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# Family Assimilation Demands and Sexual Minority Youth

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## Article

# Slutwalking in the Shadow of the Law

Deborah Tuerkheimer<sup>†</sup>

### INTRODUCTION

One in every five women in the United States is raped in her lifetime.<sup>1</sup> Of women victimized by rape, half are raped by an intimate partner, and forty percent by an acquaintance.<sup>2</sup> This ninety percent of rape departs in fundamental ways from the standard rape paradigm.<sup>3</sup> It is barely touched by the criminal justice system.<sup>4</sup> Yet this kind of rape is seldom isolated for conceptual analysis.

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1. NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (NISVS): 2010 SUMMARY REPORT 18 (2011) [hereinafter NISVS]. For purposes of the survey, rape is defined as "any completed or attempted unwanted vaginal (for women), oral, or anal penetration through the use of physical force (such as being pinned or held down, or by the use of violence) or threats to physically harm and includes times when the victim was drunk, high, drugged, or passed out and unable to consent." *Id.* at 17. Prior to publication of the NISVS, the incidence of non-stranger rape in relation to stranger rape was thought to be significantly lower, albeit still the sizeable majority of rapes. *See, e.g.*, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2006 STATISTICAL TABLES tbl.27 (2008), available at <http://www.bjs.gov/content/pub/pdf/cvus0602.pdf>.

2. NISVS, *supra* note 1, at 21.

3. *See infra* notes 315–19 and accompanying text.

4. As David P. Bryden explained:

Whatever their other disputes, rape-law scholars agree about several fundamental realities. They agree that, for practical purposes, forcible rape is really two crimes. The consensus is that the criminal justice system performs at least reasonably well in dealing with 'aggravated' rapes, defined as rapes by strangers, or men with weapons, or where the victim suffers ulterior injuries. With equal unanimity, scholars

This Article concerns itself explicitly with this kind of rape—non-stranger rape. It is also very much about women and consensual sex. In the midst of rampant sexual violence, most women (and girls) are having sex, often frequently.<sup>5</sup> The

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agree that the justice system often has performed poorly in cases involving rapes by unarmed acquaintances (dates, lovers, neighbors, co-workers, employers, and so on) and in which the victim suffers no additional injuries. Victims are less likely to report these acquaintance rapes (or even to recognize that they are rapes); if a victim does report it, the police are less likely to believe her; prosecutors are less likely to file charges; juries are less likely to convict; and any decision by an appellate court is more likely to be controversial.

David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 317–18 (2000) (footnotes omitted); see also Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1161 (1986) (“The available data suggest that while violent, stranger rape may be among the most frequently reported crimes in this country, the non-traditional rape—the case involving non-strangers, less force, no beatings, no weapons—may be among the least frequently reported, even when its victims perceive it to be ‘rape.’ In many if not most of these cases, forced sex is tolerated by its victims as unavoidable, if not ‘normal.’”).

5. Not long before the CDC issued the NISVS, one of the largest representative studies of human sexuality ever conducted was published. The National Survey of Sexual Health and Behavior (NSSHB), conducted by researchers from the Center for Sexual Health Promotion at Indiana University’s School of Health, Physical Education and Recreation, describes the sexual experiences and condom-use behaviors of 5865 adolescents and adults, ages fourteen to ninety-four. Initial findings from the survey, presented in nine separate research articles, were published in October 2010 in a special issue of *The Journal of Sexual Medicine*. Ctr for Sexual Health Promotion, *National Survey of Sexual Health and Behavior*, IND. U., <http://www.nationalsexstudy.indiana.edu> (last updated 2010). The survey found that at least 40% of women between the ages of twenty and forty-nine have engaged in anal sex, and most have engaged in oral sex. Debby Herbenick et al., *Sexual Behavior in the United States: Results from a National Probability Sample of Men and Women Ages 14–94*, 7 J. SEXUAL MED. 255, 262–63 tbl.3 (2010). Even compared to research from the early 1990s, these proportions have increased (significantly in the case of anal sex). *Id.* at 261. Vaginal sex continues to be the most common sexual behavior overall. Ninety-eight percent of women between the ages of twenty-five and forty-four have engaged in vaginal sex, over half with between three and fourteen partners in their lifetime. ANJANI CHANDRA ET AL., NAT’L CTR. FOR HEALTH STATISTICS, NAT’L HEALTH STAT. REP. NO. 36, SEXUAL BEHAVIOR, SEXUAL ATTRACTION, AND SEXUAL IDENTITY IN THE UNITED STATES: DATA FROM THE 2006–2008 NATIONAL SURVEY OF FAMILY GROWTH 1, 19 tbl.3 (2011), available at <http://www.cdc.gov/nchs/data/nhsr/nhsr036.pdf>. Girls frequently become sexually active as adolescents: about 20% between the ages of fourteen and seventeen engage in oral sex, and over 30% report vaginal intercourse by the age of sixteen. J. Dennis Fortenberry et al., *Sexual Behaviors and Condom Use at Last Vaginal Intercourse: A National Sample of Adolescents Ages 14 to 17 Years*, 7 J. SEXUAL MED. 305, 309–10 tbl.2 (2010).

latest empirical evidence is consistent with the insistence of a younger generation of women that sex is to be celebrated.<sup>6</sup>

The rise of sex positivity co-exists uneasily with the commonplace nature of rape. While this tension has gone unnoticed by legal theorists,<sup>7</sup> new impetus for sustained attention has been provided by the most significant feminist initiative to have emerged in decades: women are insisting on sex without rape and sexuality without judgment in a movement<sup>8</sup> that calls

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6. See *infra* text accompanying notes 110–15 (discussing sex positivity as a fundamental tenet of third wave feminism).

7. See *infra* Part II.B.

8. Whether SlutWalk is considered a social movement (as opposed to a social mobilization) depends on which of many working definitions is applied. One commonly invoked formulation is Sidney Tarrow's, which includes "collective challenges, based on common purposes and social solidarities, in sustained interaction with elites, opponents, and authorities." SIDNEY TARROW, *POWER IN MOVEMENT: SOCIAL MOVEMENTS AND CONTENTIOUS POLITICS* 4 (2d ed. 1998) (emphasis omitted). Another explains social movements as "conscious, concerted, and sustained efforts by ordinary people to change some aspect of their society by using extra-institutional means." Jeff Goodwin & James M. Jasper, *Editors' Introduction* to *THE SOCIAL MOVEMENTS READER: CASES AND CONCEPTS* 3, 3 (Jeff Goodwin & James M. Jasper eds., 2003). For a summary of various definitions, see generally David A. Snow et al., *Mapping the Terrain*, in *THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS* 3, 6–11 (David A. Snow et al. eds., 2004).

Beyond the definitional question, Tomiko Brown-Nagin has provided this helpful overview of how social movements tend to operate:

Social movement activity is characterized by organization, cohesion, and agenda setting. A social movement typically includes groups of people who, meeting in a safe social space, come together to caucus, and collaborate over a common grievance. The members of the collective develop a plan of action, or devise strategies and tactics, for achieving their goals. They commonly use direct action, such as demonstrations, marches, or sit-ins; community organizing, which typically includes community education or "consciousness-raising" sessions; and petitioning and pamphleteering to achieve the movement's goals. There is an express role for emotion in social movements because breaking mental chains of oppression, creating new forms of cultural expression, and awakening participants from quiescence are fundamental to the initiation, growth, and development of a movement. Public performance of the cognitively liberated self and displays of unity are integral to sustaining movement cohesion and gaining the public's attention.

Tomiko Brown-Nagin, *Elites, Social Movements, and the Law: The Case of Affirmative Action*, 105 COLUM. L. REV. 1436, 1504–05 (2005) (footnotes omitted). Because it shares many of these features, I will refer to SlutWalk as a social movement, although none of my claims rest on this characterization. The discussion that follows does, however, set the stage for further application of social movement theory to criminal law reform. Cf. William N. Eskridge, Jr., *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419, 421 (2001) (advocating "an important rather than marginal role for law and legal theory in the social movements literature").

itself SlutWalk.<sup>9</sup> By taking aim at rape while expressly promoting the virtues of female sexuality, SlutWalk situates itself where anti-rape and pro-sex norms converge.

Precisely because of the normative claims at stake, it is striking that SlutWalk targets rape *culture* alone,<sup>10</sup> leaving law and legal theory outside the bounds of protest.<sup>11</sup> This omission reflects a profound underestimation of the role of law.<sup>12</sup> I say this not simply because greater enforcement of rape laws<sup>13</sup>

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9. See generally SLUTWALK TORONTO, <http://www.slutwalktoronto.com> (last visited Mar. 10, 2014) (describing the movement and its origins).

10. Rape culture has been aptly described as follows:

[I]f a woman previously consented to any connection with a man—developing a friendship with a male colleague or superior at work, accepting a date, going to a bar or a party and talking with a man (i.e., making a stranger a nonstranger through conversation), agreeing to drive a man she has just met to his home, allowing a man she just met to drive her home, dating a man for an extended period of time, consenting to sexual relations with a man once or many times, cohabitating with a man, marrying a man—a presumption arises that she subsequently consented to sexual contact during the incident in question. [Also], she is considered responsible for having placed herself in a situation that might result in sexual contact, and, therefore, she must accept the consequences of her own conduct (i.e., nonconsensual sexual contact).

Beverly Balos & Mary Louise Fellows, *Guilty of the Crime of Trust: Nonstranger Rape*, 75 MINN. L. REV. 599, 604–05 (1991) (footnotes omitted).

11. Cf. Jack M. Balkin & Reva B. Siegel, Essay, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 946 (2006) (“The law needs social movements, even as social movements disrupt legal orderings. Social movements continuously integrate law and the institutions of civil society. They connect legal norms to the beliefs and practices of ordinary people, so as to preserve a relationship between what the law regards as licit and what the public does. This connection to the social order secures the normative vitality of the law, making it legitimate, efficacious, and practically enforceable.”). In conclusion, I will outline the parameters of law reform consistent with SlutWalk’s normative aims.

12. Eskridge, *supra* note 8, at 420 (“Any kind of collective action, however ‘spontaneous’ (a favorite word among social movement theorists), occurs in the context of the regulatory state. The norms challenged by this kind of collective action are likely to be codified in legal codes, and the movement’s struggle will inevitably involve law. . . . [L]aw has strong effects on social movements; law does not drive them, but it is a pervasive positive and normative context in which the social movement operates.”).

13. For proof of continuing problems of under-enforcement, see David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1216 (1997) (citing studies confirming the disparity in prosecutorial treatment of stranger and acquaintance rape cases); 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) (finding evidence that in cases involving “acquaintances, relatives, or intimate partners . . . prosecutors’ anticipation of a consent defense and downstream orientation toward judges and

would likely deter more rape,<sup>14</sup> and impact rape culture along the way.<sup>15</sup> While this is true, my orientation is somewhat different.

Rather than critique criminal process, I contemplate the substantive law of rape. I do so with particular attention to sexual agency—a perspective informed by close investigation of SlutWalk.<sup>16</sup> As we will see, synthesis of the movement’s anti-rape and pro-sex strands leads to a new understanding of sexual agency, along with the dilemmas it presents. This more complicated rendition has until now been neglected—in part because recent developments have altered the terrain. I offer a conceptual framework that begins to fill this void.<sup>17</sup>

Rethinking sexual agency in turn recasts the law of rape.<sup>18</sup> On close inspection, we see that judgments about the bounds of appropriate sexual conduct permeate rape law, functioning to contract simultaneously the scope of protection from sexual violence and the realm of legally approved sex.<sup>19</sup> The crime of rape thus constructs female sexuality in ways that contrast sharply with a pro-agency agenda. This is why women cannot “reclaim” sexuality, as SlutWalk professes to do, without regard for rape law.

Part One explains how SlutWalk evolved, evaluating its tenets and practices in the context of a third-wave feminism

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juries apparently lead them to scrutinize the victim’s character and behavior more carefully”); *see also* Michelle J. Anderson, *Women Do Not Report the Violence They Suffer: Violence Against Women and the State Action Doctrine*, 46 VILL. L. REV. 907, 929 (2001) (“By unfounding and downgrading crimes involving violence against women, police departments neglect to investigate hundreds, perhaps thousands, of legitimate rape complaints every year.”).

14. *See* Lynne Henderson, *Rape and Responsibility*, 11 LAW & PHIL. 127, 170–71 (1992) (explaining why criminal justice sanctions are likely to deter non-stranger rape effectively).

15. *Id.* at 132 (“[Law and culture] reciprocally influence understandings of what is and is not the crime of rape.”).

16. *See infra* Part II.B.

17. Legal feminism generally proceeds from the proposition that theory is enriched by the incorporation of contemporary feminist practice. As Martha Chamallas succinctly notes, “[a]s it has in the past, practice will drive theory and will keep feminist legal theory alive.” Martha Chamallas, *Past as Prologue: Old and New Feminisms*, 17 MICH. J. GENDER & L. 157, 174 (2010); *see also infra* note 35.

18. More specifically, I contend that rape law is constructing female sexuality and that it is doing so in ways antithetical to sexual agency. *See infra* Part III. This leads me to introduce new criteria for evaluating the adequacy of rape law and to suggest a different way of thinking about the direction of reform. *See infra* notes 315–30 and accompanying text.

19. *See infra* Part III.

that departs appreciably from what has come before. Part Two explores SlutWalk's demand for sex without rape. It then develops a model of sexual agency that arises from consideration of the movement's objectives and the tensions that surround them. Part Three describes how rape law constructs female sexuality. It accomplishes this through a critique of consent doctrine<sup>20</sup> and the rape shield rule,<sup>21</sup> challenging the law's treatment of the sexually passive woman<sup>22</sup> and the sexually deviant woman, respectively.<sup>23</sup> What emerges from this analysis is that rape law ought to be reformed to account for women's sexual agency, thereby furthering the same. A conclusion outlines the parameters of a new approach to condemning rape.

### I. NOT YOUR MOTHER'S FEMINISM

In order not to be raped, women should "avoid dressing like sluts."<sup>24</sup> When a Toronto police officer made this observation in January 2011, he galvanized a worldwide protest known as SlutWalk.<sup>25</sup> In less than a year, the grassroots initiative spread to over one hundred cities, including New York, Berlin, Cape Town, New Delhi, London, Chicago, Mexico City, Vienna, Helsinki, Buenos Aires, and Singapore, as well as smaller towns and college campuses across the United States.<sup>26</sup> To date, tens

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20. See *infra* Part III.A.

21. See *infra* Part III.B.

22. See *infra* Part III.A.

23. See *infra* Part III.B.

24. Why?, SLUTWALK TORONTO, <http://www.slutwalktoronto.com/about/why> (last visited Mar. 10, 2014).

25. SlutWalk Toronto's website provides an overview of the initiative's origins. See *id.*

26. Heather Jarvis, one of SlutWalk Toronto's organizers, has offered this reflection:

SlutWalk has gone from a small idea in our city of Toronto to a multi-faceted initiative across cities, borders, languages and cultures that takes many forms. We've seen SlutWalks, Marchas de las Putas, Marches des Salopes, Marcha de las Vadias, La Marcha de las Vagabundas, Marches to End Victim-Blaming, Marsul Panaramelor, Consent Fests, Besharmi Morcha, fundraisers, workshops, community education initiatives, collaborations, campaigns, art initiatives, open mic events, spaces to share survivor stories, community accountability work and more. We are in disbelief, especially when we think of the grassroots nature of SlutWalk, that SlutWalk has grown to mobilize thousands of people in many ways, with every SlutWalk rooted in its respective city.

Heather Jarvis, *From the Ground Up: A Response to an Open Letter and the Beginning of an Action Plan for Better Work with Our Communities*, SLUTWALK TORONTO (Oct. 17, 2011), <http://www.slutwalktoronto.com/from>

of thousands of people, mostly women—many of whom disavow any attempt to reclaim the word slut<sup>27</sup>—have participated in the effort,<sup>28</sup> and the mobilization continues.<sup>29</sup>

In this Part, I show that SlutWalk manifests a new iteration of feminism.<sup>30</sup> I will first describe the features of the movement, as it is often called,<sup>31</sup> that mark it as feminist.<sup>32</sup> I will then explain how this movement is fundamentally different from what has come before.<sup>33</sup> My methodological approach is grounded in women's articulated experiences of SlutWalk, whether as organizers, joiners, skeptics, observers, or critics.<sup>34</sup> The method uses practice to inform theory.<sup>35</sup>

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-the-ground-up. Because the remainder of this discussion focuses on SlutWalk in the US (and domestic rape law), I do not describe the ways in which women around the world are adapting SlutWalk to account for cultural variations, or how the movement bears on the state of global feminism. For one of many illustrations of SlutWalk's international resonance, see Rita Banerji, *SlutWalk to Femicide: Making the Connection*, THE WIP (Sept. 2, 2011), [http://www.thewip.net/contributors/2011/09/slutwalk\\_to\\_femicide\\_making\\_th.html](http://www.thewip.net/contributors/2011/09/slutwalk_to_femicide_making_th.html) (explaining the importance of SlutWalk for women in India).

27. See *infra* note 155.

28. Jarvis, *supra* note 26.

29. At the 2012 National Sexual Assault Conference, it was noted that SlutWalk rallies had already taken place in more than 200 cities worldwide. Colleen Westendorf, Comm'n Dir., SlutWalk Toronto, Speech at the National Sexual Assault Conference (Aug. 22, 2012) (transcript available at <http://www.slutwalktoronto.com/slutwalk-toronto-speech-from-the-2012-national-sexual-assault-conference-in-chicago-nsac2012>). In 2013, many cities held their third annual SlutWalk march. See, e.g., *SlutWalk Chicago 2013: Third Annual March Protests Rape Culture, Victim-Blaming*, HUFFINGTON POST (Sept. 10, 2013, 1:57 PM), [http://www.huffingtonpost.com/2013/09/10/slutwalk-chicago-2013\\_n\\_3901085.html](http://www.huffingtonpost.com/2013/09/10/slutwalk-chicago-2013_n_3901085.html); *SlutWalk Seattle 2013*, SLUTWALK SEATTLE, <http://slutwalkseattle.com/SWS13> (last visited Mar. 10, 2014); see also Jazmine Foster-Hall, *UA, Tucson Community March Against Rape Culture in 'SlutWalk'*, THE DAILY WILDCAT (Nov. 16, 2013, 7:14 PM), <http://www.wildcat.arizona.edu/article/2013/11/ua-tucson-community-march-against-rape-culture-in-slutwalk>. In other locations, activists are continuing to advance SlutWalk's mission under the auspices of new feminist organizations. See, e.g., Letter from Former SlutWalk NYC Organizers (Mar. 4, 2012) (available at <http://www.facebook.com/pages/SlutWalk-NYC/195661440475800>).

30. Often this latest incarnation is referred to as "third-wave" feminism. For an excellent overview, see Bridget J. Crawford, *Toward a Third-Wave Feminist Legal Theory: Young Women, Pornography and the Praxis of Pleasure*, 14 MICH. J. GENDER & L. 99, 106–133 (2007).

31. Again, my argument does not depend on whether this classification is sound. See *supra* text accompanying note 8.

32. See *infra* text accompanying notes 36–65.

33. See *infra* text accompanying notes 66–76.

34. Throughout this Part, in addition to press accounts, I rely on blog entries written by rally organizers, blog entries recording participants' impressions, and blog entries articulating the concerns of those who have declined to

SlutWalk is best understood as a feminist initiative,<sup>36</sup> notwithstanding its fundamental points of departure from earlier feminisms.<sup>37</sup> Beyond the particulars of its agenda, which I will explore shortly,<sup>38</sup> the protest has a good deal in common with accepted feminist practices.<sup>39</sup> In particular, SlutWalk reaffirms the importance of consciousness-raising<sup>40</sup> and the continuing

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join the movement. All told, blog traffic around SlutWalk has been quite sizeable. See *infra* text accompanying note 69 (describing SlutWalk's use of the internet as an organizing tool); cf. Emily Nussbaum, *The Rebirth of the Feminist Manifesto*, N.Y. MAG., Oct. 30, 2011, at 42, 44 ("[T]he blogosphere has transformed feminist conversation, reviving in the process an older style of activism among young women.").

35. This method is central to legal feminism. As Deborah Rhode has explained, "[c]ritical feminism's most common response to questions about its own authority has been reliance on experiential analysis. This approach draws primarily on techniques of consciousness-raising in contemporary feminist organizations, but also on pragmatic philosophical traditions. A standard practice is to begin with concrete experiences, integrate these experiences into theory, and rely on theory for a deeper understanding of the experiences." Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 621 (1990).

36. This perspective is widely, but not universally, recognized. See Kathy Miriam, *Branding Feminism*, DIALECTICAL SPIN (Oct. 23, 2011), [http://kmiriam.wordpress.com/tag/slutwalk/#\\_edn1](http://kmiriam.wordpress.com/tag/slutwalk/#_edn1) ("[T]he only thing that's parodic about Slutwalk, albeit inadvertently, is the event's appropriation of feminism.") See generally *Link Round Up: Feminist Critiques of SlutWalk*, FEMINIST FREQUENCY (May 16, 2011), <http://www.feministfrequency.com/2011/05/link-round-up-feminist-critiques-of-slutwalk> (providing links to articles and blog posts critiquing SlutWalk from a feminist perspective).

37. See *infra* text accompanying notes 66–76 (discussing these differences).

38. See *infra* Part II.

39. Like previous generations of feminists, SlutWalk's organizers profess a commitment to non-hierarchical institutional structures. See Jarvis, *supra* note 26 ("We do not envision our activism as a hierarchical dictation of our ideas upon others."). What is different about this initiative is the extent to which it is diffuse (a state further enabled by the internet) and thus far largely unaffiliated with existing women's organizations. As Heather Jarvis, SlutWalk Toronto co-organizer, describes it, "SlutWalk was an idea that began in Toronto and has spread across the world at lightning speed, which can and does limit our reach and influence over other SlutWalks, especially since everything we do is volunteer-run. Each SlutWalk is independently based and organized. However, though we at SlutWalk Toronto may not be in other cities as organizers, decision-makers or participants, what happens under the SlutWalk label or idea connects us all." Heather Jarvis, *Racism and Anti-Racism: Why They Matter to SlutWalks*, SLUTWALK TORONTO (Oct. 31, 2011), <http://www.slutwalktoronto.com/racism-and-anti-racism>.

40. Consciousness-raising is a quintessential feminist practice. "As feminist writing on 'consciousness-raising' has made clear, it may be only through conversation with others who have confronted similar feelings that a woman becomes aware that her self-conception does not simply reflect her own short-

power of collective efforts to advance women's well-being.<sup>41</sup> By aggregating individual experiences, women are able to discern shared meaning in previously atomized existences. As a result, new forms of collective action become possible.<sup>42</sup>

Like the Take Back the Night rallies before it,<sup>43</sup> SlutWalk seeks to spread awareness—to women who have been raped and to others—of the prevalence and harm of rape.<sup>44</sup> Using sto-

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comings, but is a function of views and expectations that are instilled socially." Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805, 827–28 (1999).

41. See *infra* text accompanying notes 51–64. At least in theory, this emphasis on group cohesion contemplates the intersectional nature of identity and avoids the pitfalls of essentialism. In practice, however, this recognition has proven extremely problematic. See *infra* Part II.B.2.

42. CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 101 (1989) ("Consciousness raising, through socializing women's knowing, transforms it, creating a shared reality that 'clears a space in the world' within which women can begin to move." (footnote omitted)).

43. This comparison has not been lost on commentators and participants. See Rachel Griffin, *Black Feminist Reflections on a Small Town SlutWalk*, MS. MAGAZINE BLOG (Oct. 5, 2011), <http://msmagazine.com/blog/2011/10/05/black-feminist-reflections-on-a-small-town-slutwalk> ("[O]ur local SlutWalk had a larger attendance than any of the Take Back the Night marches that I have been to or spoken at in the last 10 years."); Amanda Marcotte, *SlutWalks and the New Political Incorrectness*, SLATE (Apr. 21, 2011, 1:26 PM), [http://www.slate.com/blogs/xx\\_factor/2011/04/21/feminists\\_now\\_completely\\_own\\_the\\_funny](http://www.slate.com/blogs/xx_factor/2011/04/21/feminists_now_completely_own_the_funny) (contrasting "SlutWalk with its rape-protesting predecessors, the Take Back the Night rallies that emerged in the '70s and '80s"); Salamishah Tillet, *What to Wear to a SlutWalk*, NATION (Sept. 28, 2011), <http://www.thenation.com/article/163679/what-wear-slutwalk#> ("SlutWalk has been the most successful protest against sexual violence in the United States since the birth of the Take Back the Night marches in the 1970s."). However, important differences in emphasis between the two protests have gone unremarked. Most notably, in contrast to SlutWalk, Take Back the Night largely targeted stranger rape and related sexual dangers associated with public spaces. See Nadine Taub, *Thoughts on Living and Moving with the Recurring Divide*, 24 GA. L. REV. 965, 983 (1990) ("[A] spectrum of women have joined together in reclaiming public space. Frequent in the late 1970s, marches have been revived in recent years. The very notion that women are entitled to be on the streets at night is a wonderful source of energy for liberating women who learn early on where they can and cannot go."); see also SUSAN BROWNMILLER, IN OUR TIME: MEMOIR OF A REVOLUTION 301–02 (1999) (describing the first "Take Back the Night" march in 1978); Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 77 WASH. U. L.Q. 1, 46 (1993) ("Women, who are determined to 'Take Back the Night' from predatory men, have protested throughout the country demanding the right to move about freely.").

44. SlutWalk is most often described by its anti-rape commitments. See, e.g., Fiona Snyckers, *SlutWalk: When Feminists Turn Territorial*, THOUGHT LEADER (Oct. 3, 2011), <http://www.thoughtleader.co.za/fionasnyckers/2011/10/>

ries and first-hand accounts,<sup>45</sup> the rallies and web-based mobilization protest “slut shaming,” victim blaming, and a rape culture that excuses sexual violence perpetrated by non-strangers.<sup>46</sup>

One theme that resurfaces in participants’ accounts is the value of relating experiences of sexual victimization. For instance, as one woman who marched describes it:

I . . . felt a surprising amount of catharsis over my own probable date-rape; I never blamed myself for it, but that didn’t stop me from feeling incredibly pissed off over both the event itself and the daunting odds that led me not to have it investigated. To have a bunch of people be pissed off along with me felt indescribably awesome; in turn, I was pissed off on their behalf, too.<sup>47</sup>

A younger woman, still in high school, explains,

[a]fter awhile you get tired of being vulnerable . . . You get tired of letting it just happen, and you have to get past the point of just blog

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03/slutwalk-when-feminists-turn-territorial (calling SlutWalk “inarguably the most successful rape-awareness campaign in the world ever”).

45. Bridget Crawford has observed that “personal story-telling,” which she likens to the consciousness-raising tradition, is a principal method of third-wave feminism. Crawford, *supra* note 30, at 124–26.

46. In general, stranger rapes (which tend to be perpetrated with a weapon or other force) are not culturally accepted, and therefore tend to prompt a criminal justice response. *See supra* text accompanying note 13. In this respect, little has changed since Susan Estrich made this observation decades ago in her seminal article on rape:

The available data suggest that while violent, stranger rape may be among the most frequently reported crimes in this country, the non-traditional rape—the case involving non-strangers, less force, no beatings, no weapons—may be among the least frequently reported, even when its victims perceive it to be “rape.” In many if not most of these cases, forced sex is tolerated by its victims as unavoidable, if not “normal.”

Along with victim underreporting, the criminal justice system provides a second screen on the understanding of rape. Prosecution and conviction rates are highest when force and resistance are greatest, when the rape is corroborated, when no prior relationship exists between victim and defendant, and when the initial contact between the two is involuntary. Indeed, when such factors are present, prosecution and conviction rates are quite high; when they are not, the case is far more likely to be dismissed or at least pleaded out as a minor offense, or if taken to trial, most likely to result in an acquittal.

Estrich, *supra* note 4, at 1161–62.

47. Jamie Peck, *SlutWalk NYC Was Rainy, Beautiful, Inspiring*, THE GLOSS (Oct. 3, 2011), <http://thegloss.com/2011/10/03/odds-and-ends/slutwalk-nyc-was-rainy-beautiful-inspiring-453>.

ging about it. I wanted to do the walk because it was a physical moment of being around other people who are saying, “No. This has to stop.”<sup>48</sup>

In many of the rallies and online,<sup>49</sup> women speak publicly for the first time about their rapes.<sup>50</sup>

In SlutWalk, women affirm the power of a heterogeneous collective. Many participants mention the value of diversity in their accounts. For instance, a dispatch from the New York City rally notes, “[a]lthough the crowd was overwhelmingly, female there were some men there, too. There were people of all different races, abilities, genders, ages, weights, orientations, you name it . . . Far from being a homogenously white/straight/female/cisgender affair, speakers included nearly every kind of identity there is . . .”<sup>51</sup> And from Carbondale, Illinois:

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48. Tara Kulash, *Slut Walk Promotes Right to Bare Legs*, DAILY EGYPTIAN (Oct. 2, 2011, 7:50 PM), <http://archives.dailyegyptian.com/siu-2011/2011/10/2/slut-walk-promotes-right-to-bare-legs.html> (internal quotation marks omitted).

49. As SlutWalk co-founder Sonya Barnett notes, “[w]e’ve seen many people unpack their experiences on the SlutWalk Toronto Facebook page, sharing and supporting each other as they deal with what has happened to them.” Sonya Barnett, *What I’ve Learned*, SASKIA VOGEL (Nov. 13, 2011), <http://saskiavogel.com/?p=811>. Other women have responded to SlutWalk by blogging about their accounts of sexual violence. See, e.g., Jamie Peck, *Why I’m Participating in SlutWalk NYC Tomorrow*, THE GLOSS (Sept. 30, 2011), <http://thegloss.com/2011/09/30/odds-and-ends/why-im-participating-in-slutwalk-nyc-tomorrow-963> (describing waking up from “some kind of blacked out, vegetative state,” with a vagina that “felt like sandpaper,” and the realization that “sex was had” with her date despite her inability to recall it). At times, these women cite rape culture to explain their reluctance to report their sexual assault. See, e.g., *id.* (“Why didn’t I, a self-identified feminist, get a rape kit done and try to piece together what had happened the night before? Because I knew the system would treat me like shit. I’m naked on the Internet, I write about sex, and I basically roofied myself. I knew nobody was going to treat me with respect. People much more virginal and less uncertain than me have had an infuriatingly tough time getting justice. I didn’t want to put myself and my family through that for such an uncertain outcome.”); Tillet, *supra* note 43 (“I was there . . . [c]ause when I took that long walk home after I was raped, my spaghetti strapped dress was turned inside out. And I was afraid to go to the police and be told it was my fault.”).

50. See, e.g., Philip Haldiman, *Victims of Rape Share Stories of Healing at SlutWalk*, ARIZ. REPUBLIC (Oct. 23, 2011, 12:00 AM), <http://www.azcentral.com/community/tempe/articles/2011/10/23/20111023rape-victims-slutwalk.html> (“Dozens of Arizona women shared their stories and shed their tears Saturday afternoon, healing scars left behind as victims of rape and sexual assault. . . . [T]he majority of those who volunteered to speak shared their story publicly for the first time.”).

51. Peck, *supra* note 47. Cisgender means identifying with a gender that is the same as one’s biological sex. *Cisgender*, QUEER DICTIONARY (Aug. 22,

“What I saw was a beautifully diverse representation of what feminism can look like. That diversity taught me something about the significance of SlutWalk.”<sup>52</sup> Even where SlutWalk is perceived to have fallen short,<sup>53</sup> the notion of a diverse movement is still emphasized, albeit in aspirational terms.<sup>54</sup> At least as a normative proposition, inclusiveness is central to SlutWalk.<sup>55</sup>

So, too, is solidarity. This theme is expressed in the comments of a skeptic who observes, “[E]very feminist I’ve talked with about this sees the potential for good in SlutWalk, hence our cautious optimism, hesitant solidarity (but solidarity nonetheless), and our willingness to spend our time offering our critiques.”<sup>56</sup> Another participant, noting the “collective resistance” that characterizes SlutWalks, suggests,

Even if my feminism looks different than yours, can we be unexpected friends, comrades and allies? SlutWalks seem to offer a loud ‘yes,’ and if people such as myself, with a gaze tempered by suspicion or even outright disgust, choose to attend, listen and learn, we might be moved by the magical synergy of SlutWalks.<sup>57</sup>

A SlutWalk event is widely viewed as a “march of solidarity.”<sup>58</sup>

The idea of group cohesion is integral to SlutWalk’s, at times self-conscious, efforts to revitalize feminism and its ap-

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2011, 10:22 PM), <http://queerdictionary.tumblr.com/post/9264228131/cisgender-adj>.

52. Griffin, *supra* note 43.

53. *See infra* Part II.B.2.

54. For instance, Salamishah Tillet, a professor of English and Africana Studies at the University of Pennsylvania and popular feminist blogger, advises that, to become a lasting movement, SlutWalk must “integrate[], as its organizers and protesters, those women—lesbian, queer and transgendered; women of color, low-income women and sexually exploited workers—who are most vulnerable to sexual assault and more likely to be called ‘slut,’ regardless of what they’re wearing.” Tillet, *supra* note 43.

55. *But see infra* Part II.B.2.

56. *I Saw the Sign But Did We Really Need a Sign?: SlutWalk and Racism*, THE CRUNK FEMINIST COLLECTIVE (Oct. 6, 2011) [hereinafter *I Saw the Sign*], <http://crunkfeministcollective.wordpress.com/2011/10/06/i-saw-the-sign-but-did-we-really-need-a-sign-slutwalk-and-racism>.

57. Griffin, *supra* note 43.

58. Molly Kirschner, *A 17-Year-Old Does SlutWalk*, MS. MAG. BLOG (Oct. 4, 2011), <http://msmagazine.com/blog/2011/10/04/a-17-year-old-does-slutwalk>; *see also* Coco Papy, *SlutWalk NYC*, PERSEPHONE MAG. (Sept. 30, 2011), <http://persephonemagazine.com/2011/09/persephone-pioneers-slutwalk-nyc> (“[R]ape culture isn’t going anywhere and we need marches for awareness and solidarity.”); Katha Pollitt, *Talk the Talk, Walk the SlutWalk*, THE NATION, July 18/25, 2011, at 9, 9 (“[SlutWalk is the] bold, original, do-it-yourself protest movement we’ve been waiting for, a rock-hard wall of female solidarity—an attack on one is an attack on all!”).

parent success in doing so. Observers and participants alike notice this dynamic. For instance, in its annual selection of world visionaries, *The Utne Reader* chose the two Toronto women who first organized SlutWalk, noting that “[r]esponse to the movement has indeed been huge . . . invigorating feminism with new energy.”<sup>59</sup> According to Jessica Valenti, among today’s most influential feminist bloggers,<sup>60</sup> “SlutWalks have become the most successful feminist action of the past 20 years.”<sup>61</sup> An organizer of SlutWalk New York City asserts that “[t]he ‘slutwalks’ are only one manifestation of a new and young feminist movement and that’s really important to keep in mind.”<sup>62</sup> Her co-organizer expresses a similar sentiment: “We [SlutWalk New York City organizers] hope that this is just the beginning of a re-invigorated feminist movement inclusive of the many intersecting issues and identities present in feminism.”<sup>63</sup> Participants frequently echo these insights when describing their experiences of the rallies.<sup>64</sup>

SlutWalk has inspired a new generation of women to feminist activism.<sup>65</sup> Yet with few exceptions, earlier generation fem-

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59. Margret Aldrich, *25 Visionaries Who Are Changing Your World: Heather Jarvis and Sonya J.F. Barnett: Power Walkers*, *UTNE READER*, Nov. 2011, at 36, 42.

60. See *About*, JESSICA VALENTI, <http://jessicavalenti.com/about> (last visited Mar. 10, 2014).

61. Jessica Valenti, *SlutWalks and the Future of Feminism*, *WASH. POST*, June 3, 2011, [http://www.washingtonpost.com/opinions/slutwalks-and-the-future-of-feminism/2011/06/01/AGjB9LIH\\_story.html](http://www.washingtonpost.com/opinions/slutwalks-and-the-future-of-feminism/2011/06/01/AGjB9LIH_story.html).

62. Papy, *supra* note 58.

63. *Id.* (quoting Nicole C. Kubon).

64. A participant in a SlutWalk stated:

As I walked . . . I found myself thinking a powerful thought: THIS is what feminism can look like. To argue otherwise, I realized, is an attempt to foreclose what feminism can be. To do so undermines not only the shift from *feminism* to *feminisms*, but also our feminist commitments to self-definition, empowerment and agency. We must ask ourselves, *Who am I to determine how someone else should embody a feminist stance of resistance?*

Griffin, *supra* note 43.

65. See, e.g., Griffin, *supra* note 43 (wishing that more would attend SlutWalk and “witness what feminist activism can look like”); Nussbaum, *supra* note 34, at 106 (“[E]ven the most rancorous threads strike me as inspiring, a sign of how alive the conversation is.”); Kristin Tillotson, “*SlutWalk*” *March Divides Feminists*, *MINNEAPOLIS STAR TRIB.*, Sept. 29, 2011, <http://www.startribune.com/lifestyle/130720908.html> (stating that SlutWalk has “struck an inspirational chord with many women, particularly Gen Xers and millenials”).

inists remain largely uninvolved in the initiative.<sup>66</sup> One rather obvious explanation is that, through its “branding,”<sup>67</sup> SlutWalk has alienated an older constituency. But, on closer examination, we may discern more substantive reasons for a generational divide. Although SlutWalk is in many ways consistent with familiar feminist tenets, the movement also differs in important ways from prior waves<sup>68</sup> of feminism.

Heavy reliance on Internet technologies<sup>69</sup> and a revamped aesthetic<sup>70</sup> are components of this change. But two more substantive features distinguish SlutWalk from earlier feminisms: first, a surprisingly atheoretical stance; and, second, an almost exclusive focus on culture as opposed to law. I will illustrate each of these features in turn before developing the claim that there is a pronounced gap between contemporary feminist practice and the law.

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66. Cf. Pollitt, *supra* note 58, at 9 (“[M]ostly, feminists of all ages are cheering from the sidelines. . . . Further proof that the evergreen narrative about feminist generation wars tends to fade away whenever feminists actually get out and do something.”).

67. See *infra* note 155 (noting naming objections).

68. See Crawford, *supra* note 30, at 100–01 (“This self-proclaimed ‘third-wave’ of feminists consists of women . . . too young to have taken part in the ‘second wave’ of 1970s activism, let alone the ‘first wave’ of nineteenth-century advocacy for women’s rights.”).

69. As Bridget Crawford has observed, “Third-wave feminism’s interest in and reliance on the internet suggests a rich vehicle for international coalition-building around women’s issues.” *Id.* at 166. SlutWalk’s trajectory testifies to this potential. See, e.g., Nussbaum, *supra* note 34 (“Even as we march, it is being tweeted and filmed and Tumblr’d, a way of alerting the press and a way of bypassing the press.”); Tillet, *supra* note 43 (characterizing SlutWalk as “an anti-rape march and street protest that has gone viral”). In this context, it seems important to note the emergence of a significant digital divide. See Susan Crawford, *The New Digital Divide*, N.Y. TIMES, Dec. 3, 2011. For further objections to SlutWalk as elitist, see *infra* text accompanying notes 206–07.

70. See Marcotte, *supra* note 43 (“The image of the pinch-mouthed feminist scold telling the fun-loving boys to keep it down has quickly become a dinosaur, replaced now with the image of the knuckle-rapping church ladies telling third-wave feminists to roll up their stockings and tone down the dirty jokes on their ironically named blogs.”); Pollitt, *supra* note 58, at 44 (“The cheerful defiance, the in-your-faceness, the lack of hand-wringing and pleading—when was the last time feminism was this much fun?”); see also Crawford, *supra* note 30, at 118 (“Young women are reluctant to identify with the stereotype of the second-wave feminist, instead claiming to create ‘a joyful culture that makes being an adult woman who calls herself a feminist seem thrilling, sexy, and creative . . . .’”).

SlutWalk has deliberately forsaken feminist theory.<sup>71</sup> Despite the fact that SlutWalk protests sexual violence and the culture that surrounds it,<sup>72</sup> organizers and participants proceed without regard to established theoretical critiques of rape and rape culture.<sup>73</sup> While promoting its anti-rape agenda, SlutWalk valorizes female sexuality<sup>74</sup>—here, too, without attending to any number of theories that might tend to enrich or complicate this account.<sup>75</sup> Even if, as I will argue, existing legal frameworks are wanting,<sup>76</sup> it is notable that SlutWalk eschews the very enterprise of theorizing without even purporting to advance an alternative.

71. One of SlutWalk Baltimore’s organizers observes, “SlutWalk counts as the first event in years to energize the women’s rights movement. . . . [I]t is defiant and celebratory, and there are no feminist theory prerequisites to get involved.” Shawna Potter, *Finding Solidarity Through SlutWalk*, HOLLABACK! BALTIMORE (Oct. 21, 2011), <http://bmore.ihollaback.org/2011/10/21/finding-solidarity-through-slutwalk/> (internal quotation marks omitted). In a similar vein, a SlutWalk Johannesburg participant approvingly suggests that “[t]he world’s most astonishingly successful rape-awareness campaign has owed nothing to the bastions of theory-driven radical feminism.” Snyckers, *supra* note 44.

72. *See infra* text accompanying notes 93–109.

73. One commentator expresses approval of another’s objection to SlutWalk as, in effect, a “post feminist event” because it “assumes there is no patriarchal context that slutwalk exists within.” Anita Sarkeesian, *Link Round Up: Feminist Critiques of SlutWalk*, FEMINIST FREQUENCY (May 16, 2011), <http://www.feministfrequency.com/2011/05/link-round-up-feminist-critiques-of-slutwalk/> (quoting Ada Farrugia Conroy, *What Offends Me About SlutWalk*, BROKEN ARTED (May 11, 2011), <http://the-broken-arted.blogspot.com/2011/05/what-offends-me-about-slutwalk.html>). Another critic charges that SlutWalk endeavors to “decontextualize patriarchy to a super libertarian wet dream of personal preference.” *Four Brief Critiques of SlutWalk’s Whiteness, Privilege and Unexamined Power Dynamics*, PEOPLE COLOR ORGANIZE [Hereinafter *Four Brief Critiques of SlutWalk’s Whiteness*] (May 16, 2011), <http://www.peopleofcolor.tumblr.com/post/5542491947/four-brief-critiques-of-slutwalks-whiteness-privilege>. Among participants, however, abstracting violence from patriarchy is the rule, with few exceptions (like a sign reading “I Will Be Post-Feminist When There Is a Post-Patriarchy”). jambilailani, *SlutWalk NYC, MY F-ING LIFE* (Oct. 3, 2011), <http://myfinglife.wordpress.com/2011/10/03/slutwalk-nyc/> (internal quotation marks omitted); *see infra* Part II.B.3 (elaborating on the danger of decontextualization).

74. *See infra* text accompanying notes 110–15.

75. Given SlutWalk’s commitment to rape awareness, most striking is its failure even to consider how rape/rape culture might affect women’s sexuality. Catharine MacKinnon once declared, “We cannot think about sexuality and desire without considering the normalization of rape . . . .” CATHARINE A. MACKINNON, *Desire and Power*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 46, 61 (1987). Whether or not one ultimately accepts this proposition, it stands to be reckoned with. *See infra* Part II.B.

76. *See infra* text accompanying notes 228–37.

As it ignores theory, SlutWalk also overlooks the law. Given the initiative's origins,<sup>77</sup> its explicit focus on rape culture, including the culture of victim blaming,<sup>78</sup> may be unsurprising.<sup>79</sup> But, as we will see shortly, the movement is propelled by an underlying commitment to end rape.<sup>80</sup> Given this aim, a critique of culture alone is inadequate,<sup>81</sup> for it obscures how the criminal law itself functions to mediate and amplify the influence of culture on non-stranger rape.<sup>82</sup>

My intent is to highlight one little seen aspect of this dynamic by exploring the legal construction of female sexuality through rape law.<sup>83</sup> I will soon show how this construction is in-

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77. See *supra* note 24–25 and accompanying text.

78. See Tillotson, *supra* note 65 (“[W]omen in various states of dress or undress take to city streets to protest an attitude that holds victims responsible for inviting sexual violence.”); Papy, *supra* note 58 (“I don’t think the marches will ever be finished. . . . [R]ape culture isn’t going anywhere and we need marches for awareness and solidarity.” (quoting SlutWalk NYC organizer Melissa K. Marturano)).

79. It is also consistent with third-wave feminism generally. See Crawford, *supra* note 30, at 102–03 (“Third-wave feminist writers focus on social change, not on legal issues, strategies or theories.”).

80. One of SlutWalk’s organizers emphasizes that ending sexual violence is the movement’s “higher purpose.” Papy, *supra* note 58 (quoting Nicole C. Kubon). The SlutWalk Toronto web site articulates the movement’s mission as follows:

We are tired of being oppressed by slut-shaming; of being judged by our sexuality and feeling unsafe as a result. Being in charge of our sexual lives should not mean that we are opening ourselves to an expectation of violence, regardless if we participate in sex for pleasure or work. No one should equate enjoying sex with attracting sexual assault . . . . Join us in our mission to spread the word that those who experience sexual assault are not the ones at fault, without exception.

*Why?*, *supra* note 24.

81. I do not discount the possibility that SlutWalk’s focus on culture (and its corresponding overlook of legal theory and substantive law) has enhanced the size and force of its coalition. Cf. Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1735–36 (1994) (“Participants in legal controversies try to produce incompletely theorized agreements on particular outcomes. They agree on the result and on relatively narrow or low-level explanations for it.” (emphasis omitted)).

82. Only occasionally is “the system” mentioned. See, e.g., Kirschner, *supra* note 58 (reporting rally chants of “Blame the system not the victim!” (internal quotation marks omitted)). To the extent the criminal justice system is criticized, critique is leveled at individual actors (primarily police officers), rather than rape law itself. See, e.g., *id.* (describing participants’ rallying cry of “NYPD [New York Police Department], rape is a felony!” (internal quotation marks omitted)).

83. A good deal of literature documents the criminal justice system’s poor performance in non-stranger rape cases, focusing largely on the decision making of police, prosecutors, and jurors. See *supra* notes 4, 13. The role of rape

imical to sexual agency, undermining both anti-rape and pro-sex norms.<sup>84</sup> But before turning to the law, I will elaborate on the substantive claims of SlutWalk in order to begin the work of theorizing sexual agency.

## II. “LOVE SEX, HATE RAPE”<sup>85</sup>

This Part begins by examining the dominant tropes of contemporary feminist practice as evinced by SlutWalk.<sup>86</sup> The first of these I refer to as anti-rape, and the second as pro-sex. After summarizing each strand separately, I consider the tensions that result when they are integrated.<sup>87</sup> I identify three main areas of concern:<sup>88</sup> objectification,<sup>89</sup> sexualization,<sup>90</sup> and decontextualization.<sup>91</sup> With these dilemmas in mind, I suggest that sexual agency must be newly conceived.<sup>92</sup>

### A. SEX WITHOUT RAPE

SlutWalk is premised on the ubiquity of rape, most of it inflicted by acquaintances, dates, and intimates.<sup>93</sup> In the words of one participant, “Let’s acknowledge that sexual violence exists everywhere.”<sup>94</sup> Another explains that she is walking “because this kind of thing has happened to about half of the women I

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law in constructing female sexuality—and its influence on the criminalization of non-stranger rape—has received far less attention.

84. See *infra* text accompanying notes 238–42.

85. At SlutWalk Vienna, a sign read “Love Sex Hate Rape.” The photograph can be found at Gerald Henzinger, *SlutWalk Vienna 2011*, ENLUMEN (Oct. 23, 2011), <http://www.enlumenblog.net/slutwalk-vienna-2011> (click the right arrow overlaying the pictures; picture is marked 7/20 on the bottom). In Wales, protestors chanted, “[T]wo, four, six, eight, love sex, hate rape.” Rachel Conner, *Slutwalkers Take to Cardiff Streets*, PRACTICAL FEMINISM (June 4, 2011), <http://practicalfeminism.wordpress.com/tag/rape> (internal quotation marks omitted).

86. See *infra* Part II.A.

87. See *infra* Part II.B.

88. These areas may well overlap, but it is nevertheless fruitful to disaggregate them for analysis.

89. See *infra* Part II.B.1.

90. See *infra* Part II.B.2.

91. See *infra* Part II.B.3.

92. See *infra* Part II.C.

93. See *supra* text accompanying notes 1–4 (discussing the prevalence of non-stranger rape).

94. Maggie Cohen, *SlutWalk and the Legacy of White Feminism*, WHERE IS YOUR LINE? (Nov. 7, 2011), <http://whereisyourline.org/2011/11/slutwalk-and-the-legacy-of-white-feminism>.

know.”<sup>95</sup> Yet another, notes that “it happens everywhere.”<sup>96</sup> And a high school student says that she was at the rally, “not only to speak out for her friends and family that had been victimized [including her mother, who was raped the night of Homecoming,] but also to say she didn’t want it to happen to her little sisters, too.”<sup>97</sup> Participants find the status quo unacceptable.<sup>98</sup> Often angry<sup>99</sup> and defiant,<sup>100</sup> they decry rape<sup>101</sup> and the culture of victim-blaming that surrounds it.<sup>102</sup> Some wear the clothes they had on when raped.<sup>103</sup>

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95. Peck, *supra* note 49.

96. Phoebe Barghouthy, *SlutWalk Participants Emphasize Importance of Consent*, MICH. DAILY, Oct. 23, 2011, <http://www.michigandaily.com/news/slutwalk-emphasizes-importance-consent> (quoting an Ann Arbor resident) (internal quotation mark omitted).

97. *Slut Walk Promotes Right to Bare Legs*, DE ARCHIVES (Oct. 2, 2011, 7:50 PM), <http://archives.dailyegyptian.com/siu-2011/2011/10/2/slut-walk-promotes-right-to-bare-legs.html>.

98. See Griffin, *supra* note 43 (describing a sign taped to a baby girl’s stroller that read, “I Deserve to Grow Up in a World without Rape”); Peck, *supra* note 49 (“A protest might not change things overnight, but it’s important to send a message that the status quo is unacceptable.”).

99. “[Women’s] faces were filled with anger as they recalled a wealth of personal memories that have moved them to action.” Adam Polaski, *SlutWalk Ithaca: Reclaiming Our Bodies*, BUZZSAW, Nov. 2011, at 5, available at <http://www.buzzsawmag.org/2011/11/09/reclaiming-our-bodies> (The Body Issue); see also *supra* note 70 (reporting “cheerful” rally atmosphere); cf. Griffin, *supra* note 43 (reporting on “sassy yet simple ‘Fuck Rape’ [sign] in sparkly blue glitter”).

100. See Kirschner, *supra* note 58 (recounting rally cry of “When women’s rights are under attack, what do we do? Stand up fight back!”); Amanda Marcotte, *Six Reasons Why SlutWalk Is Awesome*, RH REALITY CHECK (Oct. 2, 2011, 9:01 PM), <http://rhrealitycheck.org/article/2011/10/02/slutwalk-just-awesome> (describing a chant of “Rapists, go f—yourselves!”).

101. “My body is not a cocktail party,” says one poet through the microphone . . . .” Kirschner, *supra* note 58; see also *supra* text accompanying note 80 (discussing SlutWalk’s purpose of ending violence).

102. See Marcotte, *supra* note 100 (“We are all affected by rape culture. The march featured people of different races, ages, backgrounds, sexual orientations, and gender identities, but all of us had felt the sting of victim-blaming for sexual violence.”); *Why?*, *supra* note 24 (declaring SlutWalk Toronto’s mission statement).

103. See Kirschner, *supra* note 58 (remarking on a “conservatively dressed girl holding a sign reading ‘This Is the Outfit I Was Raped In’”); Tillet, *supra* note 43 (“[At the DC march,] the women who stood out the most were rape survivors wearing the clothes they had been assaulted in—from pajamas to thigh-high boots—carrying signs that said, ‘This Is What I Was Wearing When I Was Raped.’”); see also Peck, *supra* note 49 (“I’m going to wear the plain brown dress I was wearing one night a few years ago when I was almost definitely sexually assaulted. I say ‘almost definitely’ because I can’t remember what happened, but basically, I know that sex was had, and that I didn’t re-

In placing sexual violation at the top of its agenda, SlutWalk replicates earlier feminist activism.<sup>104</sup> But in emphasis, there is an important difference.<sup>105</sup> SlutWalk implicitly challenges the stranger-rape paradigm. It is not “The Night” being reclaimed this time around<sup>106</sup> but sexuality.<sup>107</sup> Sexual violence is no longer primarily located in a dark alley. Instead, it is seen as occurring in the very same places where sex between intimates and acquaintances takes place.<sup>108</sup>

Just as sexual violation occurs in the setting of relationships<sup>109</sup> so, too, does wanted sex. This brings us to SlutWalk’s more radical departure from prior feminist efforts—its deliberate embrace of female sexuality in service of an anti-rape agen-

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member it, and that I was probably passed out (or at best, incredibly groggy) at the time.”).

104. Though SlutWalk disclaims reliance on theory, the centrality of sexual violation (with which the movement is primarily concerned) is also a hallmark of radical feminism. In Catharine MacKinnon’s influential words, “Sexuality is to feminism what work is to Marxism: that which is most one’s own, yet most taken away.” Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 *SIGNS* 515, 515 (1982); see also Robin West, *Law’s Nobility*, 17 *YALE J.L. & FEMINISM* 385, 395 (2005) (suggesting that this statement “might be the most important single utterance of twentieth-century radical political thought”). Notwithstanding this convergence, SlutWalk’s pro-sex agenda sharply contrasts with the account of sexuality offered by radical feminists. See *infra* text accompanying note 164 (discussing radical feminism’s view of sexuality).

105. Susan Estrich, among a small group of legal scholars, has been attending to non-stranger rape for decades. See Estrich, *supra* note 4, at 1161–69, 1171–72 (discussing, in 1986, the legal issues of non-stranger rape). Even so, what we see today in terms of prioritization for feminist activism is different.

106. See *supra* text accompanying note 43 (comparing SlutWalk to Take Back the Night rallies).

107. Cf. *I Saw the Sign*, *supra* note 56 (“It’s inspiring to see women coming together to protest the all-too-real threat and reality of rape and to reclaim our right to define and exercise our respective sexualities outside the context of patriarchy.”).

108. Cf. The Advocates for Human Rights, *Date and Acquaintance Sexual Assault*, STOP VIOLENCE AGAINST WOMEN, [http://www.stopvaw.org/date\\_and\\_acquaintance\\_sexual\\_assault](http://www.stopvaw.org/date_and_acquaintance_sexual_assault) (last updated Feb. 22, 2012) (discussing the definitions and respective prevalence of acquaintance, date, and party rape). These are places where consensual sex may also occur. See discussion *infra* note 109 and accompanying text (elaborating on relationships and consensual sex).

109. I am using the word “relationship” loosely here, to encompass any association with someone who is known: intimately, hardly, or somewhere between. In this general sense, it is within relationships that consensual sex may also occur. According to the dictates of SlutWalk, this consensual sex is to be fully celebrated. See *infra* notes 110–15 and accompanying text.

da.<sup>110</sup> Sexual desire, possible and realized, is central.<sup>111</sup> Women chant, “[Y]es means yes,”<sup>112</sup> and extol the virtues of liberated sex.<sup>113</sup> As one participant remarks, “I wanted to be confrontational and unapologetic for owning my sexuality.”<sup>114</sup> This ven-

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110. Katha Pollitt remarks that these women, even beyond delivering an anti-rape message, “are making a radical challenge to foundational ideas about women’s sexuality—and men’s.” Pollitt, *supra* note 58, at 9; *see also* Nona Willis Aronowitz, *A Tale of Two Protests: Why SlutWalk Works Better than Occupy Wall Street*, GOOD (Sept. 30, 2011, 2:30 AM), <http://www.good.is/post/a-tale-of-two-protests-why-slutwalk-works-better-than-occupy-wall-street> (“SlutWalk gets down to business while advocating pleasure.”).

111. This strand of SlutWalk sounds loudly in sex positive feminism. *See* Noor Al-Sibai, *We Need Positive Feminists—Sex Positive Feminists, That Is*, FEMINSPIRE (July 3, 2013), <http://feminspire.com/we-need-positive-feminists-sex-positive-feminists-that-is/> (noting that the “SlutWalk movement of 2011” was the “coming out celebration” for sex positive feminism). As Rosalind Dixon helpfully summarizes the theory:

Sex-positive feminists challenge the premises of dominance feminism. They argue that while sex might in some cases be a source of danger for women, it is also a potentially important site of pleasure, fulfillment, and even power. In this sense, they share the approach of other “partial agency” feminist theorists, who emphasize the possibilities for, rather than simply constraints on, female agency. A key source of injustice, for sex-positive feminists, is the way in which women’s sexual agency is limited by prevailing ideologies, particularly “repronormative” ideologies, i.e., those that valorize reproduction over other socially productive activities and casts non-reproductive sex for women as dangerous and illegitimate.

Rosalind Dixon, Note, *Feminist Disagreement (Comparatively) Recast*, 31 HARV. J.L. & GENDER 277, 282 (2008) (footnotes omitted). It is interesting that SlutWalk, the most significant sex positive feminist initiative to date, comes in service of rape protest.

112. *See, e.g.*, Karis Hanson, *SlutWalk: Whatever We Wear, Wherever We Go, Yes Means Yes and No Means No!*, F WORD (Sept. 25, 2012, 4:24 PM), [http://www.thefword.org.uk/blog/2012/09/slutwalk\\_london\\_2](http://www.thefword.org.uk/blog/2012/09/slutwalk_london_2).

113. *See, e.g.*, Cohen, *supra* note 94 (“I quickly embraced the goals of SlutWalk. I have a right to my sexuality, and I am exhausted from trying to dispel myths that women in touch with their sexuality deserve violence.”); Amanda Marcotte, *Defending SlutWalk*, SLATE (May 13, 2011), [http://www.slate.com/blogs/xx\\_factor/2011/05/13/feminist\\_infighting\\_over\\_slutwalk\\_commence.html](http://www.slate.com/blogs/xx_factor/2011/05/13/feminist_infighting_over_slutwalk_commence.html) (“When it comes to sex, women are as dirty as the next man, but they don’t have the same right to act out their fantasies. If they’re to be liberated, women have to demand the right to be dirty.” (quoting Australian feminist Germaine Greer) (internal quotation marks omitted)); Papy, *supra* note 58 (“[T]he point is extending basic sexual liberty to women benefits the health of the nation! Happier partners, healthier children, more wholly free and competent selves!” (quoting SlutWalk NYC co-organizer Rebecca Katherine Hirsch)).

114. Papy, *supra* note 58 (quoting SlutWalk NYC co-organizer Melissa K. Marturano).

eration of sex is not coincidental. Rather, it is intricately connected to rape protest as an animating feature of SlutWalk.<sup>115</sup>

On first glance, the picture that emerges from SlutWalk's anti-rape, pro-sex initiative might seem paradoxical.<sup>116</sup> How can so many women be victimized by sexual violence and still glorify sex? As a related matter, why has a globalized exaltation of female sexuality been integral to a frontal attack on rape? Answering these questions requires reconciling SlutWalk's anti-rape and pro-sex motifs. We will see that this inquiry ultimately surfaces the primacy of sexual consent and the agency it is thought to represent.<sup>117</sup>

Let us begin by considering that SlutWalk seeks to contest cultural formulations of "bad victims," women unworthy of protection from sexual violence.<sup>118</sup> The movement proceeds from the proposition that the dominant culture excuses rape when it is inflicted on women deemed *too* sexual.<sup>119</sup> Accordingly, "reclaiming" female sexuality—or altering its normative significance—becomes a way of subverting the very notion of "bad victimhood."

Explanations of SlutWalk's agenda often encompass this rationale. According to one participant, the protest challenges the belief "that women who act in pleasure-seeking ways are transgressive and that crimes against them aren't so bad."<sup>120</sup>

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115. See Caitlin Flanagan, *The Trouble with SlutWalks: They Trivialize Rape*, DAILY NEWS, Aug. 4, 2011, <http://www.nydailynews.com/opinion/trouble/slutwalks-trivialize-rape-article-1.944247> ("SlutWalks are dedicated to an audacious proposition: that the erotic desires of sexually adventurous women can be celebrated at the same time and during the very same event, that they demand improved protection from rape."); Marcotte, *supra* note 100 ("SlutWalk uses an anti-rape message to sell sex positivity as much as anything else."); Papy, *supra* note 58 (quoting SlutWalk NYC co-organizer Rebecca Katherine Hirsch as stating, "A SlutWalk goal of mine is to normalize and broaden our conceptions of female sexuality, male sexuality, trans sexuality, etc. in all their diversity and potentiality, and to not reflexively vilify sex as 'evil' or reduce it to the most petrified, uptight, TAUGHT (as opposed to natural) 'male' standard of attack-penetrate-flee").

116. Because each of the theories most relevant to the anti-rape and pro-sex strands individually falls short of providing an adequate account of the other, it is fair to say that this apparent paradox is undertheorized.

117. See *infra* Part II.B.

118. See Estrich, *supra* note 4, at 1088 ("I learned, much later, that I had 'really' been raped. Unlike, say, the woman who claimed she'd been raped by a man she actually knew, and was with voluntarily. Unlike, say, women who are 'asking for it' and get what they deserve.").

119. See *supra* text accompanying note 10 (elaborating on rape culture).

120. Marcotte, *supra* note 113; see also Marcotte, *supra* note 100 ("For many people, female sexuality is threatening and they respond with violence.

One of SlutWalk New York City's organizers observes that "[r]ape culture' exists because women are culturally instructed to be viewed as objects, not agents with exciting, beneficial sexual things to . . . share. . . ." <sup>121</sup> A commentator suggests that SlutWalk is "attacking the very division of women into good girls and bad ones, madonnas and whores." <sup>122</sup> By centering female sexuality, SlutWalk seeks to explode a dichotomy that perpetuates (selective) victim blaming.

At the same time, women are using the occasion of a rape protest to affirm the fundamental importance of sexuality. <sup>123</sup> The harm of rape is real; <sup>124</sup> indeed the omnipresent threat of rape is itself oppressive. <sup>125</sup> As evinced by the Toronto police officer's now-infamous advice, <sup>126</sup> women the world over are pressured to conform their sexual behavior to benchmarks of acceptability in order to mitigate this threat. SlutWalk's celebration of sexuality is powerful testament to a collective will to resist these pressures. <sup>127</sup>

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And we, the SlutWalkers and SlutWalk allies, are standing up to say, 'Enough.'").

121. Papy, *supra* note 58 (quoting SlutWalk NYC co-organizer Rebecca Katherine Hirsch).

122. Pollitt, *supra* note 58, at 9; *see also* Flanagan, *supra* note 115 (calling SlutWalk "a kind of Stonewall for lusty women, a loud, angry cry to live freely and be treated the same as sexually conventional women").

123. *Cf.* Crawford, *supra* note 30, at 122 ("Third wave feminism celebrates the centrality of sexual pleasure and the woman who knows how to achieve it.").

124. *See* Kenyon Farrow, *My Remarks for SlutWalk NYC*, KENYON FARROW (Oct. 2, 2011), <http://kenyonfarrow.com/2011/10/02/my-remarks-for-slutwalk-nyc/> ("I hope that we are able to own the real legacies of trauma many of us face in terms of the ways in which we are sexualized and criminalized in communities and by the state, to say nothing of the acts of violence that have been committed against us.").

125. *See* Marcotte, *supra* note 100 ("SlutWalk gets your buy-in with the anti-rape message, and then sells you on the idea that rape is more than a crime against a single woman but part of a larger system that robs women of our freedom, our pleasure, and our right to live as we see fit."). Some participants explicitly draw a connection between rape and other forms of sexual subordination. *See, e.g.,* Papy, *supra* note 58 ("[W]e're feminists, and we dare to ironically, though seriously, call out bullshit on rape culture and repressive standards of sexuality." (quoting SlutWalk NYC organizer Melissa K. Marturano)).

126. *See supra* text accompanying note 25.

127. *See, e.g.,* Snyckers, *supra* note 44 ("[SlutWalk] is about a woman's right to wear WHATEVER she chooses, and to express her sexuality HOWEVER she chooses, without fear of oppression."); Tillet, *supra* note 43 ("For me, walking alongside women who confidently wore the clothing in which they had been sexually assaulted was exciting and empowering. As a black woman and a rape survivor, it was one of the only times in my life that I felt like I

Condemning sexual violence becomes an opportunity for proclaiming that sexual desire exists,<sup>128</sup> and it is valued,<sup>129</sup> even in a world of widespread sexual violation. While acknowledging the backdrop of rape,<sup>130</sup> women are asserting, often explicitly,<sup>131</sup> a sexuality of their own.<sup>132</sup>

“We want sex! Not assault!”<sup>133</sup> The protesters’ simple demand captures the essence of SlutWalk, which defies neat characterization as pro-sex or anti-rape, because it is both.<sup>134</sup> For the women participating, the distinguishing feature of sex (which, again, women “want”) is the presence of mutual consent.<sup>135</sup> No particular type of sex is promoted over any other.<sup>136</sup> And while desire is a recurring theme,<sup>137</sup> it is consent that emerges as SlutWalk’s touchstone.

SlutWalk New York City’s mission statement reflects this orientation: “No matter who you are. No matter where you work. No matter how you identify. No matter how you flirt. No matter what you wear. No matter whom you choose to love. No

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could wear whatever I wanted, wherever I wanted, without the threat of rape.”); *Why?*, *supra* note 24 (“No one should equate enjoying sex with attracting sexual assault.”).

128. *See supra* text accompanying notes 110–15.

129. *Id.*

130. *See supra* text accompanying notes 93–109 (discussing SlutWalk’s anti-rape agenda).

131. *See, e.g.,* Papy, *supra* note 58 (“I wanted to be confrontational and unapologetic for owning my sexuality . . . .” (quoting SlutWalk NYC organizer Melissa K. Marturano)).

132. Women and men participating in SlutWalks have made similar observations. *See* Farrow, *supra* note 124. Farrow concludes the passage by asserting that pervasive sexual violence “does not negate nor render impossible the many of us who, despite those legacies [of trauma], own our overt sexuality or promiscuity, and see it as a liberatory process.” *Id.*; *see also* Polaski, *supra* note 99, at 5 (reporting remarks of a college senior who was raped by her boyfriend as a teenager, urging women to “reclaim’ their bodies and to declare that they are allowed to experience pleasure”). For a discussion of challenges to these ideas, *see infra* Part II.B.1.

133. Polaski, *supra* note 99, at 5 (internal quotation mark omitted) (describing chant at Ithaca protest).

134. As we will soon see, “sex, not assault” explains the emergence of consent as the movement’s unifying principle. *See infra* notes 138–56 and accompanying text.

135. *See infra* notes 138–44 and accompanying text.

136. *See* Farrow, *supra* note 124 (discussing how the purpose of SlutWalk extends to gay, straight, bisexual, and queer men); Papy, *supra* note 58 (“Straight sex is not more special than queer sex.” (quoting SlutWalk NYC organizer Rebecca Katherine Hirsch)).

137. *See supra* text accompanying notes 110–15 (discussing SlutWalk’s embrace of female sexuality).

matter what you said before: NO ONE has the right to touch you without your consent.”<sup>138</sup> At rallies around the country, signs and shirts express a similar orientation: “Got Consent?,”<sup>139</sup> “A short skirt is not an invitation,”<sup>140</sup> “My Dress is not a Yes,”<sup>141</sup> “Whether scantily dressed or fully dressed, clothing does not equal consent,”<sup>142</sup> and “Sex Is Something You Do Together, Not Something You Do To Someone Else.”<sup>143</sup> When reflecting on SlutWalk’s purpose, participants often cite the desideratum of consent.<sup>144</sup>

But the meaning of consent is thinly sketched. The minimal definition that has evolved derives mostly from elaboration on what consent is not.<sup>145</sup> Nonetheless, we may surmise a number of features of the consent construct advanced by SlutWalk.<sup>146</sup> Consent is affirmative: “Consent is a clear and freely given ‘yes,’ not the absence of a ‘no . . . .’”<sup>147</sup> Moreover, because women are sexual beings,<sup>148</sup> their consent expresses not simply acquiescence<sup>149</sup> but desire itself.<sup>150</sup> As one rally sign proclaims, “Consent is Sexy.”<sup>151</sup>

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138. Papy, *supra* note 58.

139. Tillet, *supra* note 43.

140. Barghouthy, *supra* note 96.

141. Griffin, *supra* note 43.

142. Harsha Walia, *Slutwalk—to March or Not to March*, FEMINISTING (May 18, 2011), <http://feministing.com/2011/05/18/slutwalk-to-march-or-not-to-march/>.

143. jambilaleilani, *supra* note 73.

144. See, e.g., Barghouthy, *supra* note 96 (“[T]he walk drew important attention to the issue of consent.”); Farrow, *supra* note 124 (“Being slutty and promiscuous is not incongruent with dignity, self-esteem or consent!”); hanalei, *Critique of SlutWalk on Behalf of All Women of Color Communities*, FEMINISTING (Sept. 26, 2011), <http://community.feministing.com/2011/09/26/critique-of-slutwalk-on-behalf-of-all-women-of-color-communities/> (“I understand that this is about consent.”); Walia, *supra* note 142 (“I marched to mark the unceded territory of women’s bodies. . . . Most heartening was the significant number of teenagers, who are perhaps most pressured against affirming consent . . .”).

145. See *supra* text accompanying notes 137–44 (discussing SlutWalk’s stance against non-consensual sex).

146. These are based on expressions of what constitutes consent’s absence, as well as on the movement’s foregrounding of female sexual desire.

147. Barghouthy, *supra* note 96 (quoting SlutWalk participant Jenny Hansen).

148. See *supra* text accompanying notes 110–15 (discussing the centrality of women’s sexuality to the movement).

149. How frequently this is actually the case is a difficult question, about which I will have more to say later. See *infra* Part II.B.3.

As a pivot point for the sex/rape distinction,<sup>152</sup> the idea of consent—and the woman who gives or withholds it—is foundational to SlutWalk.<sup>153</sup> By demanding sex without rape and insisting that consent distinguishes the two, women are in effect declaring their sexual agency.<sup>154</sup> Because sexual agency unifies SlutWalk’s dual mission,<sup>155</sup> the concept has been given new

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150. Cf. Peck, *supra* note 47 (“A lot of the SlutWalk’s message is that you should do (or not do) sexual things because they make you happy, and not because someone else is pressuring you to do (or not do) them.”).

151. Polaski, *supra* note 99, at 5 (describing Ithaca rally).

152. While this distinction makes good sense in some contexts—primarily, the criminal justice arena—it may well be overly simplistic, as a general proposition, to “love sex” (while “hating rape”). See *supra* text accompanying note 85. I elaborate on this idea in later discussion. See *infra* Part II.B.3.

153. By contrast, the law in most jurisdictions does not make consent dispositive when marking the border between sex and rape. See *infra* notes 243–44 and accompanying text.

154. This assertion is largely channeled into talk of consent. One rare exception is the comment by a self-described sex worker who explains that “SlutWalk is about my choices, however complex they may be, feeling good about my agency, and insisting that I deserve to be safe.” Trisha Low, *On SlutWalk NYC, Occupy Wall Street, and Why on Saturday, My Sex Work Has Nothing to Do with Your Capitalism*, WHERE IS YOUR LINE? (Sept. 29, 2011), <http://whereisyourline.org/2011/09/on-slutwalk-nyc-occupy-wall-street-and-why-on-saturday-my-sex-work-has-nothing-to-do-with-your-capitalism/>. For concerns about decontextualizing agency, see *infra* Part II.B.3.

155. Because I am most interested in problems of agency raised by SlutWalk, I do not focus on concerns about the name, except insofar as they expose problems of essentialism. It should be noted, however, that the name itself has provoked much, if not most, of the popular criticism. See, e.g., Keli Goff, *Dear Feminists, Will You Also Be Marching in N\*\*\*erwalk? Because I Won't*, HUFFINGTON POST (Oct. 3, 2011, 8:22 PM), [http://www.huffingtonpost.com/keli-goff/slutwalk-new-york\\_b\\_993261.html](http://www.huffingtonpost.com/keli-goff/slutwalk-new-york_b_993261.html) (“You can’t ‘reclaim’ a word defined by a predominant group in power unless you are a part of that group.”); Sarkeesian, *supra* note 73 (“While the organizers of the SlutWalk might think that proudly calling themselves ‘sluts’ is a way to empower women, they are in fact making life harder for girls who are trying to navigate their way through the tricky terrain of adolescence.” (quoting Gail Dines & Wendy J. Murphy, *SlutWalk Is Not Sexual Liberation*, GUARDIAN (May 8, 2011, 1:34 PM), <http://www.theguardian.com/commentisfree/2011/may08/slutwalk-is-not-sexual-liberation>)); see also Allie Grasgreen, “SlutWalks” Attract Attention, Controversy Internationally, USA TODAY, Oct. 5, 2011, <http://usatoday30.usatoday.com/news/education/story/2011-10-05/slutwalk/50670972/1> (“Chief among the criticisms [of SlutWalk] is the event’s title . . .”). While the linguistic implications of “slut” and the relative merits of reclamation remain outside the scope of further discussion, the underlying conceptual issues implicated by the term will be addressed shortly. See *infra* Part II.B.

stature. This may ultimately prove to be the movement's enduring contribution to legal theory.<sup>156</sup>

The next section examines the implications of this turn by describing the female sexual subject constructed by an anti-rape, pro-sex agenda. To do so, I first explore the dilemmas that inhere in sexual agency.<sup>157</sup> I then propose a conceptual framework that accommodates these tensions,<sup>158</sup> thereby enabling a deeper understanding of what sexual agency entails.

## B. SEXUAL AGENCY QUANDARIES

The new normative significance afforded sexual agency provides strong impetus to elaborate on its meaning. Sexual agency is not simply derived from a pro-sex orientation, as a simplistic account of SlutWalk might suggest. Rather, core tensions inhere in the concept of agency that threaten to undermine it, particularly if these tensions are overlooked. I identify these tensions as objectification, sexualization, and decontextualization.<sup>159</sup>

### 1. Objectification

SlutWalk presumes that women's sexuality is their own, and their desires therefore are to be celebrated.<sup>160</sup> But there is reason to be skeptical of this premise. Particularly at its most performative,<sup>161</sup> the movement presents the possibility that

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156. In turn, legal theory requires some reworking to accommodate insights into sexual agency that have emerged from practice. *See infra* Part II.C.

157. These dilemmas are starkly presented by SlutWalk but are by no means confined to it. For an agentic view of female sexuality to positively influence theory and practice, these tensions must be confronted.

158. *See infra* Part II.C.

159. *See supra* text accompanying note 88 (noting potential for overlap between the three areas).

160. *See, e.g.,* Papy, *supra* note 58 ("I justified using the name [SlutWalk] because I wanted to ridicule it, I wanted to suck the venom out of it, I wanted to be confrontational and unapologetic for owning my own sexuality . . . ." (quoting SlutWalk NYC co-organizer Melissa K. Marturano)).

161. For instance, pole dancing comes to mind. *See* Grasgreen, *supra* note 155 ("[A]t SlutWalk NYC one weekend, one woman pole-danced while male onlookers filmed the scene with their phones."). The question of performance is also raised by women's dress at the rallies, which have been described by competing accounts. *Compare, e.g.,* Goff, *supra* note 155 ("Fair or not, the images from SlutWalk send the message that when push comes to shove, young women will always fall back on taking off their clothes to get attention, even when it comes to making a serious political statement."), and Griffin, *supra* note 43 ("[T]here was a cascade of short skirts, lace tights, knee high black boots and the color red."), with Aronowitz, *supra* note 110 ("The protest has been criti-

women's sexual conduct (and even preferences)<sup>162</sup> are contorted by patriarchal structures.<sup>163</sup>

This prospect finds abundant support in a long tradition of radical feminist critique of women's sexuality as inseparable from women's oppression.<sup>164</sup> From this vantage, women's claims of sexual subjectivity are simply false. Because men have the power to violate and objectify women, men define the meaning of female sexuality (to their own advantage), irrespective of whether women recognize this reality. The very notion of subjectivity is therefore misguided. As Catherine MacKinnon once remarked, "All women live in sexual objectification the way fish live in water."<sup>165</sup>

Critics of SlutWalk voice related objectification concerns,<sup>166</sup> which are acknowledged even by movement supporters.<sup>167</sup> As

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cized for pressuring women to wear Girls-Gone-Wild outfits, but the reality is that while some women stuff themselves into bustiers and stilettos, others rock sweatpants. Most wear something in between.").

162. Robin West helpfully distinguishes between preferences and conduct. West, *supra* note 104, at 388 ("What we *should* doubt . . . are not women's sexual *desires* but rather women's sexual *choices*, and particularly women's choices to engage in sex—of any description—that is *not* desired.").

163. Duncan Kennedy, *Sexual Abuse, Sexy Dressing and the Eroticization of Domination*, 26 NEW ENG. L. REV. 1309, 1387 (1992) ("Doing and appreciating sexy dress is flawed as pleasure/resistance . . . . It is asymmetrical. The (straight white middle class) men (or man) watch and the woman performs. It seems plausible to me that this pattern reinforces, helps reproduce one of the bad aspects of patriarchy: its construction of woman as the object of the attentive, adoring, excited male gaze, the actress active by being-for-the-men, while the men dispose of her fate, and the fate of the world, on the side.").

164. See, e.g., Dixon, *supra* note 111, at 282 (explaining that dominance feminism, as radical feminism is often called, posits that "female identity and the feminine as we know it are the pure products of a system of sexual subordination in which men defined themselves as subjects, and women as objects"); West, *supra* note 104, at 399 ("Preference and choice are constructed hand-in-hand with the individual: what the individual is—she, from whom sex is taken—will dictate what the individual prefers—she prefers to give her sex, largely so as to avoid the threat to life entailed by its forceful, coerced expropriation." (restating an argument by Catharine MacKinnon)).

165. MACKINNON, *supra* note 42, at 149.

166. See, e.g., Flanagan, *supra* note 115 ("Get a group of barely dressed women to shout about how horny they are, and men will reliably show up to cheer them on and get their digits."); Rebecca Traister, *Ladies, We Have a Problem*, N.Y. TIMES MAG., July 24, 2011, at 9–10 ("Scantly clad marching seems weirdly blind to the race, class and body-image issues that usually (rightly) obsess young feminists and seems inhospitable to the scads of women who, for various reasons, might not feel it logical or comfortable to express their revulsion at victim-blaming by donning bustiers."); Miriam, *supra* note 36 ("[I]f the choice of sexual self-presentation was such a free choice why does it seem to come in only one flavor, namely, some variant of the patriarchal

one women warns, “There are going to be a lot of men lined up to watch this—and they’re not going to be celebrating women’s rights.”<sup>168</sup> But the movement itself stands in opposition to the idea of female sexuality as subordination. Put differently, the impossibility of sexual agency cannot be squared with SlutWalk—unless, as an epistemological matter, the collective consciousness it manifests is utterly disregarded.<sup>169</sup>

If this false consciousness approach is rejected as unconvincing, unworkable, or both,<sup>170</sup> SlutWalk must be accepted as a

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construct of ‘slut’? And why does corporate patriarchy have such a mammoth investment in this construct?”); Kirstin Powers, *Slut Walks Don’t Help Women*, DAILY BEAST (May 19, 2011), <http://www.thedailybeast.com/articles/2011/05/19/slut-walks-are-organized-by-liberal-feminists-but-dont-help-women.html> (“Feminists are supposed to be countercultural, yet by marching in fishnets and bras with the word ‘slut’ scrawled on their bodies, they are simply imitating a culture that objectifies and hypersexualizes women and girls on a scale never before seen in history . . . . Do [the walkers] really think that when men see scantily clad women holding signs saying ‘Slut Pride,’ the first thing they think of is women’s empowerment?”). For a somewhat more complicated account, see Griffin, *supra* note 43 (“[M]any women . . . were unafraid to bare cellulite, stretch marks and tummy fat, all of which are typically outlawed by dominant size and beauty ideals. Baring the parts of themselves most vulnerable to cruel public commentary, they sauntered and strutted with a tangible sense of body confidence . . .”).

167. For instance, one participant poses the question, “How might the SlutWalk be reproducing oppression in this very moment?” Griffin, *supra* note 43.

168. Tillotson, *supra* note 65 (quoting Kristine Holmgren, a feminist playwright).

169. See Crawford, *supra* note 30, at 166 (“[T]hird-wave feminists reject the suggestion that women act with a false consciousness. Third-wave feminism values an individual’s account of his or her own experience and trusts it as accurate.” (footnote omitted)).

170. I am persuaded by this assessment:

The pragmatist-feminist brackets the question of false consciousness. She sees that for women living in patriarchy, women’s experience of patriarchal life is partially self-constitutive. She forbears from demanding of women, of herself, the impossible: the self-destroying regimen of constantly remarking, in one’s every moment of self-fulfillment *as woman*, the mark, the trace, of deprivation of self. Not only do those moments of self-fulfillment, lived in patriarchy, partially constitute identity for women in patriarchy, they also constitute the beginning (not the end) of knowledge of a possible better world and determination to strive towards it. Conventional femininity is where we start, it is what we have to work with. No pragmatist would want women to detach thought and action from desire. No pragmatist would want to waste the concrete knowledge wrought by women living, speaking, finding voices, under male domination.

Margaret Jane Radin & Frank Michelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. PA. L. REV. 1019, 1050–51 (1991). Robin West also warns about “the practical consequence . . . of putting into serious ques-

rape protest rooted in the genuine valuation of female sexuality. The movement maintains that sex is not per se subordination, and agency is possible.<sup>171</sup> Yet it also affirms that elements of the objectification critique are valid: sex can be subordinating, and agency is not always possible.<sup>172</sup>

Women seek to exercise a *meaningful* degree of sexual agency—and often achieve it, but not always. They certainly don't exercise this when they are raped. Perhaps they exercise this when they pole dance in the streets, and perhaps not.<sup>173</sup> When men line up to watch the march,<sup>174</sup> their reasons for doing so may matter, and they may not. All of this brings to mind a spectrum, rather than the complete presence or absence of women's agency.<sup>175</sup>

A refurbished understanding of objectification accounts for the real possibility of female sexual subjectivity. It credits the validity of female sexual desire.<sup>176</sup> At the same time, it proclaims that, in a world of massive sexual violation, subjectivity and desire too often founder.

## 2. Sexualization

Any effort to move female sexual agency to the fore raises the specter of sexualization, which occurs when an imposed level of hypersexuality subsumes other (i.e., non-sexual) as-

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tion the authenticity or falsity of felt preferences and desires, rather than viewing those preferences and desires as the baseline of our evaluative practices . . . ." Robin West, *Relativism, Objectivity, and Law*, 99 YALE L.J. 1473, 1495 (1990).

171. See *supra* text accompanying notes 110–15.

172. Insofar as postmodern feminism is inclined to minimize the significance of sexual violation, it fails to account for the primacy of SlutWalk's anti-rape commitments. Cf. West, *supra* note 104, at 427 ("[S]exuality per se should not be understood as (primarily) a site of political exploitation and violence. It should be understood, rather . . . as (primarily) a site of liberation and transgression. Consequently, not only should women's sexual choices be embraced . . . but sex should be more or less valorized, and women's claims of sexual victimization should be viewed skeptically." (footnote omitted)) (summarizing views of postmodern critics); *id.* at 439–44 (critiquing these views).

173. Of course, I don't pretend to know the answer.

174. See *supra* text accompanying note 155 (quoting Grasgreen).

175. See *infra* Part II.C.

176. West, *supra* note 104, at 38 ("We should at least be neutral—neither critical nor confident—regarding the degree to which our desires, if fulfilled, will give pleasure, and whether their satiation will serve our interests. What we should doubt . . . are not women's sexual desires but rather women's sexual choices, and particular women's choices to engage in sex—of any description—that is not desired.").

pects of women's identity. The danger is that women who explicitly embrace their sexuality will be defined primarily as sexual beings.<sup>177</sup> This definition may even extend to women who do not explicitly embrace their sexuality.<sup>178</sup> SlutWalk's pro-sex advocacy raises this dilemma.

The harm of sexualization impacts women in many different ways.<sup>179</sup> But Black women are particularly situated to suffer from a discourse that promotes female sexuality as a uni-

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177. Among others, Ruth Colker has questioned the extent to which sexuality should be emphasized by feminists given that patriarchy has long defined women by their sexuality. She writes:

An emphasis on sexuality within a woman's life may be feminine but not feminist. Patriarchy has made sexuality a crucial component of women's lives by making it central to women's oppression and subordination. Because women have never had the freedom to experience their authentic sexuality, it is impossible to know whether expressions of sexuality would be central to a woman's free and authentic life. In a transformed society, the importance of sexuality in a woman's life might dissipate or disappear. In existing society, the energy that women expend on developing sexual connectedness, love, compassion, etc., may be evidence of their brokenness and subordination rather than their authenticity.

Ruth Colker, *Feminism, Sexuality, and Self: A Preliminary Inquiry into the Politics of Authenticity*, 68 B.U. L. REV. 217, 231 (1988) (footnote omitted).

178. See Nathaniel Berman, *Roundtable Discussion: Subversive Legal Moments*, 12 TEX. J. WOMEN & L. 197, 211–12 (2003) (querying whether there is “too much sexuality in ‘Women and the Law’” due to the “improper eroticization of women”); Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809, 868 (2010) [hereinafter Rosenbury & Rothman, *Sex In and Out of Intimacy*] (suggesting that “sex may currently play such an important role in some people's lives because of the historic construction of sex by the state and other social forces,” and expressing hope that more sexual liberty will make sex a less exceptional activity).

179. As Dixon explains:

In an intersectional feminist account, both sex and gender hierarchies circulate and intersect with other hierarchies in ways that make gender injustice deeply contextual in nature. Both the sources and nature of gender injustice must therefore always be considered with close attention to the way in which sex and gender intersect with race and class and other axes such as religion, age, disability, sexual orientation, and immigrant status. Intersectional feminists also argue that feminists should be extremely cautious about attempting to identify sources of commonality across women's diverse experiences, understanding the act of foregrounding sex or gender as axes of subordination as exercising power that depends upon and reflects the race and class privilege of the speaker. Claims of commonality are treated as deeply suspect unless they arise from broadly mobilized forms of feminist coalitional politics in which all women have the opportunity to speak for themselves in describing the nature of their experiences and making claims for redress.

Dixon, *supra* note 111, at 283–84.

versal good.<sup>180</sup> Images of the Jezebel have endured since slavery,<sup>181</sup> leaving Black women vulnerable to widespread sexual violence with little recourse.<sup>182</sup> The idea of reclaiming sexuality thus has a different meaning in this context than it possesses for white women,<sup>183</sup> whose past and present sexualization is not rooted in slavery.<sup>184</sup>

Many Black women have effectively asserted that their experiences of sexualization contradict SlutWalk's unstated as-

180. There is a rich feminist literature to draw upon for understanding this phenomenon. See generally Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990). Martha Chamallas's summary description is particularly useful:

The key insight of these theories [intersectional feminism, critical race feminism, or anti-essentialist feminism] is that gender hierarchies intersect and circulate with other social hierarchies such as race, class, age, sexual orientation, disability, and immigrant status. The "anti-essentialist" feature of these theories resists finding commonalities among all women, stressing that women are situated differently and experience distinctive kinds of discrimination. It also recognizes that as women we are simultaneously privileged and subordinated along different dimensions. Anti-essentialist feminists are also more willing to acknowledge that women can and do oppress other women. [Anti-essentialist scholars] have stressed the importance of a 'bottom up' feminism centering on the experience of women of color and working class women, whose stories tend to be eclipsed in mainstream feminism agendas.

Chamallas, *supra* note 17, at 168 (footnotes omitted).

181. Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT L. REV. 359, 365 (1993) ("[T]he image of Jezebel, a woman governed by her sexual desires, legitimated white men's sexual abuse of Black women.").

182. See *id.* ("[T]he social meaning of rape has centered on a racialized sexual mythology arising from slavery. This mythology defines Black women as sexual objects, while it defines Black men as sexual predators. The image of the sexually loose woman who is unrapable, who always consents, and who is therefore unprotected by the law, is a Black woman.").

183. See Marcotte, *supra* note 100 ("Black female sexuality has always been understood from without to be deviant, hyper, and excessive. Therefore, the word slut has not been used to discipline (shame) us into chaste moral categories, as we have largely been understood to be unable to practice 'normal' and 'chaste' sexuality anyway.").

184. See Regina Austin & Elizabeth M. Schneider, *Mary Joe Frug's Post-modern Feminist Legal Manifesto Ten Years Later: Reflections on the State of Feminism Today*, 36 NEW ENG. L. REV. 1, 21 (2001) ("Finding safety in a closet of sorts, many black feminists have chosen to be silent about black women's sexuality. They feared that expressions of support of sexual freedom would be too easily misconstrued because of the power of stigmatizing stereotypes about black women's sexual promiscuity. Black feminists tended to emphasize the restrictive, repressive, and dangerous aspects of sexuality rather than its association with black women's own pleasure and agency." (footnotes omitted)).

sumptions about female sexuality.<sup>185</sup> The criticism is at times framed in linguistic terms. For instance: “[T]he word ‘slut’ has done things to my brown female body that racial privilege prevents White women from ever fully understanding.”<sup>186</sup> In a more fundamental critique, Black women have challenged the movement’s suggestion that sexuality can be practically severed from sexual violation.<sup>187</sup>

As one SlutWalk critic explains:

For Black women, our struggles with sexuality are to find the space of recognition that exists between the hypervisibility of our social construction as hoes, jezebels, hoochies, and skanks, and the invisibility proffered by a respectability politics that tells us it’s always safer to dissemble. To reclaim slut as an empowered experience of sexuality does not move Black women out of these binaries. We are always already sexually free, insatiable, ready to go, freaky, dirty, and by consequence, unrapeable.<sup>188</sup>

Considering this background of perpetual sexualization, SlutWalk’s sexuality jubilee seems misguided at best, and at worst oppressive. Even so, many Black women have opted to engage with SlutWalk, rather than reject it outright.<sup>189</sup> Their willingness to reshape the initiative suggests the possibility of collective action that is strengthened by a genuine response to diversity of experience. This challenge and the hope it entails is expressed by the following observation:

While white women often want to deploy “woman” as a universal category and have the nerve to get angry and defensive when Black women like myself point out differences in our experiences, it is Black

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185. This replication of essentialist structures is somewhat surprising, given that third-wave feminism claims to repudiate the non-diverse tendencies of earlier generations. See Crawford, *supra* note 30, at 117 (“Third-wave feminists also decry the lack of diversity in the second wave of feminism.”).

186. Griffin, *supra* note 43; see also *Four Brief Critiques of SlutWalk’s Whiteness*, *supra* note 73 (“Many communities of color have had growing movements *against* anti-woman language for good reason. For communities of color, even those who aren’t expressly political, there’s a visceral reaction to name-calling aimed at women of color, who are seemingly always the targets of names whose historical, cultural, social and political edge white women will never confront.”).

187. Farah Tanis, co-founder of the New York-based feminist group Black Women’s Blueprint (which ignited critical discourse surrounding SlutWalk) has noted: “Approximately 40 percent of African-American women report coercive contact of a sexual nature by age 18. Part of the problem with SlutWalk in the United States is that it doesn’t speak to the myriad of needs and the complex situations that African-American and even Asian-American, Latina and Native American women experience when it comes to sexual assault.” Tillet, *supra* note 43.

188. *I Saw the Sign*, *supra* note 56.

189. See, e.g., *id.*

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women themselves who have demonstrated what it really means to care about women as a group. For we put our bodies and our psyches on the line to show up at events called “Slutwalks” knowing that we are both more vulnerable to the same violence that brought other women there and yet that we have little social privilege and power to reclaim the terms in the ways that many of the others [sic] marchers do.<sup>190</sup>

The robust and often angry discourse around SlutWalk’s marginalization of women of color accepts that sexual violence is experienced by all kinds of women.<sup>191</sup> At the same time, it observes that sexual violence is racialized,<sup>192</sup> as are the cultural supports for this violence.<sup>193</sup> For these reasons, any successful effort to reclaim sexuality will likely depend on where one is situated.<sup>194</sup> It may be that inclusion of the perspectives of Black women will result in a far more critical stance toward using sexuality to end rape.<sup>195</sup> This conclusion is far from certain;<sup>196</sup> but the perils of sexualization are real, and they impact Black women in particular ways.

As a more general matter, the version of female sexuality implicitly represented by SlutWalk may not reflect the experi-

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190. *Id.*

191. *See supra* text accompanying note 187.

192. *See An Open Letter from Black Women to the SlutWalk*, BLACK WOMEN’S BLUEPRINT (Sept. 23, 2011), [http://www.facebook.com/note.php?note\\_id=232501930131880](http://www.facebook.com/note.php?note_id=232501930131880) (demanding that SlutWalk acknowledge the significance of the word “rape” as “language invented to perpetuate racist/sexist structures”).

193. *See id.* (“Every tactic to gain civil and human rights must not only consult and consider women of color, but it must equally center all our experiences and our communities in the construction, launching, delivery and sustainment of that movement. We ask that SlutWalk take critical steps to become cognizant of the histories of people of color and engage women of color in ways that respect culture, language and context.”).

194. *See Marcotte, supra* note 100 (“[I]f white women could recognize SlutWalk as being rooted in white female experience, it would provide an opportunity for them to participate in coalition and solidarity with similar movements that are inclusive and reflective of the experiences of women of color.”).

195. *See Austin & Schneider, supra* note 184, at 22 (discussing Black feminists using sexuality as a tool). Austin and Schneider suggest that:

Black women will not know that they have arrived at the point where they can be sexy for the sake of being sexy unless they have the resources to choose to be something else instead. It is dangerous to think that cultural expression can be wholly divorced from the material and political reality.

*Id.*

196. *See id.* (admiring, albeit with some apparent hesitation, “the optimism young black feminists express about their ability to put their sexual freedom on the agenda or to use their sexuality as tool [sic] in the struggle for equality”).

ences of women who identify as members of other marginalized groups.<sup>197</sup> Sexualization might well raise special concerns for these women, too. For example, this description comes from a group of transnational women and descendants of women from Latin America, Asia, and Africa:

[W]e are the ones who compose the majority of sex trafficking victims in this country, who comprise the majority of those sold in the mail-order-bride system, who are the commodities offered in brothel houses ringing US military bases in and out of this country, who are the goods offered for sexual violation in prostitution. We who are and historically have been the “sluts” from whom traffickers, pimps, and other “authorities” of the global sex trade realize \$20 billion in earnings cannot, with a clear conscience, accept the term in reference to ourselves and our struggle against sexual violence and for women’s liberation.<sup>198</sup>

And this, from a prostituted woman:

If you want to know what it [is] [sic] to be a Slut, a Slut without freedom of movement, freedom of speech, freedom of safety—then place yourself inside the skin of the Ultimate Slut. Women and girls inside most aspects of the sex trade are raped, battered and murdered whatever they wear, whatever environment they are placed in.<sup>199</sup>

As these accounts demonstrate, women’s sexuality is socially constructed along multiple dimensions, complicating any one-size-fits-all approach to redefining it. Sexualization is differently fraught for lesbians,<sup>200</sup> Muslim women,<sup>201</sup> indigenous

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197. In response to sustained critique, SlutWalk’s founding organizers now seem largely to have acknowledged this, in a series of substantive blog postings on the web site. *See, e.g., Racism and Anti-Racism: Why They Matter to Slutwalks*, SLUTWALK TORONTO (Oct. 31, 2011), <http://www.slutwalktoronto.com/racism-and-anti-racism>; *What’s All This About Privilege?*, SLUTWALK TORONTO (Nov. 3, 2011), <http://www.slutwalktoronto.com/what’s-all-this-about-privilege>.”

198. *Slutwalk and Women of Color*, SCISSION (Sept. 29, 2011), <http://www.oreaddaily.blogspot.com/slutwalk-and-women-of-color.html> (reproducing an article by AF3IRM, a transnational organization of women dedicated to feminist activism).

199. Sarkeesian, *supra* note 73.

200. In South Africa, SlutWalk has attracted particularly strong support among lesbians. *See* Snyckers, *supra* note 44 (“In South Africa, if you dress in a certain way you are at risk of suffering the peculiarly noxious type of assault known as corrective rape—a form of punishment for sexual expression that is sometimes viewed as an attempt to ‘convert’ women to heterosexuality . . . . South African lesbians have recognized that their right to . . . express their sexuality however they like is under appalling threat, and that the SlutWalk fight is therefore their fight too.”).

201. *See* Walia, *supra* note 142 (“Sexual assaults against Muslim women are often minimized in our society because Muslim women are perceived as repressed, and therefore in need of sexual emancipation. I would much rather

women,<sup>202</sup> women with disabilities,<sup>203</sup> asexual women,<sup>204</sup> and teenagers,<sup>205</sup> among others. Poor, black, and transgendered women in New Orleans confront a separate constellation of dangers.<sup>206</sup> And poverty itself sits uneasily with an agenda that privileges sexual agency,<sup>207</sup> perhaps at the cost of attaining more pressing needs.<sup>208</sup>

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have attended a 'Do Not Rape' Walk." (quoting Nassim Elbardough, a community organizer and Muslim woman)).

202. See *id.* ("The history of genocide against Indigenous women . . . goes beyond their attire. It is a means of gender control that is embedded within the intersecting processes of racism and colonialism.").

203. See Cohen, *supra* note 94 ("[D]isabled women . . . are often considered asexual and undesirable," [and] are "isolate[d] [from [SlutWalk's] approach to sexual violence, despite their disproportionately high rates of victimhood.").

204. See Nicole Prause & Cynthia A. Graham, *Asexuality: Classification and Characterization*, 36 ARCHIVES SEXUAL BEHAV. 341, 352 (2007) (noting four common drawbacks stated by individuals self-identified as asexual to be "(1) problems establishing nonsexual, dyadic intimate relationships, (2) needing to find out what problem is causing the asexuality, (3) a negative public perception of asexuality, and (4) missing the positive aspects of sex").

205. See *infra* note 224 and accompanying text (discussing issues specially relevant to this cohort).

206. Aura Blogando, *SlutWalk: A Stroll Through White Supremacy*, TO CURB (May 13, 2011, 5:11 PM), <http://tothecurb.wordpress.com/2011/05/13/slutwalk-a-stroll-through-white-supremacy> ("[B]lack, poor and transgender women are being disproportionately and systematically branded as criminal 'sex offenders' on an online database for engaging in 'survival sex . . . .").

207. Women in poverty have been and continue to be particularly subjected to stigmas and regulations associated with sexuality. See generally ANNA MARIE SMITH, WELFARE REFORM AND SEXUAL REGULATION (2007).

208. See Austin & Schneider, *supra* note 184, at 22 ("By all means be sexy, but never take your eye off the material ball."); *id.* at 25 ("Women's interest in sexual freedom, agency and autonomy has the potential to, but does not necessarily, translate into a broader understanding of women's experience and oppression in the world. And sex and sexuality has to be understood in a larger material context."). As a practical matter, Harsha Walia urges feminists to deliberately consider the needs of "low-income women and women of colour who bear the brunt of institutionalized sexism—from lack of access to childcare and denial of reproductive justice to stratification in precarious low-wage work and disproportionate criminalization." Walia, *supra* note 142.

All of this suggests that the pursuit of meaningful sexual agency for women requires a willingness to abandon a single sexuality paradigm. This is true in practice,<sup>209</sup> as in theory.

### 3. Decontextualization

Lastly, successful claims of sexual agency are in tension with a thick conception of patriarchy and its effects. This problem is highlighted by the suggestion that SlutWalk brings women together “to reclaim our right to define and exercise our respective sexualities outside the context of patriarchy.”<sup>210</sup>

By promoting a view of sexuality that is (or can be) fully abstracted from social constraints, SlutWalk obscures a range of coercive practices—short of rape—that influence women’s sexual choices. While acknowledging the connection between nonconsensual sex and sexuality, SlutWalk decontextualizes consensual sex, thus immunizing it from critique.

This simplifying move may well be a consequence of SlutWalk’s anti-rape agenda.<sup>211</sup> Emphasizing consent as the boundary between sex and rape<sup>212</sup> has practical import—

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209. A number of women engaged in sustained dialogue around SlutWalk’s future have voiced this sentiment. *See, e.g.*, Tillet, *supra* note 43 (arguing that in order to become a lasting movement, SlutWalk must “integrate[], as its organizers and protesters, those women—lesbian, queer and transgendered; women of color, low-income women and sexually exploited workers—who are most vulnerable to sexual assault and more likely to be called ‘slut,’ regardless of what they’re wearing”); Hanalei, *supra* note 144 (“What will propel this movement forward . . . is the creation of ‘new, self-determined definitions and expressions of sexual liberation’ for all . . .”).

210. *I Saw the Sign*, *supra* note 56.

211. *See supra* text accompanying notes 93–109 (noting SlutWalk’s anti-rape stance as well as its celebration of female sexuality).

212. *See supra* text accompanying notes 137–44. The disappearance of context need not result from a focus on consent, although there seems to be a strong pull in this direction. For instance, in Canada, reform efforts have led to legal recognition of non-consent as rape. What has transpired provides a cautionary tale:

Not only are good feminine sexual subjects expected to avoid risky situations, they are also expected to respond assertively and decisively in the face of sexual threats and to seek immediate protection.

Positioned paradoxically an actively diligent “victim in waiting,” the idealized feminine subject produces new axes of victim-blaming and also functions as a standard for assessing the credibility of actual complainants . . . . Within recent Canadian sexual assault decisions, good sexual citizens are reconfigured as being like rational economic actors, assuming responsibility for their actions and the risks that they take. Under the standard of explicit consent, what is bad and untrustworthy is being redefined. As normalized sexual subjects are increasingly reconfigured through concepts of responsibility and risk, so

namely, it advances a particular vision for how the law ought to define criminality.<sup>213</sup> To implement this vision, consent marks the boundary between sex and rape.<sup>214</sup> But even accepting that consent rightly serves this function,<sup>215</sup> consensual sex remains deeply rooted in social context.<sup>216</sup> What decontextualization accomplishes is the elision of troubling (though not illegal)<sup>217</sup> pressures on women's decision making, sexual and otherwise.<sup>218</sup>

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too is the untrustworthy complainant reconstituted. The inverse opposite of the rape-preventing subject is the risky woman, the woman who avoids personal responsibility for sexual safety, the woman who places herself within and occupies a space of risk. The risky woman slides into the traditional place of the promiscuous woman under new logics of consent.

Lise Gotell, *Rethinking Affirmative Consent in Canadian Sexual Assault Law: Neoliberal Sexual Subjects and Risky Women*, 41 AKRON L. REV. 865, 880–82 (2008).

213. See Michelle Anderson, *Negotiating Sex*, 78 S. CAL. L. REV. 1401, 1423 (2005) (“The law cannot do anything about those [women] who agree to unpleasant penetration from their husbands because they imagine it is their ‘wifely duty.’ Nor can the law help a seventeen-year-old boy who agrees to sexual penetration that he does not desire because he hopes it will prove he is a man. The law cannot do anything about a young woman who agrees to dangerous, unprotected penetration in order to impress her friends. It cannot do anything for persons who, having suffered chronic sexual abuse as children, come to think of themselves as their perpetrators thought of them, and so seek to engage in degrading sexual acts.” (citation omitted)); Robin West, *Sex, Law, and Consent*, in *THE ETHICS OF CONSENT: THEORY AND PRACTICE* 221, 224 (Franklin G. Miller & Allan Wertheimer eds., 2010) (“Consent works relatively well . . . as the demarcation of noncriminal from criminal sex . . .”).

214. See *infra* notes 243–44 and accompanying text (discussing criminal law's default rule to the contrary).

215. We will soon see that this understanding is rejected by the law, which generally requires something more than non-consent (i.e., force) in defining rape. See *infra* notes 243–47 and accompanying text.

216. As a more general proposition, Deborah Rhode has observed that “[t]o a substantial extent, our choices are socially constructed and constrained; the desires we develop are partly a function of the desires our culture reinforces. As long as gender plays an important role in shaping individual expectations and aspirations, expressed objectives cannot be equated with full human potential.” Rhode, *supra* note 35, at 629. Cf. MACKINNON, *supra* note 42, at 135 (attacking the notion that “pleasure and how to get it, rather than dominance and how to end it, is the ‘overall’ issue sexuality presents feminism”).

217. Again, there is properly a distinction between the two. See *supra* text accompanying note 213 (noting the law does not and should not address every undesirable sexual encounter).

218. My concern here is with women's choices, as opposed to the content of their desires. See Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 350 (1995) (proposing a critique of agency that entails a “shift in focus from women's pleasure to women's agency”). Kathryn Abrams explains:

Agency and pleasure occupy the opposite sides of a public/private divide that retains considerable organizing power in legal thought.

While consent may evidence a desire for sex,<sup>219</sup> this is not always the case. Instead, consent and wanting can diverge. When they do, women engage in sex that is neither rape, nor apparent cause for celebration.<sup>220</sup> This category of sexual conduct is inadequately described by an anti-rape, pro-sex platform that tacitly imbues consent with the power to negate social context.

An abstracted understanding of agency tends to eliminate the space from which to assess the circumstances under which

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Pleasure, particularly sexual pleasure, is often viewed as a highly personal matter which the law can facilitate, if at all, only by staying its hand. The notion of agency, in contrast, is rich with potential legal associations. The attributes associated with agency are necessary not only to such intimate pursuits as sexuality, but also to the range of public activities that constitute commercial exchange or citizenship. These attributes are also implicated in responsibility for injurious acts targeted by tort and criminal law. These are attributes with which the law is likely to have more continuous engagement, and which legal actors can more legitimately claim to have an interest in fostering.

*Id.* at 350–51 (citations omitted). *Cf.* West, *supra* note 104, at 388 (“We should at least be neutral—neither critical nor confident—regarding the degree to which our desires, if fulfilled, will give pleasure, and whether their satiation will serve our interests. What we *should* doubt . . . are not women’s sexual *desires* but rather women’s sexual *choices*, and particularly women’s choices to engage in sex—of any description—that is *not* desired.”).

219. A canvas of photographs from SlutWalk rallies around the nation shows women carrying signs that read “I [heart] consensual sex.” *See, e.g.*, Alan Wilfahrt, *Revealing Images at SlutWalk Minneapolis*, TC DAILY PLANET (Oct. 2, 2011), <http://www.tcdailyplanet.net/blog/alan-wilfahrt/revealing-images-slutwalk-minneapolis>.

220. Robin West has done groundbreaking work in this area. Most recently, she develops the “possibility that the sexual choices women make, when those choices are contrary to felt desires, are harmful.” West, *supra* note 213, at 246. In particular, consensual sex that is unwanted and unwelcome “often carries harms to the personhood, autonomy, integrity, and identity of the person who consents to it.” *Id.* at 224. I am somewhat skeptical that there is “a way to capture, descriptively, the subclass of unwanted consensual sex that is harmful from that which is not,” *id.* at 238, without resorting to a framework that privileges one or another conception of worthwhile sex or, alternatively, conflating what West refers to as “welcomeness” with desire (which she does not purport to do); *id.* at 239. Perhaps the evolution of a more developed welcome/unwelcome description will alleviate this concern. For now, I wonder how we might go about assessing a woman’s motivation to engage in sex. Suggesting reasons that are “not necessarily harmful,” and therefore likely welcome, West offers a list that includes friendship, love, trust, and gratitude. *Id.* It seems that these criteria favor sex within relationships of one sort or another. Perhaps this is justifiable; if not, the motivations deemed harmless could give way to a more encompassing notion of welcome. At some point, however, if the construction becomes too elastic, it may lose its meaning as a marker of something other than desire.

it is exercised. By contextualizing consent, it is possible to generate an account of what unwanted consensual sex looks like. Consider Robin West's helpful explanation:

Heterosexual women and girls, married or not, consent to a good bit of unwanted sex with men that they patently don't desire, from hook-ups to dates to boyfriends to cohabitators, to avoid a hassle or a bad mood the endurance of which wouldn't be worth the effort, to ensure their own or their children's financial security, to lessen the risk of future physical attacks, to garner their peers' approval, to win the approval of a high-status man or boy, to earn a paycheck or a promotion or an undeserved A on a college paper, to feed a drug habit, to survive, or to smooth troubled domestic waters. Women and girls do so from motives of self-aggrandizement, from an instinct for survival, out of concern for their children, from simple altruism, from friendship or love, or because they have been taught to do so. But whatever the reason, some women and girls have a good bit of sex a good bit of the time that they patently do not desire.<sup>221</sup>

Upon consideration, it becomes clear that women, whether or not they are married,<sup>222</sup> make decisions about whether to consent to sex in a fraught social context.<sup>223</sup> The fallacy of

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221. *Id.* at 236. West goes on to posit that "participation by many women and girls, in unwanted but consensual opposite-sex sex, particularly over time, carries with it harms that are different from those that attend to wanted consensual sex, are often serious, and are not only unregulated by law but also largely *unrecognized*." *Id.* at 237.

A woman who endures unpleasant invasive sex over time has implanted in her body, so to speak, the truth that her subjective pleasures and interests don't matter. Her will does (the sex is consensual), but her pleasures don't; they are not determinants of her body's actions. Rather, the subjective pleasures of another determine the use to which she puts her body . . . . And, if it becomes a central part of a life that ties her existence, survival, and hence her interests to that of another—if unwanted sex is the *raison d'être* for a way of life that limits her mobility, her ambition and the development of her talents or remunerative skills—it constitutes a threat to her autonomy, likewise.

*Id.* at 238.

222. Married women's reasons for engaging in sex warrant special consideration:

For years—centuries—married women have consented to sex that they do not want with their husbands either out of a sense of religious obligation, out of fear of their husbands' violence, or from their understanding of the requirements of their wifely role. Until well into the twentieth century, in this country alone, a married woman's consent was not required by law—forcible sex without consent between a man and his wife was not rape—and her pleasure and desire likewise were either irrelevant or their importance minimized by social norm. It was her *availability* that was expected of her, and that defined her sexual being, not her rapturous participation.

*Id.* at 235–36.

223. As Laura Rosenbury and Jennifer Rothman have observed, "sexual double standards can influence individuals' experiences within the relation-

equating consent with desire may be especially pronounced for teenage girls, whose sexual experiences are often unwanted and whose identities are not yet fully formed.<sup>224</sup> Separate concerns arise with regard to many college women, whose expressions of sexuality are embedded in a pervasive “hookup culture.”<sup>225</sup>

Contextualizing women’s choices is fully consistent with an affirmative conception of female sexuality—one in which desire and consent are indeed aligned.<sup>226</sup> But when sexual decision making is rooted in social context, the possibility of a divergence between the two also becomes readily apparent. Exposing

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ships celebrated by the sex-in-service-to-intimacy paradigm. In their most basic incarnation, these sexual double standards reserve sexual desire and pleasure for men, assuming that women either do not or should not enjoy sex.” Rosenbury & Rothman, *Sex In and Out of Intimacy*, *supra* note 178, at 840.

224. See Michelle Oberman, *Turning Girls Into Women: Re-Evaluating Modern Statutory Rape Law*, 8 DEPAUL J. HEALTH CARE L. 109, 112–13 (2004) (“While girls may dress and act like sexy women, they are still girls. . . . A multiplicity of factors induce girls to consent to sex: to feel liked or loved, to feel closer to someone, to become popular. Desire often is not the motivating force in girls’ sexual exploration.” (citations omitted)). For an empirical study of girls’ experiences with first intercourse, see Joyce Abma et al., *Young Women’s Degree of Control over First Intercourse: An Exploratory Analysis*, 30 FAM. PLAN. PERSP. 12, 17 (2008) (finding that “substantial numbers of young women voluntarily participated in a first sexual experience about which they felt ambivalent or negative”). The sexual behaviors of teenage girls cannot be abstracted from a backdrop of pervasive sexual violation. According to the latest research, over forty percent of female rape victims are first raped before the age of eighteen. NISVS, *supra* note 1, at 25.

225. See Paula England et al., *Hooking Up and Forming Romantic Relationships on Today’s College Campuses*, in THE GENDERED SOCIETY READER 531 (M. Kimmel & A. Aronson eds., 2008) (discussing orgasm gap, and nonreciprocal oral sex). Researchers have concluded that, “equal opportunity for women appears to have gone farther in the educational and career world than in the college sexual scene.” *Id.* at \*12. See also Julie A. Reid et al., *Casual Hookups to Formal Dates: Refining the Boundaries of the Sexual Double Standard*, 25 GENDER & SOC’Y 545, 564 (2011) (identifying a sexual script that “does not fully embrace women’s sexual agency and may present particular quandaries for women around sexuality. It implies that women are sexual beings, but also suggests women need more of an excuse to act on their sexual desires, such as the consumption of alcohol and the expectation of anonymity. This new script instructs women to ‘be desirable but not *too* desiring. . . .”). In this context, it should also be noted that more than three quarters of female rape victims are first raped before the age of twenty-five. NISVS, *supra* note 1, at 25.

226. Dennis Patterson reiterates Zillah Eisenstein’s assertion, stating that “there is no (one) such thing as ‘female sexuality.’ On the contrary, there are many ways to think about female sexuality.” Dennis Patterson, *Postmodernism/Feminism/Law*, 77 CORNELL L. REV. 254, 301 (1992) (citing ZILLAH R. EISENSTEIN, *THE FEMALE BODY AND THE LAW* 172–73 (1988)).

this divide, and the pressures that contribute to it, begins to unfetter agency.

### C. SEXUAL AGENCY CONCEPTUALIZED

Sexual agency marries SlutWalk's anti-rape and pro-sex commitments, though this function has been mostly overlooked. On inspection, we have observed that sexual agency (as opposed to sex itself) is integral to women's equality. We have also discovered that sexual agency presents profound dilemmas that have yet to be adequately addressed in practice<sup>227</sup> or in legal theory.<sup>228</sup>

Accounting for objectification, sexualization, and decontextualization enriches our understanding of sexual agency<sup>229</sup> and the extent to which it is constrained—incomplete and

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227. Although this may change over time, SlutWalk has yet to confront the tensions I identify here.

228. There are notable exceptions. Kathryn Abrams has offered this reflection on how agency may operate under constraints:

A glimpse into the operation of institutions, or a vivid experiential insight into their own constraint, may move such women to grasp a vision of themselves or an explanation of their lives in particular settings that is contrary to the images propounded by dominant social arrangements. They may then be encouraged, by the sheer force of their insight, the sense of power conferred by other group-based attributes, the support of other women, or the receptiveness or the resistance of their first "outside" audiences, to act on this insight to alter the arrangements in which they find themselves. Both the ability to glimpse an explanation rendered unintelligible by existing practices and the ability to act on that insight to change those practices are forms of agency that emerge, often dramatically, in women's lives. These forms of agency reflect inevitable gaps in the structures that produce oppression, as well as the assertion of a multiply-constructed will: they occur in what we might conceive as the conceptual space between social influence and social determination.

Abrams, *supra* note 40, at 836–37 (citation omitted).

229. A number of feminist scholars have already suggested the importance of this work. *See, e.g.*, Abrams, *Sex Wars Redux*, *supra* note 218, at 346 (referring to an "emerging practice of juxtaposing agency and constraint," or "highlighting partial agency"); Elizabeth M. Schneider, *Feminism and the False Dichotomy of Victimization and Agency*, 38 N.Y.L. SCH. L. REV. 387, 399 (1993) (noting how sexuality "may simultaneously be a source of women's experiences of victimization and oppression, and a site of women's agency and resistance. If we examine both of these dimensions simultaneously, our work will be more meaningful, and will be more grounded in, and more reflective of, the experiences of women's lives." (citation omitted)); *supra* text accompanying note 221; *cf.* Chamallas, *supra* note 17, at 166–67 ("The partial-agency strand of this newer feminism stresses possibilities for the exercise of women's sexual agency, rather than focusing principally on our victimization. These partial-agency feminists regard as a key source of gender injustice the prevailing ideologies

always subject to the taking.<sup>230</sup> This view of imperfect sexual agency is far from abstract. It contemplates rampant sexual violence by non-strangers and strangers alike, along with a culture that excuses this violence and conditions rape protection on sexual conformity.<sup>231</sup> It acknowledges that women and girls consent to sex for reasons other than desire, and it resists the unthinking exaltation of this kind of sex.<sup>232</sup> It recognizes that female sexuality is constructed along multiple axes, and that the path to liberation has as many forks.<sup>233</sup> It is complicated,<sup>234</sup> both contingent and tentative.<sup>235</sup> And it is partial, positioning sexual agency not as everything,<sup>236</sup> but as essential.

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that cast sex as dangerous and illegitimate, particularly for certain groups of women.”).

230. To date, Kathryn Abrams has provided the most robust conceptual account:

This version of the agency critique affirms the central premise of dominance feminism: that women suffer systematic oppression in which sexualized domination by men plays a crucial role. It does not . . . see women’s oppression as a problem that exists largely in feminists’ heads. It also shares the constructivist thrust of dominance theory: women are not simply impeded . . . but actually shaped—in their fears, tastes, and choices—by sexualized oppression. This means that resistance to those forces of oppression, whether internal or outwardly focused, will inevitably be difficult or partial . . . Yet this critique takes issue with dominance theory for its often-strategic repression of the possibility of such resistance. This muting of the agency theme in dominance-based accounts of the female subject provides an incomplete picture of contemporary women’s lives . . . This version of the agency critique seeks to highlight this repressed element through a respectful supplementation of dominance theory.

Abrams, *supra* note 218, at 354 (citation omitted).

231. *See supra* text accompanying note 10.

232. *See supra* text accompanying notes 219–25; *see also* Kathryn Abrams, *Songs of Innocence and Experience: Dominance Feminism in the University*, 103 *YALE L.J.* 1533, 1558 (1994) (“[E]ncouraging contextualized judgments about the presence and extent of coercion can be appropriate and beneficial.”).

233. *See supra* note 197.

234. *See Abrams, supra* note 232, at 1559 (urging a “more far-reaching reflection on appropriate stances for women toward a sometimes dangerous, sometimes exhilarating sexual world”).

235. *Cf.* Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 *S. CAL. L. REV.* 1763, 1768 (1990) (“Pragmatic method suggests plural, provisional, and emergent truths. It is skeptical of universalized experience and absolute description.”).

236. *See supra* text accompanying notes 207–08 (raising the possibility that economic issues and other issues of equality might be more pressing than sexuality); *cf.* Rosenbury & Rothman, *Sex In and Out of Intimacy, supra* note 178, at 868 (suggesting that “sex may currently play such an important role in some people’s lives because of the historic construction of sex by the state and other social forces,” and expressing hope that more sexual liberty will make sex a less exceptional activity).

This conception of female sexual agency is largely absent from legal theory.<sup>237</sup> As we will now see, the same is true of rape law.

### III. RAPE LAW AND THE FEMALE SEXUAL SUBJECT

SlutWalk proceeds without regard for the law's powerful influence on norms of sexuality.<sup>238</sup> This overlook is exceedingly problematic, since rape law's construction of female sexuality is in serious conflict with the orientation advanced by SlutWalk. The legal treatment of female sexual subjectivity has consequences that are real and unexamined.<sup>239</sup> By advancing a non-agentic view of women's sexuality, the law constrains agency—both by limiting protection from non-stranger rape, and by placing certain consensual sexual behaviors off-limits to “nor-

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237. Elizabeth Schneider notes “feminist work has too often been shaped by an incomplete and static view of women as *either* victims or agents.” Schneider, *supra* note 229, at 387. She continues:

[P]ortrayal of women as *solely* victims or agents is neither accurate nor adequate to explain the complex realities of women's lives. It is crucial for feminists and feminist legal theorists to understand and explore the role of both victimization and agency in women's lives, and to translate these understandings into the theory and practice that we develop.

*Id.* at 389 (alteration in original) (quoting Elizabeth M. Schneider, *Describing and Changing: Women's Self-Defense Work and the Problem of Expert Testimony on Battering*, 9 WOMEN'S RTS. L. REV. 195, 221 (1986)).

238. While sexuality is constructed by a host of extra-legal factors, the role of law is significant as well. As Laura Rosenbury and Jennifer Rothman have explained:

A purely legal critique is unlikely to transform the current construction of sex given that so many extralegal factors also contribute to that construction. Legal discourse about sex has also undoubtedly been shaped by such extralegal forces, making it difficult to identify legal effects separate from the effects of other forces. Despite these limitations, legal critique is a necessary component of any challenge to the current construction of sex given the law's power to endorse certain sexual practices while ignoring or punishing others.

Rosenbury & Rothman, *Sex In and Out of Intimacy*, *supra* note 178, at 813.

239. Sylvia Law has observed that “[g]endered assumptions about sexuality have long denied women sexual gratification.” Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 210; *see also* Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 788–89 (1988) (discussing the double standard of sexual morality, which subjected women to “harsh social penalties if they exerted sexual independence”); Mary Joe Frug, *A Postmodern Feminist Legal Manifesto (An Unfinished Draft)*, 105 HARV. L. REV. 1045, 1050 (1992) (identifying sexualization as a legal mechanism for constraining female sexual pleasure).

mal” women.<sup>240</sup> The following discussion examines two facets of this constructive process.

First, the law defines rape in a manner that is decidedly not in keeping with a sexually agentic view of women. Most glaringly, non-consent is dispossessed of meaning as a marker of rape; force assumes this role. Moreover, the presence of consent is imagined in the strangest of circumstances, including a woman’s total passivity. In short, by equating non-action with consent, the substantive law of rape effectively renders women sexual objects.

Second, what I call the law of sexual patterns defines certain sexual behaviors on the part of women as deviant, establishing what amount to presumptions of unrapeability. By narrowing the range of acceptable sexual practices, rape shield law further diminishes agency.<sup>241</sup>

Overall this framework represents a rather ironic inversion of SlutWalk’s anti-rape/pro-sex paradigm. In its stead is a regime with decidedly pro-rape/anti-sex tendencies—which, given SlutWalk’s central preoccupations, makes its failure to engage with rape law all the more surprising.

The following discussion exposes fault lines in the legal construction of female sexuality—fault lines that substantially weaken rape law’s normative force.<sup>242</sup>

#### A. THE PASSIVE WOMAN

Rape has traditionally been defined as nonconsensual intercourse by force, and this remains the rule in a majority of ju-

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240. “Concepts of sexuality are an important element of the more general gender script that destines men for ‘serious’ work in the world and women for essential, but unvalued, lives caring for others.” Law, *supra* note 239, at 210.

241. See *supra* text accompanying note 239 (citing Sylvia Law). Writing not about rape law, but about law generally, Laura Rosenbury and Jennifer Rothman have argued:

[T]he governing legal regime signals that sex within a particular form of relationship is superior to sex in all other contexts. That signal in turn implies that other sexual practices are unworthy of state support. The legal and social disapproval that follows such nonconformity can have a powerful effect on individuals’ psyches, their relationship to their own sexuality, and their overall place in society. The law thereby continues to sustain a narrow vision of acceptable sexual expression and conduct.

Rosenbury & Rothman, *Sex In and Out of Intimacy*, *supra* note 178, at 817–18 (citation omitted).

242. Only then is it possible to consider whether (and if so, how) to inscribe sexual agency into rape law. See *infra* notes 314–30.

risdictions.<sup>243</sup> A woman's non-consent alone is thus insufficient to establish rape.<sup>244</sup> This conception of rape is at odds with an agentic understanding of female sexuality,<sup>245</sup> which starts from the premise that mutual consent is a *sine qua non* of acceptable sex.<sup>246</sup> Because an existing body of scholarship criticizes the force requirement,<sup>247</sup> I will not say more about it here.<sup>248</sup>

I am interested in exploring how consent is operationalized by the law, and ultimately how this functional understanding undermines women's sexual agency. As a rule,<sup>249</sup> consent is le-

243. Bryden, *supra* note 4, at 321–22 (“Even if the victim verbally declines sex, the encounter is not rape in most states unless the man employs ‘force.’”). The traditional rule has begun giving way to broader rape definitions that do not require force. *Id.* at 322 (“Although the process is far from complete, the long-term direction of change is clear: The concept of forcible rape is gradually being replaced by an array of offenses, not all of which involve force. . . . Very probably, this gradual expansion of rape and related offenses will continue for many years.”). Reflecting this trend, the FBI announced earlier this year that it is changing how it compiles rape statistics. Charlie Savage, *U.S. to Expand Its Definition of Rape in Statistics*, N.Y. TIMES, Jan. 6, 2012, <http://nytimes.com/2012/01/07/us/politics/federal-crime-statistics-to-expand-rape-definition.html>. For purposes of tracking data on nationwide rape, force is no longer required. *Id.* Instead, rape is now defined as non-consensual sex. *Id.*

244. “The traditional rule is that a successful prosecution for forcible rape requires proof that the female did not consent to the intercourse *and* that the sexual intercourse was secured by force. That is, where there is lack of consent, but no showing of force, a forcible rape conviction is inappropriate.” JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 574 (6th ed. 2012).

245. It is also at odds with the premium SlutWalk places on consent. See *supra* text accompanying notes 137–53.

246. On this view, consensual sex, albeit lawful, may be harmful nevertheless. See *supra* text accompanying notes 219–25.

247. See, e.g., Bryden, *supra* note 4, at 322 (“Virtually all modern rape scholars want to modify or abolish the force requirement as an element of rape.”); Deborah Tuerkheimer, *Sex Without Consent*, 123 YALE L.J. ONLINE 335 (2013), <http://yalelawjournal.org/2013/12/1/tuerkheimer.html> (addressing how requiring force “discounts the importance of sexual agency”); Robin West, *Legitimizing the Illegitimate: A Comment on Beyond Rape*, 93 COLUM. L. REV. 1442, 1445 (1993) (“Many, if not most, rape law commentators from a range of perspectives have addressed the under enforcement of laws against sexual assault by arguing that rape should be defined simply as nonconsensual sex—by dropping, in effect, the force requirement altogether.”).

248. I will return to the issue when considering the impact of ongoing cultural change on rape reform. See *infra* notes 307–14 and accompanying text.

249. There are exceptions. For instance, consent has been variously defined as “positive cooperation in an act or attitude as an exercise of free will,” 1 CAL. JURY INSTRUCTIONS CRIM. (7th ed. 2003), and as “words or overt actions . . . indicating a freely given agreement to have sexual intercourse,” WIS. STAT. ANN. § 940.225(4) (West 2013); see also FLA. STAT. ANN. § 794.011(5) (West 2000); WASH. REV. CODE ANN. § 9A.44.010(7) (West 2009); *State v. M.T.S.*, 609 A.2d 1266, 1277 (N.J. 1992).

gally inferred from a woman's passive acquiescence to sex or, put differently, her mere submission to the same.<sup>250</sup> The law sees consent in inaction, permitting sex that would be rape absent the use of this proxy.<sup>251</sup> As others have convincingly shown, sexual violation is in this way concealed.<sup>252</sup>

Unremarked is that the legal equation of consent with submission is incompatible with female agency. By conflating inaction and consent, the law constructs an ultra-passive female sexuality—that is, sexuality *without* agency. In this account, a woman is acted upon; she experiences sex in the absence of a will (much less desire); she consents merely by being.

Perhaps to partially mitigate this state of affairs, some jurisdictions criminalize sex with a passive victim—but only under delineated circumstances. In these jurisdictions, where a woman's submission is seen as resulting from physical helplessness,<sup>253</sup> incapacitation,<sup>254</sup> or intoxication,<sup>255</sup> the sex is

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250. See Anderson, *supra* note 213, at 1406 (“Traditionally, sexual consent has meant a woman’s passive acquiescence to the male sexual initiative.”); William N. Eskridge, *The Many Faces of Sexual Consent*, 37 WM. & MARY L. REV. 47, 58 (1995) (noting that the law “embodies an ideology of traditional masculinity that views man as hunter and woman as helper and breeder. . . . The law of sexual consent is primarily a law responsive to Victorian male fantasies.”).

251. Particularly vexing empirical issues are raised if consent is an internal state, since non-consenting women may be passive in the face of unwanted sex for any number of reasons. See Michelle Anderson, *Reviving Resistance in Rape Law*, 1998 U. ILL. L. REV. 953, 958 (suggesting that often “women . . . do what they were taught to do as girls—to remain passive in the face of a rapist”). My argument here does not depend on whether consent is considered internal or external.

252. See Chamallas, *supra* note 239, at 796 (arguing how using a narrow definition of consent as “no more than acquiescence or submission . . . made the sexual exploitation of women less visible and more impervious to reform”).

253. See, e.g., ALA. CODE § 13A-6-60(7) (LexisNexis 2013); ALASKA STAT. § 11.41.470(2) (2001); ARK. CODE ANN. § 5-14-101(7) (2013); CONN. GEN. STAT. ANN. § 53a-65(6) (West 2001); FLA. STAT. ANN. § 794.011(1)(e) (West 2000); HAW. REV. STAT. ANN. § 707-700 (West 2000); IOWA CODE ANN. § 709.1A(2) (West 2003); KY. REV. STAT. ANN. § 510.010(6) (LexisNexis 2013); MICH. COMP. LAWS ANN. § 750.520a(k) (West 2013); MINN. STAT. § 609.341(9) (2000); MISS. CODE ANN. § 97-3-97(d) (LexisNexis 2013); N.J. STAT. ANN. § 2C:14-1(g) (West 2001); N.Y. PENAL LAW § 130.00(7) (McKinney 2014); N.C. GEN. STAT. § 14-27.1(3) (2013); OR. REV. STAT. ANN. § 163.305(5) (West 2013); R.I. GEN. LAWS § 11-37-1(6) (2001); S.C. CODE ANN. § 16-3-651(g) (West 2003); TENN. CODE ANN. § 39-13-501(5) (West 2013); VA. CODE ANN. § 18.2-67.10(4) (2013); WASH. REV. CODE ANN. § 9A.44.010(5) (West 2013); W. VA. CODE ANN. § 61-8B-1(5) (LexisNexis 2013). For a comprehensive description, along with the statutory citations contained in this note and *infra* notes 246–47, see Patricia J. Falk, *Rape By Drugs: A Statutory Overview and Proposals for Reform*, 44 ARIZ. L. REV. 131, 156–73 (2002).

deemed unlawful (though not necessarily because it is non-consensual).<sup>256</sup> This legislative scheme results in the criminalization of more sex,<sup>257</sup> but it does so by maintaining that consent may be present under rather extraordinary circumstances.<sup>258</sup> As such, these laws reify a view of passive female sexuality.

254. See, e.g., ALA. CODE § 13A-6-60; ALASKA STAT. § 11.41.470(4); ARK. CODE ANN. § 5-14-101(5); CONN. GEN. STAT. ANN. § 53a-65(4); FLA. STAT. ANN. § 794.011(1)(c); HAW. REV. STAT. ANN. § 707-700; KY. REV. STAT. ANN. § 510.010(5); MICH. COMP. LAWS ANN. § 750.520a(g)-(h); MINN. STAT. § 609.341(7); MISS. CODE ANN. § 97-3-97(c); N.J. STAT. ANN. § 2C:14-1(i); N.Y. PENAL LAW § 130.00(6) (McKinney 2014); N.C. GEN. STAT. § 14-27.1(2); OR. REV. STAT. ANN. § 163.305(4); R.I. GEN. LAWS § 11-37-1(5); S.C. CODE ANN. § 16-3-651(f); TENN. CODE ANN. § 39-13-501(4) (West 2013); W. VA. CODE ANN. § 61-8B-1(4).

255. See, e.g., ALA. CODE § 13A-6-60(6) (narcotic or intoxicating substance); ARK. CODE ANN. § 5-14-101(4) (controlled or intoxicating substance); CONN. GEN. STAT. ANN. § 53a-65(5) (drug or intoxicating substance); FLA. STAT. ANN. § 794.011(1)(c) (narcotic, anesthetic, or intoxicating substance); 9 GUAM CODE ANN. § 25.10(a)(5) (1995) (narcotic, anesthetic, or other substance); HAW. REV. STAT. ANN. § 707-700 (substance); IOWA CODE ANN. § 709.1A(1) (narcotic, anesthetic, or intoxicating substance); KY. REV. STAT. ANN. § 510.010(5) (controlled or intoxicating substance); MICH. COMP. LAWS ANN. § 750.520a(g) (narcotic, anesthetic, or other substance); MINN. STAT. § 609.341(7) (narcotic, anesthetic, or any substance); MISS. CODE ANN. § 97-3-97(c) (LexisNexis 2013) (drug, narcotic, anesthetic, or other substance); N.J. STAT. ANN. § 2C:14-1(i) (narcotic, anesthetic, intoxicant, or other substance); N.Y. PENAL LAW § 130.00(6) (narcotic or intoxicating substance); OR. REV. STAT. ANN. § 163.305(4) (controlled or other intoxicating substance); R.I. GEN. LAWS § 11-37-1(5) (narcotic, anesthetic, or other substance); S.C. CODE ANN. § 16-3-651(f) (substance); TENN. CODE ANN. § 39-13-501(4) (West 2013) (narcotic, anesthetic, or other substance); WASH. REV. CODE ANN. § 9A.44.010(4) (substance); W. VA. CODE ANN. § 61-8B-1(4) (controlled or intoxicating substance). See generally Karen M. Kramer, *Rule by Myth: The Social and Legal Dynamics Governing Alcohol-Related Acquaintance Rapes*, 47 STAN. L. REV. 115 (1994).

256. This logic is epitomized by a case in which witnesses in a vacant public lot observed the defendant's "bare rear end moving up and down," while a woman was "lying underneath [him] . . . motionless" and "limp." *State v. M.C.*, No. 42089-5-1, 1999 WL 436617, at \*1 (Wash. Ct. App. June 29, 1999). The woman "never moved and her eyes were closed." *Id.* When police arrived, the woman was not moving and appeared to be unconscious. *Id.* The defendant, who was charged with (and convicted of) rape under the state's physically helpless provision, testified that the victim "did not move very much during intercourse, but maintained that she had consented to it." *Id.*

257. The laws enable prosecutors to successfully pursue rape charges in cases where it might otherwise be impracticable to prove forcible nonconsensual intercourse.

258. A small number of states deem victims who are incapacitated, helpless, or mentally disabled incapable of consent. See ALA. CODE §§ 13A-6-61, -63, -70; ARK. CODE ANN. §§ 5-14-103(a)(2)(B), -125(a)(2) (2013); CONN. GEN. STAT. ANN. §§ 53a-70, 73a; KY. REV. STAT. ANN. §§ 510.020(3), .060, .090, .120; N.Y. PENAL LAW § 130.05(3), .30, .45; OR. REV. STAT. ANN. §§ 163.315, .375, .405, .411, .427; WASH. REV. CODE ANN. §§ 9A.44.050, .100; Falk, *supra* note

An example illustrates this perspective.<sup>259</sup> A California appeals court relayed the facts as follows:

Monica T. reported to the Pasadena Police Department that Diaz had sexually assaulted her while she was unconscious. After her report, the police sought and received a warrant to search Diaz's home for evidence relating to the sexual assault. The police seized various items from Diaz's apartment, including a videotape. The videotape did not depict Monica T.; instead, it was a recording of Diaz engaging in sexual intercourse and other sexual acts with an unknown woman who appeared to be semi-conscious.

Diaz was charged with 14 sexual offenses against Monica T. and the unknown woman, known as Jane Doe. At trial, Monica T. testified, but Jane Doe did not. The jury viewed the videotape depicting Diaz engaged in sexual acts with Jane Doe. The jury acquitted Diaz of all counts pertaining to Monica T.,<sup>260</sup> but convicted him on the five counts alleged against him in which Jane Doe was the victim.<sup>261</sup>

Diaz was never prosecuted for having nonconsensual sex with Jane Doe. Instead, he was charged under a statute that criminalizes the "sexual penetration of a victim who [is] unable to resist due to intoxication, anesthesia, or a controlled substance."<sup>262</sup> Accordingly, the prosecutor's theory at trial was not that Diaz engaged in nonconsensual sex with Doe, but rather that Doe was intoxicated.<sup>263</sup> Consent was said to be "irrelevant" to the case.<sup>264</sup>

Consider this factual rendition against the backdrop of the videotape that was admitted into evidence. The videotape depicted sexual intercourse taking place between Diaz and Doe—

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253, at 163 ("With respect to the relationship between victim incapacity and consent, eight jurisdictions in this category explicitly provide that mentally incapacitated, physically helpless, or mentally disabled persons are incapable of consent."). In these jurisdictions, the law eases the prosecutor's burden of proving non-consent in cases where, absent a special rule, general assumptions about female passivity might effectively preclude a rape conviction.

259. *People v. Diaz*, No. B185735, 2007 WL 3015448 (Cal. Ct. App. Oct. 17, 2007).

260. Of course we have no way of knowing why the jury acquitted the defendant of raping the woman who testified.

261. *Id.* at \*1.

262. *Id.* at \*7 (describing CAL. PENAL CODE § 289(e) (2013)). Diaz was also convicted of two counts of oral copulation by means of intoxication, anesthesia or controlled substance, and two counts of rape by intoxication, anesthesia or controlled substance. *Id.* at \*1.

263. *Id.* at \*4. The prosecutor's summation made this point abundantly clear: "The difference with intoxication and—the Legislature is very smart in this regard—is actual consent. . . . Actual consent is irrelevant to any sexual charge that involves intoxication. . . . Your job is not to determine whether or not she agreed to this . . . it's just irrelevant." *Id.*

264. *Id.*

or, as the court more aptly explained, Diaz “captured the sex acts he performed on videotape.”<sup>265</sup> Here is the fuller description:

For much of the video, Jane Doe lies limp and motionless, with her eyes closed. She periodically attempts to roll to her side, to cover her vaginal area with her hands, or to close her legs as Diaz positions himself to assault her. She moans and mumbles, often incoherently, slurring the few words and phrases she does say. Diaz drags her across the bed to arrange her limbs and position her body for the camera, but he is hampered by her limpness and her tendency to roll onto her side as soon as he lets go of her legs. He slaps her repeatedly and appears to attempt to rouse her from her stupor to cause her to perform sex acts on him.

On appeal, Diaz claimed that admission of this videotape was an error.<sup>266</sup> The court rejected this argument, but only because consent was not an issue in the case.<sup>267</sup> According to the court’s opinion, the tape was probative of Doe’s “*condition* while Diaz was performing sexual acts upon her.”<sup>268</sup> Doe’s condition was relevant, not whether she consented,<sup>269</sup> and the tape was therefore, properly admitted. Moreover, the court emphasized that the crime that Diaz was charged with “depend[s] not on an unwilling victim but on an incapacitated one.”<sup>270</sup> The law thus

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265. *Id.* at \*5.

266. *Id.* at \*3. The court’s fuller explanation reads as follows:

Diaz argues that the videotape of his sexual conduct with Jane Doe should not have been admitted because it violates his Sixth Amendment rights and because it is hearsay that is not admissible under any exception to the hearsay rule. Both of Diaz’s arguments are premised on the view that the evidentiary value of the videotape was to show consent or lack thereof. Diaz argues that consent is not necessarily verbal, at least in this sexual context, for in the course of sexual fantasy and role-playing, a woman could be saying “no” but meaning “yes.” Diaz argues that because Jane Doe’s state of mind is relevant to determining whether her repeated use of the words “No,” “Stop,” and similar negative responses to the sexual conduct Diaz was engaging in were actually intended to deny or withdraw consent, the statements on the tape were inadmissible hearsay and testimonial statements.

*Id.* (citation omitted).

267. *Id.*

268. *Id.* Elaborating on Doe’s condition, the court continued: “her mostly motionless body, her grogginess and lack of alertness, her slurred speech and frequent incoherence, her failure to rouse unless slapped (and sometimes even when slapped), and other indicia of her level of impairment.” *Id.*

269. *Id.* (“The evidentiary value of the videotape was not to demonstrate that Jane Doe gave or did not give consent . . .”). Perhaps this is why the court did not dwell on the fact that Doe repeatedly said “No” and “Stop,” and exhibited “similar negative responses to the sexual conduct.” *Id.*

270. *Id.* “Diaz was not charged with committing oral copulation, copulation with a foreign object, and rape because he lacked Jane Doe’s consent—he was

suggests that, even in her condition, Jane Doe could have consented; Mark Diaz's conviction is in keeping with this perspective on consent.

According to this view, consent may be manifested by a woman who is undisputedly "limp and motionless," in a "stupor."<sup>271</sup> This representation of female sexuality, though extreme, is wholly consistent with rape law's general approach to women's submission. A woman who does nothing to indicate her willingness to engage in sex may nonetheless be viewed as consenting.<sup>272</sup> Regardless of whether passivity co-occurs with other debilitating conditions, assuming consent from inaction denies women's sexual subjectivity.

## B. THE SLUT

Rape law negates female sexual agency in yet another way, by placing certain sexual conduct outside of the bounds of acceptability.<sup>273</sup> The practice of judging sex is framed by an exception to the rape shield rule that allows the evidentiary admission of a woman's sexual history where this history is deemed "patterned."<sup>274</sup> A woman's past sexual conduct tends to be considered probative of her tendency to consent when that conduct is perceived as deviant.<sup>275</sup> The effect of this practice is to circumscribe normal female sexuality. Both anti-rape and pro-sex ideals are undermined. Women whose pasts involve consensual sex of a disapproved kind are presumed to be "unrapeable."<sup>276</sup>

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charged with the specific versions of those offenses that depend not on an unwilling victim but on an incapacitated one." *Id.*

271. *Id.* at \*5.

272. See Chamallas, *supra* note 239, at 795 ("Consent is a devilishly malleable term which may describe a wide spectrum of responsive behavior, ranging from the mere failure to engage in active resistance, to active participation in and encouragement of another's initiatives. For that reason, a decision as to what conduct constitutes consent in any particular context may mask value judgments implicit in the choice of definition." (footnote omitted)).

273. See generally Deborah Tuerkheimer, *Judging Sex*, 97 CORNELL L. REV. 1461 (2012) (exploring this constructive process by focusing exclusively on the jurisprudence of sexual patterns).

274. *Id.* at 1462.

275. See *id.*; *infra* notes 286–301 and accompanying text.

276. See Tuerkheimer, *supra* note 273, at 1477 (explaining that "[c]ertain sexual histories give rise to a presumption that the victim consented on the occasion in question. . . ." and defining this presumption as a "presumption of unrapeability"). The notion of unrapeability has been employed to describe the aggregate effects of pervasive biases in law and society. For instance, black women, married women, prostitutes, and gay men have been, and to varying degrees continue to be, deemed unrapeable. See, e.g., CAROLINE A. FORELL &

Certain consensual sexual behavior—the kind judges believe is improper for women—is also delegitimized.<sup>277</sup> The remainder of this section develops these claims.

We must first understand the doctrinal framework that facilitates a remarkably non-agentic construction of female sexuality. Rape shield rules generally preclude the admission of a victim's past sexual history unless the evidence satisfies an exception, which may be either legislatively defined<sup>278</sup> or rooted in a defendant's constitutional right to present a meaningful defense.<sup>279</sup> One of these exceptions falls under the rubric of sexual pattern evidence.<sup>280</sup>

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DONNA M. MATTHEWS, A LAW OF HER OWN: THE REASONABLE WOMAN AS A MEASURE OF MAN 229 (2000) (discussing as inappropriate the widespread belief that prostitutes are “looking for trouble”); Bennett Capers, *The Unintentional Rapist*, 87 WASH. U. L. REV. 1345, 1368 (2010) (describing the “double hurdle” for black rape victims who are treated as “unrapeable”).

277. See Rosenbury & Rothman, *Sex In and Out of Intimacy*, *supra* note 178, at 813 (illustrating the law's role in constructing sexuality); see also *supra* text accompanying note 238.

278. In relevant part, Federal Rule of Evidence 412 reads as follows:

(a) PROHIBITED USES. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct.

(1) evidence offered to prove that victim engaged in other sexual behavior; or

(2) evidence offered to prove victim's sexual predisposition.

(b) EXCEPTIONS.

(1) *Criminal Cases*. The court may admit the following evidence in a criminal case:

(A) evidence of specific instances of a victim's sexual behavior offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and

(C) evidence whose exclusion would violate the defendant's constitutional rights.

FED. R. EVID. 412. For a comparison of the federal rape shield to various state law counterparts, see Harriet R. Galvin, *Shielding Rape Victims in the State and Federal Courts: A Proposal for the Second Decade*, 70 MINN. L. REV. 763, 812–915 (1986).

279. Numerous cases are grounded in the rights of due process, confrontation, and compulsory process—collectively, the right to present a meaningful defense. See, e.g., *Holmes v. South Carolina*, 547 U.S. 319 (2006); *Crane v. Kentucky*, 476 U.S. 683 (1986); *Chambers v. Mississippi*, 410 U.S. 284 (1973).

280. See Tuerkheimer, *Judging Sex*, *supra* note 273, at 1469 (exploring the “sexual pattern” exception to the rape shield rule).

Depending on jurisdiction, the admissibility of sexual pattern evidence is governed by specific statutory exception,<sup>281</sup> judicially-created exception,<sup>282</sup> or purportedly fact-bound constitutional analysis.<sup>283</sup> Yet regardless of the specific mechanism for determining admissibility, courts discuss the worth of this type of evidence in a remarkably similar fashion:<sup>284</sup> “the probative value of past sexual conduct is evaluated by reference to whether it is sufficiently patterned to mark it as distinctive.”<sup>285</sup>

In a previous study of the legal treatment of patterns, I concluded that the designation of a woman’s sexual conduct as patterned (and thus admissible) hinges on whether the conduct is perceived as deviant.<sup>286</sup> I elaborated as follows:

[I]ntuitions regarding the appropriate bounds of female sexuality influence, and perhaps even dictate, judgments about deviance. Though these boundaries have shifted considerably since pre-rape shield days, their very persistence reflects and operationalizes a patriarchal conception of women as decidedly limited sexual agents. This conception maintains its hold on judicial imaginations just as it reinscribes control over women’s sexuality.<sup>287</sup>

Without acknowledging it, courts are identifying “the point at which *too much sex* or *sex of the wrong kind* or *sex with the wrong people* becomes sufficiently deviant to [designate] it patterned.” In this endeavor, “retrograde notions of chastity powerfully influence judicial inquiry.”<sup>288</sup> “Sex within a monogamous relationship is generally considered irrelevant to later consent

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281. See FLA. STAT. ANN. § 794.022; MINN. STAT. § 609.347 (2000); N.C. Gen. Stat. § 8C-1, R. 412; TENN. CODE ANN. R. 412; NEB. REV. STAT. § 28-321 (1995) (repealed 2009).

282. See, e.g., *State v. Gonzalez*, 757 P.2d 925 (Wash. 1988); *Hardy v. State*, 285 S.E.2d 547 (Ga. Ct. App. 1981); Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, n.247 (2002) (citing *United States v. Kelly*, 33 M.J. 878 (A.C.M.R. 1991)).

283. See *supra* text accompanying note 279 (describing the constitutional rights at issue and leading cases interpreting these rights).

284. See FED. R. EVID. 401 (defining “relevant evidence” as evidence [having] any tendency to make a fact more or less probable than it would be without the evidence”); FED. R. EVID. 403 (“The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.”).

285. Tuerkheimer, *supra* note 273, at 1469.

286. See *generally id.* (discussing judgments about “deviant” sexual behavior).

287. *Id.* at 1476.

288. *Id.* at 1489.

with another man.”<sup>289</sup> In contrast, “sex outside such relationships (however mainstream the acts themselves) may give rise to an inference of patterned behavior, informing the likelihood of later consent—for instance, if the victim was considered the “initiator” of, as one court put it, a “one night thing.”<sup>290</sup>

In various ways, female sexuality that fails to conform to normative benchmarks<sup>291</sup> sits uneasily with the law of rape shield.<sup>292</sup> Most discomfiting are acts of prostitution,<sup>293</sup> group sex,<sup>294</sup> and sadomasochism.<sup>295</sup> In a similar fashion, sex outside

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289. *Id.*; see, e.g., *State v. Mustafa*, 437 S.E.2d 906, 910 (N.C. Ct. App. 1994) (affirming the exclusion of the victim’s previous sexual encounters with a man where the encounters occurred during an ongoing relationship).

290. Tuerkheimer, *supra* note 273, at 1489.

291. See Rosenbury & Rothman, *Sex In and Out of Intimacy*, *supra* note 178, at 825 (arguing that the “new ground for restricting sexual conduct [is] the promotion of emotional intimacy. As such, states may find reason to . . . penalize sexual activities that occur outside of acceptable relationships or are otherwise assumed to play no role in the furtherance of emotional intimacy even within relationships.”).

292. See, e.g., *State v. Brodie*, 2005 WL 1431686 (N.C. Ct. App. June 21, 2005) (exemplifying that because the defendant first raised the issue on appeal, the court did not decide the admissibility of evidence that the victim previously engaged in intercourse in the presence of her child); *State v. Sheline*, 955 S.W.2d 42, 44, 47 (Tenn. 1997) (illustrating that after an intermediate court reversed because excluded evidence “constitute[d] one episode of a distinctive pattern in which the victim met an acquaintance at a bar, was drinking, and eventually had sexual relations with that person,” the state supreme court reinstated the conviction on grounds that the “described acts could hardly be characterized as signature cases”); *State v. Smart*, No. 57129-0-I, 2007 WL 959891, at \*6 (Wash. Ct. App. Apr. 3, 2007) (rejecting the defendant’s claim that the court wrongly excluded evidence that “sometimes [the victim] would drink, hit on men she did not know, and then consent to sex,” and that she “had sexual relations with men she met over the Internet or on a camping trip”; “proffered evidence was not similar to [the defendant’s] version of the incident because according to him [the victim] was sober”).

293. See generally Margaret A. Baldwin, *Split at the Root: Prostitution and Feminist Discourses of Law Reform*, 5 *YALE J.L. & FEMINISM* 47 (1992) (exploring how the relationship between “prostitutes” and other women is shaped by legal responses to sexual assault of women and girls).

294. See Tuerkheimer, *supra* note 273, at 1477–82 (discussing *Gagne v. Booker*, 680 F.3d 493 (6th Cir. 2012)).

295. See *State v. Archibald*, No. 2006-L-047, 2007 WL 2758600 (Ohio Ct. App. Sept. 21, 2007). On occasion, judges resist characterizing consensual sexual conduct as deviant. For instance, one state appellate court grappled with the relevance of a victim’s past attendance at a “pure romance party,” which it defined as “parties held by women for their female friends at which they can purchase marital aids.” *Id.* at \*7. Though the issue was not preserved on appeal, the court opined: “[w]e fail to see how the victim’s alleged attendance at a pure romance party is evidence [of] . . . ‘kinky’ sex. Further, we do not agree that if a person was fond of ‘kinky’ sex, this affinity would be admissible to support a consent defense . . .” *Id.* at \*9; see also Anderson, *supra* note 282, at

of monogamy,<sup>296</sup> sex with perceived frequency,<sup>297</sup> sex on the part of teenagers,<sup>298</sup> and sex that is woman-initiated<sup>299</sup> are often deemed sufficiently deviant to be given patterned treatment.<sup>300</sup> In these cases, the consent requirement is diluted, creating a presumption of unrapeability.<sup>301</sup>

Women who behave in appropriate ways are assumed to approach each sexual encounter anew, while women who transgress sexual boundaries are suspected of proclivities toward perpetual consent.<sup>302</sup> The law of sexual patterns sets the parameters for acceptable female sexuality and then powerfully reinforces them.<sup>303</sup> By placing consensual sexual conduct of a disfavored kind off-limits, rape law subordinates sexual agency to a judgment about what women ought, and ought not, to do.

### CONCLUSION

Female sexual agency has not yet found outlet in rape law, which remains emphatically counter to women's sexual subjectivity.<sup>304</sup> Identifying this dissonance introduces a new criterion for evaluating the criminal law's response to rape: what conception of female sexual subjectivity is embedded in the doctrine, and how does it advance or suppress women's agency? Related,

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131-37; Cheryl Hanna, *Sex Is Not a Sport: Consent and Violence in Criminal Law*, 42 B.C. L. REV. 239, 286 (2001) (discussing the possibility of courts extending the consent doctrine to sadomasochism).

296. See Tuerkheimer, *supra* note 273, at 1490.

297. *Id.*

298. *Id.*; see also *State v. Whitehead*, No. W2000-01062-CCA-R3-CO, 2001 WL 1042164, at \*6 (Tenn. Crim. App. Sept. 7, 2001) (describing evidentiary record containing evidence of fifteen-year-old girl's prior sexual history, including consensual acts with "several boys who were approximately her own age").

299. See Tuerkheimer, *supra* note 273, at 1490.

300. See *id.*

301. *Id.* at 1477 ("Certain sexual histories give rise to an inference that the victim consented on the occasion in question, markedly diminishing the odds of a successful rape prosecution.").

302. See *id.* at 1467 (discussing the attitude that "unchaste women [are] perpetually consenting").

303. See Rosenbury & Rothman, *Sex In and Out of Intimacy*, *supra* note 178, at 813 (exposing the law's role in "channeling sex into a domesticated and gendered form").

304. While SlutWalk has to date avoided engaging in legal critique, it is quite possible that the movement will evolve to recognize the influence of rape law on female sexuality, particularly if feminist legal scholars are involved in the conversation. See Austin & Schneider, *supra* note 184, at 15 (urging feminist legal scholars to participate in "gender and race culture wars" by following fellow, younger feminists' "road map" indicating where legal activism is needed and where analysis has fallen short).

is the question of how the law responds to the typical non-stranger rape.<sup>305</sup> Together, these metrics anchor a rethinking of future reform.<sup>306</sup>

The movement that SlutWalk represents signifies that now may be an opportune time for such modernization.<sup>307</sup> Rape law reform can only be effective if it bears a close connection to social norms.<sup>308</sup> Absent this convergence, legal transformation will do little to affect actors' decision-making throughout the criminal process.<sup>309</sup> Given these dynamics, SlutWalk's efforts to

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305. See *supra* text accompanying notes 4, 13; *infra* note 315 (proposing that the stranger rape paradigm be subverted).

306. Framing the inquiry in this manner allows for the possibility that criminal law is too blunt an instrument to fully incorporate the complex meaning of sexual agency that I have begun to theorize, while still reorienting rape law toward female sexual subjectivity.

307. The American Law Institute is in the process of revisiting, for the first time in over fifty years, the Model Penal Code provisions on rape. See *Current Projects*, AM. L. INST., [http://www.ali.org/index.cfm?fuseaction=projects.proj\\_ip&projectid=26](http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=26) (last visited Jan. 25, 2014). With regard to this effort, and to state legislative reform, SlutWalk's success to date raises the prospect that there is sizeable demographic support for legal change previously dismissed as unfeasible.

308. Social norms scholarship has profoundly influenced criminal law scholarship. Dan M. Kahan's work on social norms has focused particularly on rape law, which provides a "dramatic example" of the inefficacy of radical reform. Dan Kahan, *Gentle Nudges vs. Hard Shoves: Solving the Sticky Norms Problem*, 67 U. CHI. L. REV. 607, 623 (2000). Kahan argues that the failure of rape law reform fits the profile of a self-defeating "hard shove." *Id.* at 620. He advocates instead for a "gentle nudge"—or reform efforts somewhat consistent with existing norms. *Id.* at 624. In this regard, Vivian Berger's remarks are especially provocative:

A domain as controversial as rape law ineluctably brings to the fore questions about the complex connection between legal and cultural change. Which is the chicken, which the egg? Depending on specific circumstances, the likely answer is either or both. As I wrote over two decades ago: "To some extent and over time, the law converts as well as mirrors cultural norms and expectations."

Vivian Berger, *Rape Law Reform at the Millennium: Remarks on Professor Bryden's Non-Millennial Approach*, 3 BUFF. CRIM. L. REV. 513, 524 (2000) (quoting Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 100 (1977)).

309. Elizabeth Iglesias has disaggregated this process as follows:

As long as rape processing practices are embedded in a network of discretionary decisions, legal agents will enforce the culturally dominant narratives of race and sexuality. As long as these narratives are racist and sexist, appeals to the criminal justice system will only reinscribe "[t]he disjuncture between the rape victim's grounds for appealing to the legal system—including the violation of her right to liberty and self-determination—and the court's response." This disjuncture illustrates the tenuous nature of legal strategies that expect to eliminate rape by reforming the criminal justice apparatus.

target cultural attitudes around rape—though not directed at the criminal justice system—take on new significance.<sup>310</sup> The frontal assault on rape culture that we are witnessing may indeed enable a legal shift that would not otherwise be possible.<sup>311</sup> When the moment arises where sufficient societal consensus has been reached,<sup>312</sup> the criminal law will adapt.<sup>313</sup> On this view, SlutWalk may well be a precursor to legal reform consistent with the movement's basic tenets.

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Elizabeth M. Iglesias, *Rape, Race, and Representation: The Power of Discourse, Discourses of Power, and the Reconstruction of Heterosexuality*, 49 VAND. L. REV. 869, 890 (1996) (alternation in original) (footnote omitted) (quoting Winifred Woodhull, *Sexuality, Power and the Question of Rape*, in FEMINISM & FOUCAULT: REFLECTION ON RESISTANCE 167, 173 (Irene Diamond & Lee Quinby eds., 1998)).

310. See Myrna Raeder, *Excluding Sexual Pattern Evidence of Rape Complainants When the Defense Is Consent*, JOTWELL (Nov. 28, 2011), <http://www.crim.jotwell.com/excluding-sexual-pattern-evidence-of-rape-complainants-when-the-defense-is-consent> (“Until attitudes about sex, drinking, and victim blaming change, rape shields are likely to continue to be inconsistently interpreted. This raises the question of how to change public attitudes to overcome moralistic reasoning that is unduly sympathetic to defendants charged with acquaintance rape.”).

311. For a discussion of this assault on rape culture, see Iglesias, *supra* note 309, at 871 (“Because the culturally dominant images of race and sexual identity inevitably influence the processing of rape cases through the discretionary judgments of individual agents, these images and their social production are themselves important targets for feminist legal intervention and political struggle.”).

312. See Berger, *supra* note 308, at 523–24 (discussing the timing of reform).

313. Susan Estrich has articulated this vision for legal reform:

We live, in short, in a time of changing sexual mores—and we are likely to for some time to come. In such times, the law can cling to the past or help move us into the future. We can continue to enforce the most traditional views of male aggressiveness and female passivity, continue to adhere to the “no means yes” philosophy and to the broadest understanding of seduction, until and unless change overwhelms us. That is not a neutral course, however; in taking it, the law (judges, legislators, or prosecutors) not only reflects (a part of) society, but legitimates and reinforces those views.

Or we can use the law to move forward. It may be impossible—and even unwise—to try to use the criminal law to change the way people think, to push progress to the ideal. But recognition of the limits of the criminal sanction need not be taken as a justification for the *status quo*. Faced with a choice between reinforcing the old and fueling the new in a world of changing norms, it is not necessarily more legitimate or neutral to choose the old. There are lines to be drawn short of the ideal: The challenge we face in thinking about rape is to use the power and legitimacy of law to reinforce what is best, not what is worst, in our changing sexual mores.

Estrich, *supra* note 4, at 1181 (citations omitted).

How should rape law respond to women's global mobilization around sexual freedom, along with the cultural migration that this development simultaneously portends and manifests?<sup>314</sup> As an overarching principle, the criminal law should insist on the normative value of agency. This entails reconstructing the female sexual subject in order that agency be advanced—or, at minimum, not be impeded. To accomplish this aim, the standard rape paradigm must fundamentally shift. Contemporary approaches to sexual violence rest on a mythical understanding of rape as primarily perpetrated by strangers.<sup>315</sup> Because most victims in fact know their rapist,<sup>316</sup> the criminal justice system's emphasis on stranger rape<sup>317</sup> defies reality.<sup>318</sup> As a consequence, most "real" rape gets a pass.<sup>319</sup>

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314. My ambition here is not to propose a specific reform agenda, but to begin describing how an emerging conception of sexual agency might be written into rape law. In other words, I introduce the broad parameters of legal change addressed to both anti-rape and pro-sex norms.

315. See, e.g., Nancy Chi Cantalupo, *Burying Our Heads in the Sand: Lack of Knowledge, Knowledge Avoidance, and the Persistent Problem of Campus Peer Sexual Violence*, 43 LOY. U. CHI. L.J. 205, 220 (2011) ("[Our] society continues to hold onto many persistent myths about sexual violence. One such myth is that of the stranger rapist. In the public imagination, a rapist is still someone who jumps a woman in a dark alley late at night—someone she has never seen before and may never see again, depending on whether he is caught."); see also Capers, *supra* note 276, at 1390 ("It has not mattered that the vast majority of rapes are intraracial, acquaintance rapes. . . . [W]e have imagined the 'classic rape' as interracial, stranger rape . . .").

316. See *supra* text accompanying notes 1–2 (citing recent statistics to this effect).

317. See *supra* note 4 and accompanying text; see also Capers, *supra* note 276, at 1386 ("The rape laws in this country, whatever the black letter law may have said or may say, have always been obsessed with certain types of rapists (strangers and black men) and certain types of rape victims (white, pure, demure, chaste, and of the right class). Indeed, there are parallels between rape law's obsession with strangers and black men. It is quite possible that the concern with stranger rape was predicated on a concern for interclass rape. As with interracial rape, which was concerned primarily with the rape of white women by nonwhites, interclass rape was also unidirectional—concerned primarily with the rape of the not-poor by the poor. This perhaps explains why the law developed in such a way to facilitate interclass and interracial rape prosecutions. This perhaps explains why the law, for the longest time, was indifferent to marital rape and to acquaintance rape, both assumed to be intraclass and intraracial." (citations omitted)).

318. See Iglesias, *supra* note 309, at 894 ("[T]he resources deployed to promote rape as hate crime as the dominant cultural image of rape channel the socio-political struggle over rape around a set of ideas and practices that appear trivial, if not completely irrelevant, when contrasted to the struggles organized around the images of rape as sex and rape as power. Rape as hate crime suggests that women are relatively safe so long as they avoid dark alleys and take other appropriate steps to reduce their vulnerability to the deprived

To advance an anti-rape agenda, the law's stranger rape paradigm should be deliberately upended.<sup>320</sup> A separate crime of non-stranger rape could go some way toward achieving this goal. To be sure, enacting a non-stranger rape statute raises difficult questions of penalty,<sup>321</sup> particularly in relation to the jurisdiction's existing statutory framework for sexual offenses. Even so, a separate crime would have the distinct advantage of removing relationship as a practical defense to rape.<sup>322</sup> Moreover, it would reflect and reinforce cultural pressure to recognize the pervasiveness (and most common sources) of women's sexual violation..<sup>323</sup>

With or without a separate crime of non-stranger rape, several doctrinal reforms might allow for greater prosecution of

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and deranged who are stalking the streets, usually at night. This account of causes and cures feeds certain struggles and suppresses others.”).

319. I am using “real” rape to mean actual, stranger *and* non-stranger rape, which stands in stark contrast to the formulation of “real” rape famously articulated by Susan Estrich:

At one end of the spectrum is the “real” rape, what I will call the traditional rape: A stranger puts a gun to the head of his victim, threatens to kill her or beats her, and then engages in intercourse. In that case, the law—judges, statutes, prosecutors and all—generally acknowledges that a serious crime has been committed. But most cases deviate in one or many respects from this clear picture, making interpretation far more complex. Where less force is used or no other physical injury is inflicted, where threats are inarticulate, where the two know each other, where the setting is not an alley but a bedroom, where the initial contact was not a kidnapping but a date, where the woman says no but does not fight, the understanding is different. In such cases, the law, as reflected in the opinions of the courts, the interpretation, if not the words, of the statutes, and the decisions of those within the criminal justice system, often tell us that no crime has taken place and that fault, if any is to be recognized, belongs with the woman. In concluding that such acts—what I call, for lack of a better title, “non-traditional” rapes—are not criminal, and worse, that the woman must bear any guilt, the law has reflected, legitimized, and enforced a view of sex and women which celebrates male aggressiveness and punishes female passivity. And that vision, while under attack in recent years, continues to be a dominant force in our society and in the law of rape.

Estrich, *supra* note 4, at 1092.

320. See Capers, *supra* note 276, at 1394 (asking “How do we get to a point where rape is rape, and all rape is real rape, regardless of race?”).

321. In particular, should the punishment for non-stranger rape be equal to that for stranger rape?

322. I suspect that this might also tend to deracialize rape prosecution.

323. See *supra* text accompanying note 308 (discussing Kahan on the problem of sticky norms).

rape, which is currently under-criminalized.<sup>324</sup> This endeavor raises legitimate line-drawing concerns. Still, given that ninety percent of rape is inflicted by non-strangers<sup>325</sup> and very little of it goes punished,<sup>326</sup> the law is in desperate need of re-tooling. This might be accomplished by abolishing the force requirement,<sup>327</sup> redefining consent,<sup>328</sup> clarifying the notion of reasonable mistake,<sup>329</sup> and eliminating the evidentiary exception for “patterned” sexual histories.<sup>330</sup>

Each of these possibilities merits independent consideration. I reference them in the aggregate not because they provide a perfect solution to the problems I have diagnosed,<sup>331</sup> but in order to suggest a more general proposition. The type of reform that will improve the criminal justice system’s response to rape is reform that will facilitate the prosecution of non-stranger rape.

The approach that I envision affirms female sexual agency—not only by protecting it, but also by refusing to circumscribe it. For the law to foster women’s agency, it must meaningfully condemn rape—rape of strangers, rape of acquaintances, and rape of intimates. And for the law to meaningfully condemn rape, it cannot judge female sexuality.

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324. See *supra* text accompanying note 4.

325. See NISVS, *supra* note 1 (illustrating acquaintance rape statistics).

326. See *supra* text accompanying note 13 (articulating under-enforcement issues).

327. See *supra* text accompanying note 247 (noting overwhelming scholarly consensus in this direction).

328. The literature on consent identifies many possible definitions. For a helpful classification of reform proposals including the “No Model” and the “Yes Model” of consent, as well as a third proposed model that sidesteps consent altogether, the “Negotiation Model,” see Anderson, *supra* note 213, at 1404–14, 1421–25; see also *supra* text accompanying note 212 (describing Canada’s rape law reform efforts around consent).

329. See Gotell, *supra* note 212, at 868–69 (discussing Canada’s experience with this endeavor).

330. See Tuerkheimer, *supra* note 273, at 1499–1503 (urging same).

331. See *supra* text accompanying note 306 (observing that the criminal law is a blunt instrument).