforce the law.²⁴⁸ Such “gentle nudges,” may allow for slow, incremental change to both the law and the cultural norms necessary for its effective execution.²⁴⁹ But light penalties for sexual assault may have the unintended effect of reinforcing the notion that the conduct does not really merit condemnation or punishment, turning a gentle nudge into a “sly wink.”²⁵⁰

As a deterrent, criminal law is notoriously inept at changing norms and behaviors, particularly sexual behaviors.²⁵¹ It is a weak tool to

242. See McMahon, *supra* note 186, at 27 (characterizing criminal law as largely responsive rather than preventive); Todres, *supra* note 209, at 480–81 (commenting that research refutes the assumption that criminal law effectively deters undesirable behavior).

243. McMahon, *supra* note 186, at 28.

244. See Dan M. Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 607–08 (2000).

245. *Id.*

246. *Id.* at 623.

247. *Id.* at 607.

248. See Dripps, *supra* note 13, at 1805; Kahan, *supra* note 244, at 608.

249. See Dripps, *supra* note 13, at 1805; Kahan, *supra* note 244, at 607–22.

250. Kahan, *supra* note 244, at 624–25. Kahan proposes shaming penalties in the context of campus codes. For a discussion of this approach, see *supra* note 17.

251. See Bryden, *supra* note 30, at 419–20 (arguing that even radical changes in rape law “may not percolate down to most citizens” and that conventional, sexual mores often determine how people think about sexual crimes); Gruber, *supra* note 11, at 638–45, 647, 652 (discussing the failure of criminal law to deter “date rape” and arguing that the “criminal system” stands in the

address attitudes and norms because it addresses only negative behavior and is poorly suited to teach positive behavior. Criminal law is also limited in its scope; it addresses only the worst behavior meriting society's condemnation. Public health strategies, in contrast, can engage the wide range of behaviors and attitudes that increase the risk of sexual violence.²⁵²

3. *Addressing Social Determinants.* Public health law can also move upstream to address social determinants of rape. In recent years, public health efforts have increasingly recognized the role of social determinants in public health problems.²⁵³ Social determinants are “social institutions” (including “economic systems and political structures”), surroundings (such as “neighborhoods [and] workplaces”), and “social relationships” (such as hierarchies and “differential treatment of social groups”) that correspond to health outcomes.²⁵⁴ Income, environment, gender, race, and other social determinants significantly influence health outcomes and create substantial health disparities.²⁵⁵

way of potential reforms aimed at reshaping norms); Kaplan, *supra* note 151, at 1562–63 (demonstrating that criminal sanctions have had no positive effect on behaviors or social norms regarding HIV exposure); Todres, *supra* note 209, at 462 (“In the public health arena, criminal sanctions have had relatively minimal impact on reshaping behavior and reducing harm.”). There are also legitimate concerns about the extent to which criminal law is an appropriate tool to change social norms. See Husak & Thomas, *supra* note 46, at 112; Kahan, *supra* note 37, at 751.

252. See McMahon, *supra* note 186, at 28.

253. See Laurie M. Anderson, Susan C. Scrimshaw, Mindy T. Fullilove, Jonathan E. Fielding & Task Force on Cmty. Preventive Svcs., *The Community Guide's Model for Linking the Social Environment to Health*, 24 AM. J. PREVENTIVE MED. 12, 12 (2003); Mariner, *supra* note 189, at 253–54; Michael Marmot, *Social Determinants of Health Inequalities*, 365 LANCET 1099, 1101–02 (2005); David R. Williams, Manuela V. Costa, Adebola O. Odunlami & Selina A. Mohammed, *Moving Upstream: How Interventions That Address the Social Determinants of Health Can Improve Health and Reduce Disparities*, 14 J. PUB. HEALTH MGMT. & PRAC. S8, S8 (2008); Nazleen Bharmal, Kathryn Pitkin Derose, Melissa Felician & Margaret M. Weden, *Understanding the Upstream Social Determinants of Health* (RAND Corp., Working Paper No. WR-1096-RC, 2015), https://www.rand.org/content/dam/rand/pubs/working_papers/WR1000/WR1096/RAND_WR1096.pdf [<https://perma.cc/WNS3-GN49>].

254. Anderson et al., *supra* note 253, at 12.

255. See NAT'L CTR. FOR HEALTH STATISTICS, HEALTH, UNITED STATES, 2011, WITH SPECIAL FEATURE ON SOCIOECONOMIC STATUS AND HEALTH 24–25 (2012), [http://www.cdc.gov/nchs/data/11.pdf](http://www.cdc.gov/nchs/data/hus/11.pdf) [<https://perma.cc/C442-L8T2>]; CERD WORKING GRP. FOR HEALTH & ENV'TL HEALTH, UNEQUAL HEALTH OUTCOMES IN THE UNITED STATES: RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE TREATMENT AND ACCESS, THE ROLE OF SOCIAL AND ENVIRONMENTAL DETERMINANTS OF HEALTH, AND THE RESPONSIBILITY OF THE STATE 18–24 (2008), <http://www.prrac.org/pdf/CERDhealthEnvironmentReport.pdf> [<https://perma.cc/R8QZ-L3CH>]; Anderson et al., *supra* note 253, at 12–13; Ichiro Kawachi, Norman Daniels & Dean E.

Relationships between social institutions and health outcomes tend to be complex and involve the interplay of multiple factors. For example, African American breast cancer patients have higher mortality rates than white breast cancer patients.²⁵⁶ While racial discrimination and disparity in access to health care seem like obvious causes, the actual explanation is more complex.²⁵⁷ African American women tend to be diagnosed with a type of cancer that is by nature harder to treat and more lethal.²⁵⁸ The disparity in types of diagnoses is not genetic, but rather related to earlier onset of menstruation and higher obesity rates among African American women, which in turn is caused by socioeconomic, environmental, and cultural factors that limit access to healthy foods and exercise.²⁵⁹

Likewise, numerous social determinants contribute to the risk of rape, in particular those that perpetuate socioeconomic, racial, and gender inequality.²⁶⁰ Poverty is associated with, and may cause, higher incidences of rape and other intimate-partner violence.²⁶¹ Racial minorities experience higher rates of rape.²⁶² There is also a growing consensus that the structural inequality of women in the social, political, and economic order contributes to rape.²⁶³

Public health law provides a framework that can analyze and address the social determinants that cause sexual assault. As discussed above, public health laws are informed by data collection and analysis

Robinson, *Health Disparities by Race and Class: Why Both Matter*, 24 HEALTH AFF. 343, 343 (2005); Bharmal et al., *supra* note 253, at 1–6.

256. See OTIS WEBB BRAWLEY, HOW WE DO HARM: A DOCTOR BREAKS RANKS ABOUT BEING SICK IN AMERICA 13–17 (2012).

257. See *id.*

258. See *id.*

259. See *id.*

260. See CDC SURVEY, *supra* note 66, at 4; Rachel Jewkes, *Intimate Partner Violence: Causes and Prevention*, 359 LANCET 1423, 1424–36 (2002) (discussing rape in the context of intimate partner violence); Ruth D. Peterson & William C. Bailey, *Rape and Dimensions of Gender Socioeconomic Inequality in U.S. Metropolitan Areas*, 29 J. RES. CRIME & DELINQUENCY 162, 162–67 (1992); N.Y.C. All. Against Sexual Assault, *Sexual Violence Is a Public Health Issue*, TORCH (SPRING 2009), http://svfreenyc.org/media/newsletter/issue_30.pdf [<https://perma.cc/M7T5-EVMQ>].

261. See Jewkes, *supra* note 260, at 1424; Peterson & Bailey, *supra* note 260, at 164.

262. See *supra* note 79; see also Melissa Harris-Perry, *Rape and Race: We Have to Talk About It*, ROOT (Apr. 10, 2008), http://www.theroot.com/articles/culture/2008/04/rape_and_race_we_have_to_talk_about_it.html [<https://perma.cc/F2JR-WWF8>] (“[R]ape is complicated by race.”); Peterson & Bailey, *supra* note 260, at 163–65 (discussing an argument which theorizes that higher rates of rape stem from racial inequality).

263. See Hines, *supra* note 99, at 404–20; Jewkes, *supra* note 260, at 1425–26; Peterson & Bailey, *supra* note 260, at 162, 165–67.

that assess the complex causes of problematic behaviors. This analysis can be used to create legal interventions that specifically address these underlying causes. Moreover, because public health law is not cabined in a certain legal realm, it can employ several types of laws and policies to achieve these goals.

Public health approaches are more capable of addressing social determinants than criminal law. The ecological model of primary prevention, for example, analyzes the interplay of individual, relationship, community, and societal factors that promote sexual violence.²⁶⁴ It also employs prevention strategies that address risk at the individual, relationship, community, and societal levels.²⁶⁵ Criminal law is simply neither designed nor equipped to study the complex causes of sexual violence or to engage in effective prevention strategies.²⁶⁶ Its punitive nature often exacerbates social determinants and creates an antagonistic relationship with marginalized communities.²⁶⁷

C. *Legal and Policy Interventions*

1. *Preliminary Thoughts.* It would be foolhardy to attempt to catalogue every legal intervention that a public health approach to rape could entail. In fact, public health law's broad scope and reliance on evidence-based interventions would make this task impossible. These laws must rely on the collection and analysis of data, the testing of different types of interventions, and careful weighing of which methods would be most effective.

This Section provides salient examples of legal interventions a public health framework might employ to meet the challenges rape

264. See SHIFTING THE PARADIGM, *supra* note 85, at 8 (discussing the ecological model); Todres, *supra* note 209, at 485–86 (discussing the ecological model in the context of human trafficking).

265. See SHIFTING THE PARADIGM, *supra* note 85, at 8.

266. See Gruber, *supra* note 11, at 624, 645 (arguing that criminal law's focus on individual culpability and not economic and social conditions obscures the nature of many causes of rape); Todres, *supra* note 209, at 453–54, 463–64 (discussing the limitations of criminal law in the context of human trafficking, including its “narrow focus on the state-perpetrator dynamic” at the expense of analyzing “community- and population-based impacts”).

267. See Badi Hasisi, *Police, Politics, and Culture in a Deeply Divided Society*, 98 J. CRIM. L. & CRIMINOLOGY 1119, 1123 (2008). For example, the criminalization of sex work may increase the incidence of rape among sex workers. See Scott Cunningham & Manisha Shah, *Decriminalizing Indoor Prostitution: Implications for Sexual Violence and Public Health* 30 (Nat'l Bureau of Econ. Research, Working Paper No. 20281, 2014) (providing evidence that decriminalization of prostitution decreases sexual violence).

poses. It begins the larger discussion of how the law can address the problems of rape in ways that it has thus far largely ignored. An array of legal tools is necessary to effectively shape the attitudes, values, and behaviors that make sexual violence so ubiquitous and difficult for criminal law to address.

The examples this Article explores demonstrate that shifting to a public health law framework would require fundamental changes to many of our laws, policies, and resources. At minimum, it would require lawmakers and scholars to rethink approaches to education laws (such as Title IX), curricular requirements, public health mass media campaigns, and efforts to address the social determinants of sexual violence.²⁶⁸

2. *Fostering an Evidence-Based Approach: Data Collection.* Public efforts to collect data on sexual assault currently exist but are insufficiently coordinated and lack a focus on underlying causes necessary for effective prevention. This is in large part because data are often collected after the fact. The CDC, for example, uses surveys of victims to determine the prevalence of sexual violence and the demographic characteristics of victims.²⁶⁹ Where CDC data collection focuses on behavioral risk, it looks to the risk of becoming a victim rather than the risk of becoming a perpetrator.²⁷⁰

268. While Part II.C divides these interventions into categories, in reality laws are likely to be far more interconnected. Changes to education law would require and be informed by increased data collection and funding to test curricular requirements. Educational requirements would likely interact with programs that address social determinants, such as models that use a combination of curricular requirements and home visits to help support struggling families. *See generally* Sorenson & Dodge, *supra* note 232 (studying the Fast Track childhood intervention program).

269. *See* CDC SURVEY, *supra* note 66. The National Electronic Injury Surveillance System-All Injury Program provides data on nonfatal injuries treated in U.S. hospital emergency departments, including those related to sexual violence. The National Violence Against Women Survey interviewed women about their general fear of violence, emotional abuse, physical assaults, forcible rape, stalking, and threats of violence. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, SEXUAL VIOLENCE DATA SOURCES, <http://www.cdc.gov/violenceprevention/sexualviolence/datasources.html> [<https://perma.cc/V28Y-VE69>] [hereinafter CDC DATA SOURCES].

270. The Behavioral Risk Factor Surveillance System (BRFSS) tracks health conditions and risk behaviors in the United States through surveys conducted by state health departments. The CDC briefly funded an optional module to the BRFSS on sexual violence victimization between 2005 and 2007. CDC DATA SOURCES, *supra* note 269. Private institutions tend to take the same tactic. For example, when the Association of American Universities created a survey of campus sexual assault, they focused on the prevalence of nonconsensual sexual contact and the demographics of the victims. They did not collect data on perpetrators or on the attitudes and norms that are associated with rates of nonconsensual sexual contact. *See* DAVID CANTOR,

This focus is somewhat predictable. Surveys can more easily collect data from victims than perpetrators, who may be less likely to admit their actions. Analyzing causes of sexual assault, such as the effect of norms and attitudes, is also more difficult than determining the number of sexual assaults from crime statistics or telephone surveys.

A robust public health law framework, however, requires a concentrated effort to meet these challenges. Public health law's focus on evidence-based prevention necessitates coordinated data collection on causes, in particular on what causes sexual-violence *perpetration*. Surveys that collect data on perpetrator behavior, attitudes, and beliefs can provide insights into the norms that contribute to sexual aggression. The obstacles to collecting this data are not insurmountable. Evidence suggests, for example, that surveys of perpetrators or potential perpetrators are more likely to be successful if they ask about specific behaviors rather than value-laden terms like rape (for example, "Have you ever coerced somebody to intercourse by holding them down?" instead of, "Have you ever raped somebody?").²⁷¹

A public health framework therefore requires a strong mandate for national, state, and local public health authorities to conduct data collection on the causes of sexual assault and risk. This legislative mandate would be most effective if it set forth minimum standards for data collection. Previous legislative mandates provide examples of strong and coordinated mandates. For example, the ACA mandates national data collection on racial health disparities.²⁷² Similarly, VAWA mandates data collection on domestic and sexual violence.²⁷³

Public health authorities can also partner with other experts to generate creative ways to collect data. A legislative mandate can, for

BONNIE FISHER, SUSAN CHIBNALL, REANNE TOWNSEND, HYUNSHIK LEE, CAROL BRUCE & GAIL THOMAS, REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT (2015).

271. See Edwards et al., *supra* note 103, at 188, 190; Mary P. Koss, *Hidden Rape: Sexual Aggression and Victimization in a National Sample of Students in Higher Education*, in 2 RAPE AND SEXUAL ASSAULT 3 (Ann Wolbert Burgess ed., 1988).

272. See U.S. DEP'T OF HEALTH & HUM. SERVS., IMPLEMENTATION GUIDANCE ON DATA COLLECTION STANDARDS FOR RACE, ETHNICITY, SEX, PRIMARY LANGUAGE, AND DISABILITY STATUS (2011) [hereinafter DATA COLLECTION STANDARDS], <https://aspe.hhs.gov/basic-report/hhs-implementation-guidance-data-collection-standards-race-ethnicity-sex-primary-language-and-disability-status> [<https://perma.cc/6NEM-AUJS>].

273. See, e.g., NAT'L INST. OF JUSTICE, DOMESTIC AND SEXUAL VIOLENCE DATA COLLECTION: A REPORT UNDER THE VIOLENCE AGAINST WOMEN ACT (1996).

example, require the collection of data in public schools on behaviors, gender norms, and attitudes about sexual behavior and consent. Congress can expand Title IX requirements to require similar data collection in universities.

Such mandates can and should take advantage of partnerships with private and educational institutions. State or local public health authorities may have limited capacity to collect data or may lack the resources or expertise to analyze the nuanced causes of sexual violence. Legislative mandates can respond to this problem by allowing partnerships with other public and private institutions. The ACA, for example, allows federally funded population surveys on health care disparities to be contracted to private actors.²⁷⁴ A public health law framework for rape should take advantage of the broad scope of public health law by encouraging partnerships with community organizations, private actors, and educational institutions.

3. *Education Laws and Policies.* Education is a powerful means of changing sexual attitudes and behavior.²⁷⁵ A public health law approach to rape could provide both the opportunity and obligation to improve our education laws and policies. In contrast to current education laws and policies, which form an underwhelming and piecemeal approach to addressing the social norms that encourage rape, it could strengthen and refocus Title IX on creating mandatory, evidence-based educational requirements for those enrolled in college. More important, however, is how it could create a massive shift in education law by focusing on students in kindergarten through high school. Taking rape seriously as a public health problem requires national and state curricula to integrate sexual assault prevention into improved, evidence-based sexuality education. It also requires the federal government and states to jettison curricula that teach students rape myths.

Title IX, perhaps the most well-known use of education law to prevent sexual assault, focuses primarily on schools' responses to sexual assaults rather than *prevention*. Title IX encourages colleges to enact rape-prevention education, but provides no mandate and no

274. See DATA COLLECTION STANDARDS, *supra* note 272.

275. See SHIFTING THE PARADIGM, *supra* note 85, at 7–9 (identifying effective ways in which education programs and community involvement can change social norms, “preventing sexual violence before it occurs”); Todres, *supra* note 209, at 488 (discussing success of various public health campaigns).

standards for content or evidence-based practices.²⁷⁶ Programs occur at the discretion of universities and university groups.

As a result, existing college rape-prevention programs are piecemeal and vary considerably in their content and effectiveness. Many programs are simply single-session sexual-violence interventions, which evidence shows are ineffective and perhaps even counterproductive.²⁷⁷ Several programs reinforce gendered scripts for sex that encourage sexual aggression against women: namely, that women are responsible for stopping others from raping them.²⁷⁸ These programs reflect or contain the common advice that women who do not want to be raped should avoid alcohol, dress conservatively, travel in groups, and be on constant alert about their surroundings.²⁷⁹

A public health law framework provides the opportunity to strengthen Title IX requirements for universities and gear them toward prevention. In particular, it could mandate minimum hours of evidence-based sexuality-education programs that address sexual coercion, violence, and healthy relationships. Such programs might take the role of a curricular requirement or might integrate peer educators (a strategy with demonstrated effectiveness).²⁸⁰ These educational requirements would be able to implement strategies that change social and cultural norms, offer positive models for sexual

276. See *supra* note 21. In addition, the U.S. Department of Justice Office on Violence Against Women offers grants to colleges to develop or strengthen policies related to prevention. Dear Colleague Letter, *supra* note 21, at 15–19.

277. See Basile, *supra* note 219, at 2351; McMahon, *supra* note 186, at 34 (finding that programs directed at men tend to be under two hours long and thus are unlikely to have long-term effects).

278. See Basile, *supra* note 219, at 2350–51; see also Filipovic, *supra* note 85, at 23–24 (arguing that “self-defense” classes send a false message “that women can prevent rape,” and problematically divert attention from “the perpetrator’s” conduct to the victim’s); Erica Schwiengershausen, *Should We Teach Women Rape-Prevention Tactics?*, N.Y. MAG. (June 15, 2015), <http://nymag.com/thecut/2015/06/should-we-teach-women-rape-prevention-tactics.html> [<https://perma.cc/2SLP-C2U7>] (noting that although rape-prevention programs may be viewed by some as empowering, they reinforce a victim-blaming narrative); Jessica Valenti, *We Need to Stop Rapists, Not Change Who Gets Raped*, GUARDIAN (June 12, 2015), <http://www.theguardian.com/commentisfree/2015/jun/12/stop-rapists-not-change-who-gets-raped> [<https://perma.cc/A96G-YM3K>] (“[T]here’s a real danger in believing the solution to sexual assault is on the shoulders of women who might be attacked.”).

279. See Basile, *supra* note 219, at 2351; McMahon, *supra* note 186, at 29; Schwiengershausen, *supra* note 278; Valenti, *supra* note 278; see also Filipovic, *supra* note 85, at 23–24 (cataloging suggestions offered to women that are “well-meaning” but promote the incorrect notion that “women can prevent rape”).

280. See Berkowitz, *supra* note 228, at 719; Fogg, *supra* note 239.

relationships, and help students develop skills to determine a partner's consent and talk openly about sexual boundaries.

A strong public health approach to rape, however, would include legal interventions that begin far earlier than college.²⁸¹ Despite the recent public focus on campus rape, nearly half of rapes occur before victims are in college.²⁸² Gender roles and norms are established at a very early age and carry through to judgments later in life.²⁸³ Prevention education works best when it mirrors the way people learn social norms, beginning early and repeating and progressing over a long period of time.²⁸⁴ Interventions that encourage empathy and respect and reject gender norms that encourage sexual violence should start at an early age and progress in an age-appropriate way.²⁸⁵

An effective approach will require a more substantial, consistent, and long-term investment in public education curricula. Programs with the greatest evidence of effectiveness focus on changing social attitudes and norms and improving peer-helping and conflict-resolution skills.²⁸⁶ Countries such as the Netherlands, for example, provide models for evidence-based, age-appropriate curricula that address sexual coercion and teach positive relationship skills. Students in the Netherlands begin to discuss love and respect at age four as part of a comprehensive

281. See Basile, *supra* note 219, at 2351.

282. Between 42 and 61 percent of female victims are raped before age eighteen and 28 percent of male victims were raped before they turned eleven. See CDC SURVEY, *supra* note 66, at 2, 25; Schafran, *supra* note 41, at 15.

283. See Jennifer S. Hendricks & Dawn Marie Howerton, *Teaching Values, Teaching Stereotypes: Sex Education and Indoctrination in Public Schools*, 13 U. PA. J. CONST. L. 587, 603 (2011); see also Michelle J. Anderson, *Sex Education and Rape*, 17 MICH. J. GENDER & L. 83, 87–97 (2010) (describing how teenagers and children pick up social norms and stereotypes about sex and gender).

284. See McMahon, *supra* note 193, at 475.

285. See CDC SURVEY, *supra* note 66, at 4 (discussing the need for early prevention efforts that promote healthy, respectful relationships); Basile, *supra* note 219, at 2351 (arguing for a “comprehensive multilevel approach, including a focus on younger ages and potential perpetrators, to address this public health crisis”); see also Anderson, *supra* note 283, at 97, 104–07 (lamenting that American sex education fails to counter “negative messages about sexuality advanced in popular media”); Schroeder, *supra* note 237 (noting the effectiveness of sexuality education programs to which children are exposed early in childhood and that counter prevailing norms).

286. See CTRS. FOR DISEASE CONTROL & PREVENTION, SEXUAL VIOLENCE: PREVENTION STRATEGIES, <http://www.cdc.gov/violenceprevention/sexualviolence/prevention.html> [https://perma.cc/W57G-KTKK] (discussing characteristics of evidence-based programs).

sexuality program that progresses throughout each school year.²⁸⁷ As they reach eight, students discuss self-image and gender stereotypes; eleven-year-olds discuss sexual orientation and contraceptive options.²⁸⁸ Lessons help children discuss—in addition to the mechanics of sex and disease prevention—what types of intimacy feel good and what types do not, as well as how to express and respect personal boundaries.²⁸⁹

Currently, the CDC funds programs in public schools to change social norms associated with sexual violence. The CDC's Rape Prevention and Education Program (RPE) provides grants for primary prevention tactics, notably behavioral-change skills, at the individual, relationship, community, and societal levels.²⁹⁰ The CDC also runs smaller programs that target specific communities, such as Dating Matters, which works with children ages eleven to fourteen in high-risk, urban communities.²⁹¹

These programs, however, are quite limited in scope and funding. Dating Matters, for example, reaches only four urban areas in the country.²⁹² RPE is currently underfunded, leaving programs without the resources they need to continue interventions in schools and communities.²⁹³ Their isolated and inconsistent approach cannot by itself create the change necessary to address the epidemic proportions of sexual violence.

National and state curricular requirements are also either completely absent or woefully inadequate. The Common Core contains no sexuality-education requirement, and there are no national mandates for sexuality education in elementary, middle, or high

287. See Saskia De Melker, *The Case for Starting Sex Education in Kindergarten*, PBS NEWSHOUR (May 27, 2015), <http://www.pbs.org/newshour/updates/spring-fever/> [<https://perma.cc/CH9E-4AAC>].

288. See *id.*

289. See *id.*

290. See CTRS. FOR DISEASE CONTROL & PREVENTION, RAPE PREVENTION EDUCATION: TRANSFORMING COMMUNITIES TO PREVENT SEXUAL VIOLENCE, <http://www.cdc.gov/violenceprevention/pdf/rpe-fact-sheet-a.pdf> [<https://perma.cc/Y59P-EM36>]; NAT'L ALL. TO END SEXUAL VIOLENCE, RAPE PREVENTION AND EDUCATION PROGRAM FACT SHEET (2011), http://www.nsvrc.org/sites/default/files/Publications_NSVRC_Factsheet_Rape-Prevention-and-Education-Program.pdf [<https://perma.cc/2J5A-UWPL>].

291. See CTRS. FOR DISEASE CONTROL & PREVENTION, DATING MATTERS INITIATIVE, <http://www.cdc.gov/violenceprevention/datingmatters> [<https://perma.cc/3578-9HRP>].

292. See *id.*

293. See NAT'L ALL. TO END SEXUAL VIOLENCE, RAPE PREVENTION & EDUCATION PROGRAM (RPE), <http://endsexualviolence.org/files/NAESVrpeFY16Final1.pdf> [<https://perma.cc/9F4R-3SHX>].

school.²⁹⁴ Only twenty-four states and the District of Columbia require any sexuality education to be taught in schools.²⁹⁵ Just over half of states require that sexuality education stress abstinence, and nineteen require schools to teach the importance of confining sex to marriage.²⁹⁶ Accordingly, despite the recent introduction of funding for sexuality education, the federal government still funds curricula that teach that sex is only acceptable in the context of marriage (abstinence-only education).²⁹⁷ Even so-called comprehensive sexuality education maintains the same abstinence-based core message.²⁹⁸

When schools provide sexuality education, they rarely address sexual assault, coercion, or harassment appropriately and often reinforce negative messages. A majority of states do not require that sexuality education include information about these topics.²⁹⁹ Some states require schools to address sexual coercion, but their curricula tend to interpret coercion very narrowly.³⁰⁰ Neither abstinence-only

294. See COMMON CORE STATE STANDARDS INITIATIVE, COMMON CORE STATE STANDARDS FOR ENGLISH LANGUAGE ARTS AND LITERACY IN HISTORY, SOCIAL STUDIES, SCIENCE, AND TECHNICAL SUBJECTS, http://www.corestandards.org/wp-content/uploads/ELA_Standards1.pdf [<https://perma.cc/47PG-B9GL>]; COMMON CORE STATE STANDARDS INITIATIVE, COMMON CORE STATE STANDARDS FOR MATHEMATICS, http://www.corestandards.org/wp-content/uploads/Math_Standards1.pdf [<https://perma.cc/53N6-4JKB>]; Alice Dreger, *Why Isn't Sex Education a Part of Common Core?*, PAC. STANDARD (Feb. 27, 2015), <http://www.psmag.com/health-and-behavior/its-not-that-hard-to-put-a-condom-on> [<https://perma.cc/T7CX-5DWT>].

295. See GUTTMACHER INST., STATE POLICIES IN BRIEF: SEX AND HIV EDUCATION (2016), http://www.guttmacher.org/statecenter/spibs/spib_SE.pdf [<https://perma.cc/BD7C-5NFD>].

296. See *id.*

297. Richard Carmona, Joycelyn Elders & David Satcher, Opinion, *Renew the U.S. Commitment to Sex Education*, WASH. POST (May 22, 2015), https://www.washingtonpost.com/opinions/renew-the-us-commitment-to-sex-education/2015/05/22/8b86980e-fe53-11e4-833c-a2de05b6b2a4_story.html?utm_term=.2e95fd59ca21 [<https://perma.cc/2TGA-MXFB>]; Nicole Cushman, Debra Hauser & Monica Rodriguez, *We've Been Here Before: Congress Quietly Increases Funding for Abstinence-Only Programs*, REWIRE (Apr. 23, 2015), <https://rewire.news/article/2015/04/23/weve-sex-congress-quietly-increases-funding-abstinence-programs> [<https://perma.cc/Q5NR-LA9S>]; see Heather D. Boonstra, *Sex Education: Another Big Step Forward—And a Step Back*, 13 GUTTMACHER POL'Y REV., 27, 27–28 (2010); Jason Koebler, *Abstinence-Only Education Debate Resurfaces*, U.S. NEWS (Dec. 28, 2011), <http://www.usnews.com/education/blogs/high-school-notes/2011/12/28/abstinence-only-education-debate-resurfaces> [<https://perma.cc/5GKC-CHVY>]. Congress increased this funding by 50 percent in 2015. Cheryl Wetzstein, *Sex-Education Funds to Be Renewed*, WASH. TIMES (Apr. 15, 2015), <http://www.washingtontimes.com/news/2015/apr/15/sex-education-funds-to-be-renewed/> [<https://perma.cc/K6S3-SYST>].

298. See Anderson, *supra* note 283, at 99–101.

299. See GUTTMACHER INST., *supra* note 295.

300. See 1 GIRLHOOD IN AMERICA: AN ENCYCLOPEDIA 8 (Miriam Forman-Brunell ed., 2001); Christine E. Beyer & Roberta J. Ogletree, *Sexual Coercion Content in Twenty-One Sexuality Education Curricula*, 68 J. SCH. HEALTH 370, 372–74 (1998).

nor comprehensive sexuality-education curricula provide sufficient discussion of sexual coercion and sexual boundaries.³⁰¹ In the words of one participant of an abstinence-only curriculum, “We never talked about consent because with [an] abstinence curriculum you shouldn’t consent.”³⁰² Sexuality-education curricula also fail to discuss consent in the context of queer sex, ignoring these sexual relationships or portraying them in a negative light.³⁰³

Perhaps more troubling is how curricula—particularly abstinence-only curricula—reinforce gender norms and stereotypes that perpetuate rape myths. Curricula often limit discussion of sexual violence and coercion to the victim’s behavior and responsibility.³⁰⁴ They perpetuate the stereotypes that men are inherent sexual aggressors and that women have the responsibility to stop unwanted sex.³⁰⁵ They portray young men as having a strong “natural” desire for sex absent in women.³⁰⁶ Because girls lack this natural desire, they are responsible for stopping boys if a “kiss is leading to something else.”³⁰⁷ They warn students that boys will not be able to respect girls who dress in a way that boys find sexy and caution that “girls have an added

301. See JULIE F. KAY & ASHLEY JACKSON, *SEX, LIES, AND STEREOTYPES: HOW ABSTINENCE-ONLY PROGRAMS HARM WOMEN AND GIRLS* 20 (2008), http://hrp.law.harvard.edu/wp-content/uploads/2013/03/sexlies_stereotypes2008.pdf [<https://perma.cc/DXE6-SKJ5>]; Anderson, *supra* note 283, at 103–04.

302. KAY & JACKSON, *supra* note 301, at 10.

303. See Michelle Fine & Sara I. McClelland, *Sexuality Education and Desire: Still Missing After All These Years*, 76 HARV. EDUC. REV. 297, 306, 310–11 (2006); Hendricks & Howerton, *supra* note 283, at 601. Only nine states require a curriculum inclusive of all sexual orientations. GUTTMACHER INST., *supra* note 295. Four other states require curricula to discuss queer sexuality in a negative light. *Id.*

304. See Hendricks & Howerton, *supra* note 283, at 599. Even comprehensive sexuality education, which several advocates laud over abstinence-only education, focuses on the victim’s responsibility. The Sexuality Information and Education Council of the United States (SIECUS) describes comprehensive sexuality education as a program that teaches “young people the skills to make responsible decisions about sexuality, including how to *avoid* unwanted verbal, physical, and sexual advances.” SIECUS, FACT SHEET: WHAT THE RESEARCH SAYS . . . COMPREHENSIVE SEXUALITY EDUCATION 1 (2009), <http://www.siecus.org/index.cfm?fuseaction=Page.ViewPage&PageID=1193> [<https://perma.cc/736J-4F9Y>] (emphasis added).

305. See KAY & JACKSON, *supra* note 301, at 20; SIECUS, IN THEIR OWN WORDS: WHAT ABSTINENCE-ONLY-UNTIL-MARRIAGE PROGRAMS SAY 2 (2005); Hendricks & Howerton, *supra* note 283, at 598–99.

306. See KAY & JACKSON, *supra* note 301, at 20; SIECUS, *supra* note 305, at 2; Hendricks & Howerton, *supra* note 283, at 598–600.

307. SIECUS, *supra* note 305, at 2; see Hendricks & Howerton, *supra* note 283, at 598–99 (describing educational approaches that hold girls responsible for controlling the sexual impulses of their male peers and assuming that girls do not have sexual urges).

responsibility to wear modest clothing that doesn't invite lustful thoughts."³⁰⁸

These curricula simultaneously discourage students, and girls in particular, from talking openly about their sexual desires and boundaries. Several curricula explicitly teach girls not to assert themselves with men, discouraging the skills necessary for healthy, open sexual communication. One curriculum, for example, tells the story of a knight who rejected a princess after she gave him advice on how to rescue her, warning that "occasional assistance may be all right, but too much will lessen a man's confidence or even turn him away from his princess."³⁰⁹

An effective public health law framework would likely require substantial changes in our education laws. The Common Core—whatever its shortcomings—should be revised to include evidence-based sexuality-education requirements. These requirements should include programs that address sexual norms and behaviors that contribute to rape. Such mandates could task the CDC, in partnership with other pioneers in sexuality education and violence reduction, with devising and recommending requirements that draw from proven interventions.³¹⁰

Congress could also influence state-level curricular requirements by tying them to grant eligibility or federal funding, as it has done with abstinence-only education and the Common Core. Or it could support an increase of CDC-funded programs to reduce sexual violence. This spending could be offset in part by an elimination of abstinence-only education funding, a budget which is 50 percent larger than the CDC's grants for rape-prevention education.³¹¹

308. Hendricks & Howerton, *supra* note 283, at 589.

309. *See id.* (citation omitted).

310. A potentially valuable partner is the Future of Sex Education Initiative (FoSE), a partnership between Advocates for Youth, Answer, and SIECUS. It publishes the *National Sexuality Education Standards: Core Content and Skills* (NSES), which sets forth *minimum core content* for sexuality education that is developmentally and age-appropriate for students in grades K–12. *See generally* FOSE, NATIONAL SEXUALITY EDUCATION STANDARDS: CORE CONTENT AND SKILLS, K-12 (2011), <http://www.futureofsexed.org/documents/josh-fose-standards-web.pdf> [<https://perma.cc/VUJ7-UQ9Z>]. The NSES, however, does not provide significant guidance on curricular requirements for consent, coercion, and healthy sexuality; it is likely that additional research and development would be needed to create requirements that can effect significant change in the norms and attitudes that contribute to sexual assault. *See id.*

311. *See* DEP'T OF HEALTH & HUMAN SERVS., FISCAL YEAR 2016, CENTERS FOR DISEASE CONTROL AND PREVENTION JUSTIFICATION OF ESTIMATE FOR APPROPRIATION COMMITTEES 11, 38, 292 (2015), <http://www.cdc.gov/budget/documents/fy2016/fy-2016-cdc-congressional-justification.pdf> [<https://perma.cc/7NG5-ZKME>]; Boonstra, *supra* note 297, at 282–96.

4. *Engaging Mass Media Strategies*. Mass media campaigns have demonstrated the ability to change sexual norms and behaviors.³¹² In the context of sexual violence, media campaigns can reach a wide audience, increase public awareness and discussion, and change the gender norms that encourage sexual violence.³¹³ They can also model and promote healthy sexual attitudes and behaviors.³¹⁴ The media's potential to reach broad audiences is particularly useful when it comes to reaching men, who might otherwise dismiss sexual violence and rape prevention as a women's issue and irrelevant to them.

Canadian cities have had recent success with campaigns that target men. The "Don't Be That Guy" campaign in Vancouver sought to raise awareness and change attitudes and behaviors among men about consent and sexual assault.³¹⁵ The campaign proved remarkably popular and soon spread to other cities, where it showed surprising effectiveness.³¹⁶ Vancouver police, for example, credited the campaign

312. See, e.g., Daniel Romer et al., *Mass Media as an HIV-Prevention Strategy: Using Culturally Sensitive Messages to Reduce HIV-Associated Sexual Behavior of At-Risk African American Youth*, 99 AM. J. PUB. HEALTH 2150, 2154 (2009); M.C. Yzer, F.W. Siero & B.P. Buunk, *Can Public Campaigns Effectively Change Psychological Determinants of Safer Sex? An Evaluation of Three Dutch Campaigns*, 15 HEALTH EDUC. RES. 339, 349 (2000).

313. See NAT'L HEALTH SERV. & HEALTH DEV. AGENCY, THE EFFECTIVENESS OF PUBLIC HEALTH CAMPAIGNS 3-4 (2004), http://www.emcdda.europa.eu/attachements.cfm/att_94034_EN_Effectiveness%20of%20Mass%20Media%20campaigns%20HDA.pdf [https://perma.cc/C6PD-ZF8E] (describing the ability of media campaigns to reach wide audiences and encourage awareness and discussion); WORLD HEALTH ORG., PROMOTING GENDER EQUALITY TO PREVENT VIOLENCE AGAINST WOMEN 11-12 (2009), http://www.who.int/violence_injury_prevention/violence/gender.pdf [https://perma.cc/B8UV-PEVS].

314. See WORLD HEALTH ORG., CHANGING CULTURAL AND SOCIAL NORMS SUPPORTIVE OF VIOLENCE 7 (2009), http://www.who.int/violence_injury_prevention/violence/norms.pdf [https://perma.cc/7NRW-LA2S]; cf. Joseph Erbentraut, *Positive Messages in Public Health Campaigns Could Be More Effective than Negative Ones*, HUFFINGTON POST (May 29, 2015, 12:21 PM), http://www.huffingtonpost.com/2015/05/29/positive-public-health-messages_n_7461938.html [https://perma.cc/B3GH-9E73] (describing studies that have found that positive advertisement campaigns may be more effective with a general audience than negative messaging in areas such as healthful eating and smoking cessation).

315. "Don't Be That Guy" Posters Hit Vancouver Bars, HUFFINGTON POST B.C. (July 4, 2013, 7:41 PM), http://www.huffingtonpost.ca/2013/07/04/dont-be-that-guy-posters-vancouver_n_3548162.html [https://perma.cc/M5NS-YVJN]; Michelle Butterfield, *Edmonton Sexual Assault Awareness Campaign: "Don't Be That Guy" So Effective City Relaunches with New Posters*, HUFFINGTON POST ALTA. (Dec. 1, 2012, 12:59 PM), http://www.huffingtonpost.ca/2012/12/01/edmonton-sexual-assault-awareness-campaign-dont-be-that-guy_n_2224228.html [https://perma.cc/B8CP-WAVT].

316. See "Don't Be That Guy" Posters Hit Vancouver Bars, *supra* note 315; Butterfield, *supra* note 315; Robert Matas, "Don't Be That Guy" Ad Campaign Cuts Vancouver Sex Assaults by Ten Per Cent in 2011, GLOBE & MAIL (Nov. 11, 2013),

with contributing to a 10 percent decrease in sexual assaults, the first decrease in several years.³¹⁷ The campaign expanded in subsequent years to include additional types of sexual assault, including sexual assault in the context of LGBT relationships.³¹⁸

A public health framework for rape law affords the opportunity to increase the scope and effectiveness of media campaigns addressing sexual violence and healthy sexual relationships. The CDC and the White House have funded and continue to fund campaigns, particularly at the local and university levels, and universities themselves often run campaigns targeting students.³¹⁹ A public health framework could expand and enrich public investment in these efforts as well as research into the most effective messages and media.

One possible method of accomplishing this might be to tie media campaign requirements to Title IX requirements or grant opportunities. Such efforts should provide mandatory content standards that draw on existing research—such as marketing research and behavior-change theory—to shift behaviors.³²⁰ In particular, media campaigns should take advantage of their broad scope to target male audiences' beliefs about gender norms and consent. Such campaigns are particularly effective when they understand the behavior and attitudes of audience members and engage with members of the community to create culturally appropriate messages.³²¹ For example, messages that rely on fear and shame are often less effective than those that call on men to take responsibility for their actions and give them a powerful role in creating positive change.³²²

Use of mass media, however, need not be limited to public health campaigns. Working with industries that produce films, commercials, television, and other media can leverage existing resources. It can also

columbia/dont-be-that-guy-ad-campaign-cuts-vancouver-sex-assaults-by-10-per-cent-in-2011/article1359241 [https://perma.cc/7ZL4-H2J7].

317. See Matas, *supra* note 316.

318. See Butterfield, *supra* note 315.

319. See, e.g., WHITE HOUSE, FACT SHEET: LAUNCH OF THE “IT’S ON US” PUBLIC AWARENESS CAMPAIGN TO HELP PREVENT CAMPUS SEXUAL ASSAULT (2014), <https://www.whitehouse.gov/the-press-office/2014/09/19/fact-sheet-launch-it-s-us-public-awareness-campaign-help-prevent-campus-> [https://perma.cc/9WXJ-R6AV].

320. See SHIFTING THE PARADIGM, *supra* note 85, at 8; Todres, *supra* note 209, at 488–89; see also NAT’L HEALTH SERV. & HEALTH DEV. AGENCY, *supra* note 313, at 2–4 (describing research on effective media campaigns).

321. See WORLD HEALTH ORG., *supra* note 313, at 11; Romer et al., *supra* note 312, at 2150–53, 2155–56.

322. See WORLD HEALTH ORG., *supra* note 314, at 7.

change sources of gender stereotyping and rape culture into tools for positive social messages. While the public educational system shies away from discussions of female sexuality, as discussed in Part II.C.3, mass media commonly sexualizes women, particularly young women and girls.³²³ Its depiction of girls and women objectifies and demeans them as merely sources of male sexual gratification, focusing on women's sexual utility rather than their sexual agency.³²⁴ Public health authorities can partner with existing media sources to change attitudes about sex, sexuality, and gender norms by making thoughtful changes to their portrayal of these topics.

5. *Meeting the Challenges of Social Determinants.* Public health law provides a legal framework to analyze and address the many social determinants of sexual violence. Poverty and race, for example, increase the likelihood of victimization; exposure to violence in childhood increases the likelihood of perpetrating sexual violence.³²⁵ Addressing social determinants requires substantial research into the complex relationships between multiple interacting causes.

This is far easier said than done: the social determinants of rape are currently understudied and poorly understood.³²⁶ Poverty, for example, is associated with increased sexual violence, but precisely *why* remains unclear.³²⁷ Some theorize that poverty increases stress, which leads to sexual violence.³²⁸ There is evidence that poverty may contribute to rape through a combination of inequality, stress, and norms about masculinity; men without the ability to achieve a model of masculine success defined in part by wealth may embrace social norms that encourage them to control women through violence.³²⁹

323. See Anderson, *supra* note 283, at 90–94; Fine & McClelland, *supra* note 303, at 300; Jervis, *supra* note 93, at 166–67.

324. See Fine & McClelland, *supra* note 303, at 300; Jervis, *supra* note 93, at 166–67. In the words of Andrea Dworkin, “The girls are getting fucked but they are not getting free or equal.” ANDREA DWORKIN, *INTERCOURSE*, at xxxiv (2007).

325. See CDC SURVEY, *supra* note 66, at 2–3, 20–21 (examining the incidence of rape across various racial groups); Sarah DeGue et al., *A Systematic Review of Primary Prevention Strategies for Sexual Violence Perpetration*, 19 *AGGRESSION & VIOLENT BEHAV.* 346, 359 (2014) (observing that childhood exposure to violence increases the risk of later sexual-violence perpetration); Jewkes, *supra* note 260, at 1424 (discussing the link between poverty and intimate-partner violence); McMahon, *supra* note 186, at 32–33 (noting that childhood exposure to media displays combining sexual images and violence increases the risk of later sexual-violence perpetration).

326. See Jewkes, *supra* note 260, at 1423; Peterson & Bailey, *supra* note 260, at 166.

327. See Jewkes, *supra* note 260, at 1424.

328. See *id.*; Peterson & Bailey, *supra* note 260, at 167, 169–71.

329. See Jewkes, *supra* note 260, at 1424; Peterson & Bailey, *supra* note 260, at 165.

Legal interventions must carefully consider these causes to reduce sexual violence effectively. For example, while female empowerment is associated with lower levels of intimate-partner violence, providing more education and financial independence for women may in some scenarios increase their risk.³³⁰ Ideologies of male dominance and lack of social support for women may be just as—or more—important in addressing the risk of violence against women.³³¹

Initial interventions to address social determinants will most likely focus on data collection and analysis. As discussed in Part II.C.2, a public health law framework provides an opportunity to create a congressional mandate for data collection using public health authorities, private institutions, and community organizations.

Initial research may also support more immediate interventions. For example, programs could address the link between childhood exposure to violence and childhood delinquency and the risk of becoming a perpetrator later in life.³³² Educational programs discussed in Part II.C.3 might consider following the Fast Track model, which integrates home visits for at-risk youth.³³³ Programs that provide support to families reduce the incidence of abuse and neglect and also lower the likelihood that children will engage in delinquent behavior or commit crimes later in life.³³⁴

D. *Theorizing Yes*

Changing the paradigm of rape law can push legal feminism to meet the challenge posed by Katherine Franke’s groundbreaking 2001 work: to “theorize yes.” Her work was a response to feminist legal scholarship that adhered to a model stressing protection from sex through prohibition.³³⁵ That model asked, “How can we prohibit rape in a way that truly protects women?”; “How can we prohibit sexual

330. See Jewkes, *supra* note 260, at 1424–25.

331. See *id.* at 1425.

332. See DeGue et al., *supra* note 325, at 359; McMahon, *supra* note 186, at 32–34.

333. See Dodge et al., *supra* note 232, at 59–62, 67–68; see also DeGue et al., *supra* note 325, at 359 (identifying interventions and other solutions to fill the gaps left by current approaches to sexual-violence prevention).

334. See Dodge et al., *supra* note 232, at 59–62, 67–68; McMahon, *supra* note 186, at 34–35.

335. See Franke, *supra* note 8, at 197–98.

harassment in a way that truly protects women?"; "How can we prohibit exploitation of sex workers?"³³⁶

According to Franke, in this scholarship's exclusive focus on women's right to say no, it has failed to examine what it might mean to say yes.³³⁷ Feminist legal scholarship has spent so much effort examining what is dangerous and harmful about sex that it has failed to sufficiently analyze what can be good and right about sex.³³⁸ Exploring how the law can and should protect sexual pleasure and create a "positive domain of non-reproductive sexuality" is no easy task.³³⁹ Legal feminism needs to rise to this challenge.

Franke's criticism reflects legal feminism's ongoing tension between discouraging sexual violence and coercion and promoting female positive sexual autonomy.³⁴⁰ Some feminists have criticized broad rape laws as paternalistic toward women.³⁴¹ Such laws, they argue, undermine female sexual autonomy by assuming women are unable to express their own desires.³⁴² Other critics argue that broad rape laws entrench women in the role of victims and discourage them from being assertive in sexual encounters.³⁴³ Many feminist scholars counter that positive sexual autonomy is not exercised in a vacuum, but rather in a world that is coercive and violent.³⁴⁴ Laws should not, they

336. See *id.* at 199; Aya Gruber, *Neofeminism*, 50 HOUS. L. REV. 1325, 1352–54 (2013) (discussing how different tracts of feminism have all seemed to converge on the use of criminal law to address sexual inequality).

337. See Franke, *supra* note 8, at 181, 197–98, 206.

338. See *id.* at 182, 199–201.

339. See *id.* at 199.

340. See Gruber, *supra* note 11, at 607, 610.

341. See KATIE ROIPHE, *THE MORNING AFTER* 57–84 (1993); NAOMI WOLF, *FIRE WITH FIRE* 192–93 (1994); see also SCHULHOFER, *supra* note 12, at 261 (discussing a feminist idea that "rape law treats women as if they were not adults or free agents"); Gruber, *supra* note 11, at 608 (arguing that "criminal rape law negatively affect[s] female agency"); Kahan, *supra* note 37, at 741–42 (noting the legal feminist view that "agitation over date rape was conditioning women to accept a disempowered 'victimhood' identity").

342. See Gruber, *supra* note 11, at 608.

343. See Vivian Berger, *Not So Simple Rape*, 7 CRIM. JUST. ETHICS 69, 75–76 (1988); Dressler, *supra* note 13, at 414, 428; Kahan, *supra* note 37, at 741–42.

344. See DWORKIN, *supra* note 324, at 154–82; Cheryl Hanna, *Rethinking Consent in a Big Love Way*, 17 MICH. J. GENDER & L. 111, 136–39 (2010); MacKinnon, *supra* note 30, at 646–47, 650, 652; Carole Pateman, *Women and Consent*, 8 POL. THEORY 149, 158–64 (1980); see also Rebecca Traister, *Why Consensual Sex Can Still Be Bad*, N.Y. MAG. (Oct. 20, 2015), <http://nymag.com/the-cut/2015/10/why-consensual-sex-can-still-be-bad.html> [<https://perma.cc/8L6X-FL8Z>] (discussing the dangers of consensual sex).

argue, ignore these constraints on women's autonomy and simply pretend women are as free as men in their sexual choices.³⁴⁵

Laws must therefore treat women as autonomous while simultaneously addressing the gender subordination that undermines that autonomy.³⁴⁶ Sex-positive feminism attempts to meet this challenge by advocating a positive vision of sex that is capable of granting women both pleasure and power.³⁴⁷ It argues that sex need not be a de facto hazard for women, but rather can be something women choose on their own terms.³⁴⁸ In order for this to occur, though, the law must respect both negative and positive sexual autonomy—what Aya Gruber calls a “thick view of female autonomy.”³⁴⁹ In addition, the law must “reject[] a culture that privileges male [and] heterosexual desire and pleasure above female [and] queer desire and pleasure.”³⁵⁰

This Article does not claim to meet the complex challenge of theorizing yes, but it does assert this: we must change the dimensions of rape law to have this conversation constructively. Criminal law in itself is not equal to the task. Our focus on it thwarts any possibility of navigating these tricky waters.

Criminal law's focus on punishment and prohibition limits its ability to theorize yes. To paraphrase Oliver Wendell Holmes, “the law does not exist to tell the good man what to do, but to tell the bad man what not to do.”³⁵¹ Criminal law by nature emphasizes only the hazards of sex.³⁵² It cannot theorize what sex *should* be, only what it is *prohibited* from being. It therefore cannot be the basis of theorizing positive models of sex.

345. See Gruber, *supra* note 11, at 612; Hanna, *supra* note 344, at 136–40, 143–45; Tuerkheimer, *supra* note 44, at 340–41.

346. See Gruber, *supra* note 11, at 611; Hanna, *supra* note 344, at 143–45. Some modern feminists employ the idea of constrained autonomy, in which “women must constantly navigate the space between idealized autonomous liberality and the oppressive conditions of subordination.” Gruber, *supra* note 11, at 610.

347. See Buchhandler-Raphael, *supra* note 12, at 214; Gayle S. Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in PLEASURE AND DANGER: EXPLORING WOMEN'S SEXUALITY 143, 166–67 (Carol S. Vance ed., 1984); Traister, *supra* note 344. “While there is also no one accepted definition for sex positivity, there are guiding principles. A sex-positive framework values sexual autonomy and all forms of consensual sexual activities as sources of pleasure and fulfillment.” Margo Kaplan, *Sex Positive Law*, 89 N.Y.U. L. REV. 89, 95 (2014).

348. See Gruber, *supra* note 11, at 611–12; Traister, *supra* note 344.

349. Gruber, *supra* note 11, at 608.

350. Kaplan, *supra* note 347, at 95.

351. Estrich, *supra* note 12, at 1091 (citing Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897)).

352. See Gruber, *supra* note 11, at 611–12.

Criminal law also by nature ignores the vast expanse of sex that should not be criminal but which nonetheless is problematic. Criminal law categorizes sex as either criminal or acceptable.³⁵³ But sex is not limited to “rape” or “not rape.” Consensual sex, even enthusiastic sex, often still exists on a spectrum of sexual interactions tainted by power imbalances, poor relationships, bad communication, and lack of respect.³⁵⁴ As one commenter writes,

[T]he game remains *rigged*. . . in ways that go well beyond consent. . . . Male attention and approval remain the validating metric of female worth, and women are still (perhaps increasingly) expected to look and fuck like porn stars—plucked, smooth, their pleasure performed persuasively. Meanwhile, male climax remains the accepted finish of hetero encounters; a woman’s orgasm is still the elusive, optional bonus round. . . . [T]his is all part of consensual sex, the kind that is supposed to be women’s feminist reward.³⁵⁵

A student writing for the *Harvard Crimson* described the complicated nature of exercising sexual autonomy in a culture that simultaneously judges women on their desirability and dismisses their sexual desire. “I don’t say yes. I say oh, yes. I say yes, please. I paper his walls with my yeses,”³⁵⁶ she writes. But, she notes, “Saying yes to hooking up meant more than just hands on my breasts. It meant desirability. It meant acceptance. . . . [Women have] been trained our whole lives to associate our worth with our sexualities, so saying yes to sex . . . can determine [our] feelings of value.”³⁵⁷

In a subsequent blog for *Feministing.com*, the same author writes,

A lot of sex feels like . . . [s]ex where we don’t matter. Where we may as well not be there. Sex where we don’t say no, because we don’t want to say no, sex where we say yes even, where we’re even into it, but where we fear—some little voice in us fears—that if we did say

353. See Bryden, *supra* note 30, at 369 (noting that rape law does not prohibit all types of harmful sex and tends to legitimate what it does not prohibit).

354. See *id.* at 369–70; Traister, *supra* note 344.

355. Traister, *supra* note 344 (emphasis in original); see also Baker, *What Rape Is*, *supra* note 17, at 241 (noting that the biological nature of sex leads men to see orgasm as the sole purpose or end goal of sex).

356. Reina A.E. Gattuso, *Do You Think I’m Pretty?*, HARV. CRIMSON (Feb. 27, 2015), <http://www.thecrimson.com/column/material-girl/article/2015/2/27/you-think-im-pretty/> [https://perma.cc/A34M-AKPS].

357. *Id.*; see also Traister, *supra* note 344 (recounting Gattuso’s story).

no, if we don't like the pressure on our necks or the way they touch us, it wouldn't matter. It wouldn't count, because we don't count.

This feeling isn't necessarily assault, but it is certainly on a continuum with it.³⁵⁸

Even the most progressive rape law should not criminalize many sexual interactions like those described above—those influenced by social pressures or lacking in respect, trust, or pleasure. Yet theorizing yes must take into account the entire spectrum of sexual interactions and not simply where to draw the line of criminalization.³⁵⁹

Changing the dimensions of rape law will not resolve these issues, but it will give the law a richer and more active role in addressing them.³⁶⁰ A public health approach can explore the full range of sexual attitudes and behaviors, including those that are problematic despite being inappropriate for criminalization. It can acknowledge that female desire and sexuality is more complicated than distinguishing consent from nonconsent, where all consensual sex is good and all nonconsensual sex is bad.³⁶¹

Just as importantly, a public health approach can emphasize what is good about sex, and what good sex looks and feels like for all participants.³⁶² As feminist blogger Maya Dusenberry argues, legal feminists need “to put forth a positive alternative vision for what sex could be and isn't.”³⁶³ Public health provides a framework that can

358. Reina A.E. Gattuso, *Rape Culture Is a Contract We Never Actually Signed*, FEMINISTING (May 26, 2015), <http://feministing.com/2015/05/26/rape-culture-is-a-contract-we-never-actually-signed> [<https://perma.cc/H22M-K9DU>]; see also Traister, *supra* note 344 (recounting Gattuso's story).

359. See Traister, *supra* note 344.

360. See Filipovic, *supra* note 85, at 26–27.

361. See Heather Corinna, *An Immodest Proposal*, in YES MEANS YES, *supra* note 85, at 179, 183; Traister, *supra* note 344.

362. See Traister, *supra* note 344. This does not require the world that Franke warns of, in which sex must be a “warm, fuzzy, soft-focused cuddling.” Franke, *supra* note 8, at 206; see also MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE 3* (1999) (warning of a “sanitized, pastoral picture of sex, as though it were simply joy, light, healing, and oneness with the universe”). Sex can encompass many sources of pleasure for people, including, for example, casual sex or sex that involves bondage, dominance, submission, and sadomasochism. See Kaplan, *supra* note 347, at 155–56; see also Gattuso, *supra* note 358 (arguing that sex need not always be “some kind of soulful, look-each-other-in-the-eyes, make-sweet-love, emotional-intellectual experience”). These are not easy paths to navigate, and this Article does not attempt to resolve all debates about what constitutes healthy sexuality. It posits, however, that public health law provides a far better framework than criminal law to create laws and policies that engage this debate.

363. Traister, *supra* note 344 (quoting Maya Dusenberry).

embrace the importance of sexual pleasure and good sexual relationships.

A public health approach provides a legal framework in which to further explore feminist conceptions of sexual ideals that do not fit into the criminal law model. Martha Chamallas, for example, argues for an “ideal of sexual conduct based not just on consent, but on mutuality,”³⁶⁴ which asks whether the individual would have initiated the encounter had she been given the choice.³⁶⁵ While this ideal is likely incompatible with criminal law,³⁶⁶ public health provides a promising legal schema.

Legal feminists might also consider public health laws and policies that support what social psychology scholars Michelle Fine and Sara McClellan term “thick desire,” a framework that “situates sexual well being within structural contexts that enable economic, educational, social, and psychological health.”³⁶⁷ Thick desire places sexual desire within a broader framework of desire for opportunity, community, pleasure, and protection from coercion and danger.³⁶⁸ It requires laws and policies that allow women to

- (a) develop intellectually, emotionally, economically, and culturally;
- (b) imagine themselves as sexual beings capable of pleasure and cautious about danger without carrying the undue burden of social, medical, and reproductive consequences;
- (c) have access to information and health-care resources;
- (d) be protected from structural and intimate violence and abuse; and
- (e) rely on a public safety net of resources to support youth, families, and community.³⁶⁹

Shifting the paradigm of rape law from criminal law to public health provides a framework in which legal feminists can engage underlying social, economic, and cultural implications of theorizing yes. It allows them, for example, to challenge an educational system that has failed to acknowledge and respect female desire even as it venerates male desire and aggression,³⁷⁰ to envision laws and policies that use mass media to change social norms about healthy sexual

364. Chamallas, *supra* note 28, at 836.

365. *See id.* at 835–43. *But see* Dripps, *supra* note 13, at 1790 (arguing that Chamallas’s theory fails to take the complexity of personal relationships into account).

366. *See* Chamallas, *supra* note 28, at 836–37.

367. Fine & McClelland, *supra* note 303, at 301.

368. *See id.* at 325–26.

369. *Id.* at 300–01.

370. *See id.* at 297; Michelle Fine, *Sexuality, Schooling, and Adolescent Females: The Missing Discourse of Desire*, 58 HARV. EDUC. REV. 29, 36–37 (1988).

attitudes and behaviors, and to explore the social and economic policies that support female sexual autonomy in a country where sexual violence is linked to poverty and race.³⁷¹

E. Potential Criticisms of the Public Health Framework

One potential objection to a public health framework is that it might undermine the criminal law process. Reconceptualizing rape as a public health issue with criminal law implications may send the message that rape is not a serious crime. Similarly, those unfamiliar with the scope of public health law may misunderstand the framework as labeling rape a sickness or those who commit it as merely ill and not responsible for their actions. This may weaken society's moral condemnation of rape, which is necessary for effective criminal justice.

In practice, however, a transformation to a public health focus is likely to benefit criminal law practice and theory. As Part I.B argues, the moral condemnation necessary for effective criminalization is already undermined; in the case of acquaintance rape, it is largely absent. A public health approach can strengthen criminal law by changing the social norms that thwart the effective prosecution of sexual violence. Public health interventions can diminish the influence of stereotypes and rape myths on jury interpretation of facts and law. They will also undermine defendant arguments that they lacked mens rea; increasing awareness and changing social norms will make it far less credible that a defendant was unaware of nonconsent or that a defendant acted reasonably in ignoring or failing to perceive signs of nonconsent.

Another potential objection to this framework is that a public health model is simply unsuited to an issue such as rape. Similar arguments were made against proposals in the 1990s to address youth violence through public health interventions. In an essay published in the *Yale Law Journal*, Children's Defense Fund attorney Hattie Ruttenberg argued that youth violence did not fit neatly into the public health model because the latter generally focused on behaviors toward pathogens, as opposed to behavior *as* a pathogen.³⁷² Ruttenberg also argued that public health interventions rely primarily on providing information that changes an individual's cost-benefit analysis.³⁷³ These interventions, she argued, could not prevent youth violence because

371. See Gruber, *supra* note 11, at 609–10; *supra* Parts II.B.3, II.C.4–5.

372. See Ruttenberg, *supra* note 221, at 1887–88.

373. See *id.* at 1903–04.

lack of information was not the problem; violent youth were well aware of the risks associated with violent behavior.³⁷⁴ She also questioned the use of education programs to change attitudes toward violence and teach dispute resolution skills, arguing “it is hard to believe that anger-management skills effectively can counterbalance the real-life problems of a child who, for example, is living in poverty, a dangerous neighborhood, and an unstable family.”³⁷⁵

Such critiques underestimate the breadth and depth of public health interventions. While public health models do provide information to change individuals’ cost-benefit analyses, this is hardly their only role. Ruttenberg’s essay gives limited analysis of the role of social norms and conventions in individuals’ choices and how interventions target these norms to change behaviors. Public health interventions can effectively reduce criminal behavior and violence among youth, but such interventions must consist of more than a few anger management courses.³⁷⁶

A public health law framework is particularly well suited to solve the challenges posed by rape, perhaps more so than those posed by youth violence, because of the way that social norms and conventions obscure the problem itself. In contrast to youth violence, acquaintance rape is not widely accepted as criminal or harmful.³⁷⁷ As discussed above, a public health approach is necessary to change the social norms that prevent successful prosecution.

Such critiques correctly note that public health approaches will likely be insufficient absent policies that address underlying social determinants such as poverty, environment, and family relationships. This is less an argument against a public health framework than a caution about how to use it. Public health law can and should analyze social determinants and design interventions to target them.

Perhaps the most difficult challenge that a public health law framework poses is the significant investment in time and resources that it requires. Shifts in social norms and conventions do not occur quickly or easily. Public health efforts to change norms surrounding behaviors such as smoking or breastfeeding took significant time and investment, and these efforts are ongoing. It is also likely that tactics will need to change if interventions are proven ineffective. A public

374. *See id.* at 1906–10.

375. *Id.* at 1906.

376. *See supra* Part II.C.3.

377. *See supra* Part I.B.1.

health law approach that takes seriously its evidence-based prevention mandate could take years or decades to demonstrate progress.

Yet this is also a strength of a public health law framework. Such investment is the price of addressing the underlying causes of a problem rather than simply punishing the results. The ability to abandon a futile course for a more promising one is a hallmark of good science and good policy. Rape law should not ignore these hard truths.

CONCLUSION

Rape law scholarship has, for the most part, rejected the paradigm of the violent stranger and the resistant virgin. This Article pushes legal scholarship to reject another outdated paradigm: that rape law is first and foremost criminal law. It begins a larger discussion of how a public health framework can give the law a broader, deeper, and more complex role in preventing and punishing offenses rooted in troubling social norms.

A public health law approach to rape can also provide a model for resolving other social issues. Public health approaches are not entirely new to criminal law issues, but strategies that seek to replace criminal law as the primary approach often focus on “victimless” crimes such as drug use and possession.³⁷⁸ This Article differs from many of those arguments in that it offers public health law a primary role in the prevention of a crime with a clear victim. It does not argue against prosecution, but rather in favor of shifting to a public health framework that would make prosecution more effective and fair.

378. See, e.g., Larry Gostin, *An Alternative Public Health Vision for a National Drug Strategy: “Treatment Works,”* 28 HOUS. L. REV. 285, 287–88 (1991).