Reinforcing the Myth of the Crazed Rapist: A Feminist Critique of Recent Rape Legislation

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REINFORCING THE MYTH OF THE CRAZED RAPIST: A FEMINIST CRITIQUE OF RECENT RAPE LEGISLATION

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INTRODUCTION

Sexual violence has received considerable attention in the last decade. In the wake of several high profile incidents and on the heels of increasing awareness of violence against women, legislatures across the country have enacted a bevy of laws aimed at those who perpetrate forcible rape. Congress enacted the Violence Against Women Act ("VAWA") which provides a civil rights action for victims of sexual violence based on gender animus.¹ It further amended the Federal Rules of Evidence ("FRE"), altering its longstanding ban on character evidence in criminal proceedings to allow admission of "propensity" evidence in trials of sex offenders.² Both the Congress and several state legislatures enacted statutes requiring authorities to notify the public of registered sex offenders.³ A number of states passed laws requiring indefinite civil commitment of sexual predators.⁴ Although the specific motivations behind each law differ, they unite in their desire to protect the public against men who rape.⁵

Given the very real harms of rape and the fact that "ninety-eight percent of


² See Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935, 108 Stat. 1796, 2136-37 (1994) (enacting Federal Rules of Evidence 413-415) (permitting the admission of evidence of similar crimes in sexual assault cases (FRE 413) and child molestation cases (FRE 414), and of similar acts in civil cases concerning sexual assault or child molestation (FRE 415)).

³ See infra notes 13, 22 for citations to the federal registration statute and the registration statutes of 47 states.

⁴ See infra note 34 for citations to 16 state statutes requiring indefinite civil commitment for sexual predators.

⁵ The laws described apply to a variety of sexual offenses, ranging from forcible rape to statutory rape to child molestation. Virtually all such laws, however, cover at least the crime of forcible rape. This article is concerned with the laws as they primarily relate to that crime. See 4 WILLIAM BLACKSTONE, COMMENTARIES *209, infra note 73, for a definition of forcible rape.
the victims of rape never see their attacker caught, tried and imprisoned," one might argue that the new legislation is needed. After all, society has not always been receptive to victims' claims of rape. Decades of rape scholarship chronicle obstacles to prosecution of this crime, including onerous legal requirements and invidious societal stereotypes regarding rape victims. Feminist reformers spent nearly thirty years trying to eradicate these legal and social barriers to prosecution—in effect trying to convince the public and the legal system to take rape seriously. That these new laws demonstrate a serious attempt to increase the prosecution, conviction, and punishment for rape is arguably cause for rejoicing among feminists.

In reality, these new laws substantially undermine feminist efforts. They do so by reinforcing the myth that men who rape are "brutish male aggressor[s] . . . [and] sex crazed deviant sociopath[s] . . . [who are] violent and sadistic [and] use[ ] extreme force to violate [their] victim." Modern social science data debunks this myth and suggests that the average rapist is psychologically normal. Moreover, many studies suggest that most women know their rapists and that only a small portion of rapes involve violence

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8. Torrey, Rape Myths, supra note 7, at 1017-37 (discussing four categories of rape myths, their acceptance by society, and the media’s role in fostering these stereotypes); Toni M. Massaro, Experts, Psychology, Credibility and Rape: The Rape Trauma Syndrome Issue and Its Implications for Expert Psychological Testimony, 69 MINN. L. REV. 395, 404 (1985) (discussing the persistence of rape mythology that “insidiously infect[s] the minds of jurors, judges, and others”).


extrinsic to the rape itself. While a significant part of the feminist agenda has been the deconstruction of this myth, especially as it relates to the campaign for public recognition that "acquaintance rape" is also forcible rape, the "myth of the crazed rapist" remains deeply entrenched.

The recent rape legislation is rooted in and reinforces the myth of the crazed rapist. Registration, notification, and sexual predator laws are clearly based on this myth. Supporters of these laws have expressly embraced the notion that those who rape are unusually dangerous recidivists against whom society must be on constant guard. VAWA and the new FRE amendments—legislation at least partly grounded in feminist notions regarding the need to demolish societal barriers to rape prosecution—also accept the image of the crazed rapist. Ultimately, the new legislation's acceptance of this myth undercuts the feminist agenda with respect to rape. First, the legislation applies a scheme intended to apply to the crazed rapist situation to all rapes. The disconnection between the laws' application and the myth that propels them encourages courts to distinguish the paradigm rapist from those "normal" men who may be guilty of rape but who do not fit the paradigmatic image. Second, to the extent that some of the legislation is confined to certain "extremely dangerous" offenders, the criteria for such an assessment often reflect stereotypical and false assumptions about rape. These errors then encourage courts to distinguish between "real" rapists and other rapists. In both situations, reinforcement of the image of the crazed rapist as the "real" rapist undermines feminist efforts to gain public recognition that acquaintance rape is rape, a concrete and serious harm.

Part I of this article reviews these new legislative provisions, discussing their requirements as well as the general impetus behind their enactment. Part II discusses both the history of rape prosecution and feminist efforts in the 1970s and 1980s to eliminate barriers to successful rape prosecutions. This part also elaborates upon the myth of the crazed rapist and its relationship to feminist reform efforts. Part III explains how the current legislation is rooted in and reinforces that myth by encouraging unsupported distinctions among rape defendants. Finally, Part IV discusses the feminist response to such laws and argues for a more concerted feminist outcry against them. It further argues for either repeal or substantial restructuring of the new legislation, approaches that are most consistent with the feminist agenda regarding rape.

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11 National Victim Center and Crime Victims Research and Treatment Center, Rape in America: A Report to the Nation 4 (1992) [hereinafter Rape in America] (summarizing results of the National Women's Survey); see also infra notes 129, 143, 144.

12 Diane E.H. Russell, The Politics of Rape: The Victim's Perspective 82-86 (1974) (discussing rape by lovers); Estrich, Rape, supra note 7, at 1092-93 (citing feminist writers who assert "that most of what passes for 'sex' in our capitalist society is coerced").
I. RECENT LEGISLATIVE INITIATIVES REGARDING SEXUAL VIOLENCE AGAINST WOMEN

A. Laws Requiring Registration and Notification Regarding Sexual Offenders

The most widespread forms of the new legislation, which have proliferated in all fifty states and at the federal level, are statutes requiring registration and public notification of registered sex offenders. In 1994, Congress enacted the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, which requires states to establish a registration system for persons convicted of certain sexual offenses in order to receive federal funds. The federal law also obligates states to enact certain registration periods for offenders, to gather certain information from registrants, and to enforce penalties for an offender's failure to register. Although the registration program originally contained permissive notification provisions, Congress amended the statute in 1997 to require that state and local authorities notify the public of registered sex offenders present in local communities. Specifically, the federal law directs states to notify the public about those persons who commit violent sexual offenses or offenses against minors and

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13 42 U.S.C.A. § 14071(a)(1) (West Supp. 2000) (requiring sexually violent offenders to register their current addresses after release from incarceration). States failing to initiate sexual offender registration programs are denied ten percent of the funds they would otherwise have received as federal grants for assistance with law enforcement. Those funds are then reallocated to other States that do comply with the law. See id. § 14071(g)(2).

14 Id. § 14071(b)(6) (ranging from ten years to life according to the offense).

15 The federal act requires states to inform an offender, upon release from incarceration, that he must provide certain information to local law enforcement personnel, including fingerprints, photographs, addresses, and future changes of residence. The act also requires the state to provide the registration information to the local law enforcement agency that has jurisdiction over the released offender's residence. See id. §§ 14071(a)(1)(A), (b)(1)(A), (b)(2), (b)(4).

16 See id. § 14071(d) (enacting criminal penalties for offenders who fail to register or do not keep their registrations current).

17 See id. § 14071(d)(3) (permitting the state to release information to the public about registered offenders).

18 See id. § 14071(e)(2) (requiring that the State “release relevant information that is necessary to protect the public”).

19 See id. § 14071(a)(1)(A) (requiring registration of persons convicted of a sexually violent offense against anyone). Sexually violent offenses includes the crime of rape as defined by state law or §§ 2241 and 2242 of Title 18 of the U.S.C.A. See id. § 14071(a)(3)(B). For example, the federal registration act covers an offender who knowingly "causes another person to engage in a sexual act by threatening or placing that other person in fear . . . or [who] engages in a sexual act with another person . . . [who] is . . . incapable of appraising the nature of the conduct . . . or . . . physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act."
those who are sexual predators.\textsuperscript{21} Other than these minimal requirements, Congress granted the states great discretion to implement the registration and notification requirements.

Since the enactment of the federal law and its persuasive funding provisions, nearly all states have substantially similar registration laws.\textsuperscript{22} Reflecting the

\textsuperscript{21} See id. § 1407(a)(1)(B). A sexually violent predator is an individual “convicted of a violent sexual offense who suffers from a mental abnormality or personality disorder that makes the person likely to engage in predatory sexually violent offenses.” \textit{Id.} § 14071(a)(3)(C). The main point of the sexually violent predator designation is to signal that the offender is subject to stricter registration and notification requirements. See, \textit{e.g.}, 42 U.S.C.A. §§ 14071(b)(1)(B), 14071(b)(6)(B) (West 2000) (including documentation of treatment for the psychiatric disorder and prolonging the registration requirement until the person “no longer suffers” from the psychiatric disorder that made “the person likely to engage in a predatory sexually violent offense”).

considerable discretion left to the states, the qualifying crimes under such laws cover a broad spectrum, ranging from forcible rape to indecent exposure.\textsuperscript{23} States have also varied their information requirements, with many demanding that offenders provide substantial personal data in addition to federally-required information.\textsuperscript{24} Similarly, penalties for failure to register vary from

\textsuperscript{23} Some states broaden the registration requirement far beyond the federal statute. Thus, in Alabama and Arizona anyone convicted of the crime of indecent exposure must register. See ALA. CODE § 13A-11-200 (requiring the registration of any adult convicted, inter alia, of indecent exposure); ARIZ. REV. STAT. ANN. § 13-3821 (requiring the registration of any person convicted either of three or more violations of indecent exposure, or of two or more such violations if the victim is less than fifteen years old). In California those convicted of “lewd or dissolute conduct” are required to register. CAL. PENAL CODE §§ 290, 647(a) (West 1999). Kansas includes in its definition of “sexually violent offense” the highly interpretive “indecent liberties with a child.” KAN. STAT. ANN. § 59-29a02(e)(2) (West 1994 & Supp. 1999) (defining “sexually violent offense” to include “indecent liberties with a child” under § 21-3503, which proscribes certain specific activities “with a child who is 14 or more years of age but less than 16 years of age”). Missouri law requires registration of persons convicted of kidnapping or promoting prostitution. See MO REV. STAT. § 589.400.1(2). Washington singles out a variety of felony offenses, such as murder, assault, and kidnapping, if such crimes were sexually motivated. WASH. REV. CODE ANN. § 71.09.020(6) (West 1992 & Supp. 2000) (defining a number of crimes, including residential burglary, as “sexually violent offense[s]” upon determination that they were sexually motivated “beyond a reasonable doubt”). While almost all state laws include a forcible rape conviction as grounds for registration, some statutes are specific to the rape of a child. See, e.g., ARK. CODE ANN. §§ 12-12-901 to 12-12-909 (Michie 1999). For an in-depth review of offenses meeting various state registration requirements, see Michele L. Earl-Hubbard, The Child Sex Offender Registration Laws: The Punishment, Liberty Deprivation, and Unintended Results Associated with the Scarlet Letter Laws of the 1990s, 90 NW. U. L. REV. 788, 799-802 (1996) (reviewing the range of offenses cited by statute in over two dozen states).

\textsuperscript{24} Some states require such things as social security numbers and places of employment. See, e.g., IDAHO CODE § 18-8306 (requiring a signed form summarizing all relevant information, including social security number and residential address); LA. REV. STAT. ANN. § 15:542 (West Supp. 2000) (requiring the offender to notify “[a]t least one person in every residence or business within a one-mile radius in a rural area and a three square block area in an urban or suburban area” of the offender’s address); MO. REV. STAT. § 589.407(1) (requiring a written statement by the offender concerning all aspects of the crime, punishment, current residence, and employment, including social security and telephone numbers); see also Earl-Hubbard, supra note 23, at 802-14 (providing an overview of the registration requirements in various states).
misdemeanors to felony fines and/or sentences. Finally, notification procedures differ dramatically from state to state. Many states have broad notification procedures mandating public disclosure of all registered sex offenders. Others use a more restrictive, three-tiered, notification system. States using the latter system rely upon a risk assessment scale to categorize offenders based on their risk of recidivism. Under this system, the general public receives notification regarding only those offenders who fall into the highest risk category; narrower groups of persons are notified about sex offenders with lesser risks of re-offense.

While the registration laws apply to a variety of sex offenders, they resulted largely from the public outcry surrounding several high-profile sex crimes/murders committed against children by strangers or near-strangers.

25 See, e.g., MICH. COMP. LAWS ANN. §§ 28.730(2)-(3) (West Supp. 2000) (requiring that certain information be “available for public inspection,” and permitting that information to be “available to the public through electronic [or] computerized . . . means”); LA. REV. STAT. ANN. §§ 15:542(B)(1)(a), (B)(3) (permitting the sentencing court to require a notification via “signs, handbills, bumper stickers, or clothing labeled to that effect”); MO. ANN. STAT. §§ 589.417(1)-(2) (West 1995 & Supp. 2000) (making available a complete list of all registered offenders, including their names, addresses, and crimes, to anyone upon request, but restricting all other registry information, including photographs, “to courts, prosecutors, and law enforcement agencies”); see also Wayne A. Logan, Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws, 89 J. CRIM. L. & CRIMINOLOGY 1167, 1175 n.41 (1999) (reviewing states with single-tier notification statutes).

26 See, e.g., MASS. GEN. LAWS ANN. ch. 6, § 178E (West 1999) (promulgating rules for registration and notification that reflect the relative risk of reoffense); N.J. STAT. ANN. § 2C:7-8(c) (West 1997) (describing “three levels of notification depending upon the risk of re-offense”); N.Y. CORRECT. LAW § 168-6 (McKinney Supp. 1998) (describing the criteria for determining the type of notification based upon a low, moderate, or high risk of recidivism); see also Logan, supra note 25, at 1175 n.40 (discussing three-tiered notification statutes).


28 The New Jersey statute, for example, classifies notification obligations as follows:

(1) If risk of re-offense is low, law enforcement agencies likely to encounter the person registered shall be notified;

(2) If risk of re-offense is moderate, organizations in the community including schools, religious and youth organizations shall be notified;

(3) If risk of re-offense is high, the public shall be notified through means . . . designed to reach members of the public likely to encounter the person registered, in addition to the notice required [elsewhere in the statute].

N.J. STAT. ANN. § 2C:7-8(c)(1)-(3).

29 In 1989, a seven-year-old Washington boy was found wandering in the woods after a convicted sex offender lured him there, raped him and attempted to kill him. See Hal Spencer, Victim’s Mother Glad Predators Locked Up, SEATTLE TIMES, May 15, 1994, at B1. In 1990, Jacob Wetterling, an eleven-year-old Minnesota boy, disappeared after he was
The laws operate on the presumption that sex offenders, especially child sex offenders, are incurable recidivists. The House Report accompanying the federal law noted that the “[e]vidence suggests that child sex offenders are generally serial offenders. Indeed, one recent study concluded [that] the 'behavior is highly repetitive, to the point of compulsion,' and found that 74% of imprisoned child sex offenders had one or more prior convictions for a sexual offense against a child.”

Operating on this presumption of recidivism, registration and notification laws aim “to give communities and law enforcement officials information that they can use to prevent sex offenses in their neighborhoods, thereby reducing their sense of helplessness.”

B. Sexual Predator Laws

In the wake of high-profile, horrific sex crimes, several states enacted laws
to provide for the civil commitment of sexual predators. Like registration and notification laws, the intent of the sexual predator statutes is to protect the public, in this case by preventing the reentry of certain sex offenders into society.\textsuperscript{34} Pursuant to these statutes, states may institute commitment proceedings against any individual still within their custody\textsuperscript{35} after conviction of various sexual offenses, including rape, statutory rape, and sexual abuse of a convicted sex offender, recently released from prison, raped and sexually mutilated a young boy. Deborah L. Morris, Note, \textit{Constitutional Implications of the Involuntary Commitment of Sexually Violent Predators – A Due Process Analysis}, \textit{82 Cornell L. Rev.} 594, 611 (1997) (reviewing the 1989 case that prompted the Washington legislature to enact the Sexually Violent Predator Act).


\textsuperscript{35} Missouri law goes even further, allowing the attorney general to institute proceedings against an individual not in the custody of the state if that person has been convicted of a sexually violent offense in the past and a law enforcement agency notifies the attorney general that the individual has committed a “recent overt act” or “has been in the custody of an agency with jurisdiction within the preceding ten years and may meet the criteria of a sexually violent predator.” \textit{Mo. Ann. Stat.} §§ 632.484.1(1)-(2) (West 1995 & Supp. 2000).
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child, who otherwise meets the definition of "sexual predator." Typically, the court or a state law enforcement official, such as the attorney general or a prosecuting attorney, may institute commitment proceedings. If there is sufficient probable cause to detain the defendant as a sexual predator, he is then evaluated by mental health professionals to determine whether he meets that definition. Following the examination, the detained individual is entitled to a trial, during which the judge or a jury must determine beyond a reasonable doubt, whether he is a sexually violent predator. The state may detain


indefinitely any offender found to fall within this designation.\textsuperscript{39}

Unlike registration and notification statutes, these new commitment statutes
do not apply to all sex offenders. Instead, they pertain only to a “small but
extremely dangerous group of predators”\textsuperscript{40} who suffer from a “mental
abnormality” or a “personality disorder”\textsuperscript{41} that makes them likely to engage in
future “predatory acts of sexual violence.”\textsuperscript{42} According to legislators, such
abnormality, while not rising to the level of mental illness for the purposes of
existing civil commitment statutes, renders such individuals likely to engage in
repeated acts of sexual violence.\textsuperscript{43} Because ordinary commitment procedures
are insufficient to protect society in this instance, sexual predator statutes
prescribe altered procedures for those falling within their reach.\textsuperscript{44}

\textsuperscript{39} “If the court or jury so determines, that the person is a sexually violent predator, the
person shall be committed . . . until such time as the person’s mental abnormality has so
changed that the person is safe to be at large.” MO. ANN. STAT. § 632.495 (West 1995 &
Supp. 2000). For statutes using identical or similar language, see FLA. STAT. ch. 394.917(2)
(2000); KAN. STAT. ANN. § 59-29a07(a)(West 1999); S.C. CODE ANN. § 44-48-100(A)

\textsuperscript{40} See, e.g., WASH. REV. CODE ANN. § 71.09.010 (West 1988 & Supp. 2000) (finding
“that a small but extremely dangerous group of sexually violent predators exist[s]” who
require long-term commitment).

\textsuperscript{41} The term “mental abnormality” is generally defined as “a congenital or acquired
condition affecting the emotional or volitional capacity which predisposes the person to
commit sexually violent offenses in a degree constituting such person a menace to the health
similar definitions, see WASH. REV. CODE ANN. § 71.09.020(2) (West 1988 & Supp. 2000)
and KAN. STAT. ANN. § 59-29a02(b) (West 1999).

\textsuperscript{42} See, e.g., MO. ANN. STAT. § 632.480(5) (West 1995 & Supp. 2000) (defining a
sexually violent predator as a “person more likely than not to engage in predatory acts of
sexual violence if not confined”); WASH. REV. CODE ANN. § 71.09.020(1) (West 1988 &
Supp. 2000) (defining a sexually violent predator as “any person who has been convicted of
or charged with a crime of sexual violence and who suffers from a mental abnormality or
personality disorder which makes the person likely to engage in predatory acts of sexual
violence if not confined in a secure facility”). Predatory acts of sexual violence are often
defined as “acts directed towards strangers or individuals with whom relationships have
been established or promoted for the primary purpose of victimization.” MO. ANN. STAT. §
632.480(3) (West 1995 & Supp. 2000); see also WASH. REV. CODE ANN. § 71.09.020(4)
(West 1988 & Supp. 2000). Kansas originally used a similar definition of sexual predator
but recently amended its statutes so that commitment can occur if the detained individual
has a “mental abnormality or personality disorder which makes the person likely to engage in
repeat acts of sexual violence.” KAN. STAT. ANN. § 59-29a02(a) (West 1999).

\textsuperscript{43} See, e.g., WASH. REV. CODE ANN. § 71.09.010 (West 1988 & Supp. 2000) (finding that
certain “sex offenders’ likelihood of engaging in repeat acts of predatory sexual violence is
high”); KAN. STAT. ANN. § 59-29a01 (West 1999) (finding “that there exists an extremely
dangerous group of sexually violent predators who have a mental abnormality or personality
disorder and who are likely to engage in repeat acts of sexual violence”).

\textsuperscript{44} The new sexual predator laws are closely related to earlier sexual psychopath laws that
C. Federal Rules of Evidence 413-415

In 1995, Congress enacted several evidentiary provisions allowing the admission of propensity evidence against sexual offenders. Specifically, FRE 413 and 414 allow the prosecution to put forth evidence of a defendant's past sexual offenses in a criminal trial for sexual assault or child molestation.\footnote{FED. R. EVID. 413(a) and 414(a). The new rules became law in 1995 and technically created an offense-specific exception to the bar on admissibility of character evidence for sexual assault. For an in-depth discussion of enactment and effect of FRE 413, see Baker, supra note 10, at 563-624 (reviewing the legislative history, intent, and potential effects of FRE 413).} FRE 415 allows the use of such evidence in civil cases that are based upon sexual assault, sexual harassment, or child molestation.\footnote{FED. R. EVID. 415(a) ("In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in FRE 413 and FRE 414 of these rules.")} The rules make clear that the evidence admitted under these rules "may be considered for its bearing on any matter to which it is relevant."\footnote{FED. R. EVID. 413(a), 414(a). FRE 415 notes that such evidence in civil cases "may be considered as provided in Rule 413 and Rule 414 of these rules." FED. R. EVID. 415(a).}

were popular in the mid-twentieth century. Between 1937 and 1960, at least half of the states enacted laws allowing involuntary civil commitment of sexual psychopaths. See Raquel Blacher, Comment, Historical Perspective of the "Sexual Psychopath" Statute: From the Revolutionary Era to the Present Federal Crime Bill, 46 MERCER L. REV. 889, 897-903 (1995) (discussing the “sexual psychopath” statutes enacted by twenty-six states and the District of Columbia during this period). Such laws viewed sexual psychopaths as mentally ill and permitted commitment as an alternative to criminal punishment. See Stephen R. McAllister, "Punishing" Sex Offenders, 46 U. KAN. L. REV. 27, 45 (1997) ("The original sexual psychopath statutes operated on the premise that a sex offender was either 'bad' or 'mad,' but not both."). Due to reforms in the 1970s, many states repealed such laws and replaced them with laws imposing criminal punishment on sex offenders. See Joelle Anne Moreno, "Whoever Fights Monsters Should See to It that in the Process He Does Not Become a Monster": Hunting the Sexual Predator with Silver Bullets – Federal Rules of Evidence 413-415 – and a Stake Through the Heart – Kansas v. Hendricks, 49 FLA. L. REV. 505, 530-31 (1997) ("By 1990, half the states had repealed their sexual psychopath statutes and, of the remaining states, only five have actively enforced their laws."). The 1990s saw a resurgence of such statutes, although their purpose now is to use civil commitment as a way of prolonging detention rather than an alternative to criminal punishment. See McAllister, supra, at 45 (discussing the newer sexual predator acts that provide for involuntary commitment after completion of the term of criminal confinement).

\footnote{FED. R. EVID. 413(a) and 414(a). The new rules became law in 1995 and technically created an offense-specific exception to the bar on admissibility of character evidence for sexual assault. For an in-depth discussion of enactment and effect of FRE 413, see Baker, supra note 10, at 563-624 (reviewing the legislative history, intent, and potential effects of FRE 413).}

\footnote{FED. R. EVID. 413(a), 414(a). FRE 415 notes that such evidence in civil cases "may be considered as provided in Rule 413 and Rule 414 of these rules." FED. R. EVID. 415(a).}

There was early controversy regarding whether FRE 413-415 were exempt from FRE 403, which allows a court to exclude evidence determined to be more prejudicial than probative. Courts have since ruled that FRE 413-415 are subject to FRE 403 balancing test. See, e.g., United States v. Eagle, 137 F.3d 1011, 1016 (8th Cir. 1998) ("Under both [FRE 413 and 414] the court must conduct a Rule 403 balancing test prior to admitting the
The new rules are an exception to the general prohibition against the use of past "bad acts" as character or propensity evidence at trial. Traditionally, our law operates on the presumption that "a defendant must be tried for what he did, not for who he is."48 Thus, FRE 404 provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show actions in conformity therewith."49 The purpose behind exclusion of such evidence lies in its prejudicial tendencies:

[Character evidence] is objectionable not because it has no appreciable probative value but because it has too much. The natural and inevitable tendency of the tribunal... is to give excessive weight to the vicious record of crime thus exhibited and either to allow it to bear too strongly on the present charge or to take the proof of it as justifying a condemnation, irrespective of the accused's guilt of the present charge.50

Prior to enactment of FRE 413-415, evidence of prior sexual offenses was allowed under FRE 404 for non-character purposes, such as to show defendant's motive or to impeach him.51 The new rules, however, go far beyond any of FRE 404's exceptions and allow prosecutors and civil plaintiffs to introduce evidence of a defendant's past acts in order to demonstrate the likelihood that he committed a similar act in the present situation.

Proponents argued that the new rules were "critical to the protection of the public from rapists and child molesters" whose crimes are distinctive in nature.52 Relying on the assumption that sex offenders were predisposed to repeat their crimes, they contended that "[i]n sex-related crimes, it can be particularly useful to demonstrate a propensity of the accused to commit similar prior offenses."53 Furthermore, proponents of the rules argued that

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48 United States v. Meyers, 550 F.2d 1036, 1044 (5th Cir. 1977).
49 FED. R. EVID. 404(b).
50 1A HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 58.2 (1983).
51 FED. R. EVID. 404(b) (exceptions to ban on evidence of prior acts includes evidence to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident).
these changes were necessary to battle credibility problems faced by many rape victims at trial. In addition, sponsors of the rules suggested that they might encourage rape victims, who are often reluctant, to come forward and tell their stories. Finally, they countered arguments regarding potential prejudice to the defendant by pointing to studies showing that the likelihood of false rape allegations is minimal.

The passage of FRE 413, 414, and 415 was not without contention. Many groups opposed the proposal, with some likening the rules to the "star chamber" proceedings of medieval England, others arguing that such evidence would unfairly prejudice the defendant, and still others arguing that the rules unreasonably diminished existing constitutional protections for criminal defendants. Despite their controversy, the rules became law in 1995

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54 See 140 CONG. REC. H8991-92 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari) (discussing concern about false accusation and consent defenses at sexual assault trials); see also 140 CONG. REC. H5439 (daily ed. June 29, 1994) (statement of Rep. Kyl) ("If the defendant has committed similar acts in the past, the claims of the victim are more likely to be considered truthful if there is substantiation of other assaults.").

55 See 140 CONG. REC. H5439 (daily ed. June 29, 1994) (statement of Rep. Kyl) ("Victims who [might be reluctant to pursue charges] are often willing to bear the burden of testifying when they know that the person who marred their lives has also victimized others and that these revelations will come out at trial.").


57 See, e.g., 140 CONG. REC. H8990 (daily ed. Aug. 21, 1994) (statement of Rep. Hughes) ("If the primary evidence in a prosecution's case in chief is evidence of prior acts—which would be possible under the changes—we would be sinking into the star chamber procedures that have long been rejected by civilized societies everywhere.").

58 See 139 CONG. REC. S15072 (daily ed. Nov. 4, 1993) (statement of Sen. Biden) (noting that evidence of past acts "tends to... blind people to looking at the real facts before them and making an independent judgment").

59 The Judicial Conference Committee argued that the rules would "diminish significantly the protections that have safeguarded persons accused in criminal cases... against undue prejudice." JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE JUDICIAL CONFERENCE OF THE UNITED STATES ON THE ADMISSION OF CHARACTER EVIDENCE IN
with the weight of the executive department\textsuperscript{60} and the populace behind them. While representing a change at the federal level, the rules are not entirely without precedent. A few state courts have allowed admission of past sexual misconduct under a "lustful disposition" or "depraved sexual instinct"


\textsuperscript{60} While FRE 413-415 were enacted during the Clinton Administration, which did not oppose the rules, the considerable push for their passage occurred during the Bush Justice Administration. Prior to their enactment, David Karp, a senior counsel in the Bush Justice Department publicly spoke about the need for FRE 413-415. \textit{See} David J. Karp, \textit{Evidence of Propensity and Probability in Sex Offense Cases and Other Cases}, 70 CHI.-KENT L. REV. 15, 19-26 (1994) (supporting the admission of evidence to aid the jury in foreclosing reasonable doubt in inconclusive cases and resolving claims between plaintiff and defendant). The House and Senate sponsors of the rules explicitly relied upon Karp's reasoning in justifying them. \textit{See} 140 CONG. REC. H8991 (daily ed. Aug. 21, 1994) (statement of Rep. Molinari) (quoting Karp's speech regarding the benefits of admitting evidence "on any matter to which it is relevant" rather than the stricter rules of 404(b)); \textit{see also} Letter from W. Lee Rawls, Assistant Attorney General, Office of Legislative Affairs, to Sen. Robert Dole, Minority Leader, \textit{reprinted in} 137 CONG. REC. S4927 (daily ed. Apr. 24, 1991) ("These new rules are responsive to deficiencies in the existing rules of evidence . . . . [It is an] entirely sound perception that evidence of this type is frequently of critical importance in establishing the guilt of a rapist or child molester, and that concealing it from the jury often carries a grave risk that such criminal will be turned loose to claim other victims.").
exception. As with the federal rules, courts using the "lustful disposition" exception rely upon the notion that sex offenses are uncommon, that sex offenders are highly recidivistic, and that the lack of substantive evidence in sexual assault crimes creates a need for additional evidence.62

D. The Violence Against Women Act

In 1994, after extensive hearings and debate, Congress passed its first comprehensive legislative attempt to deal with violence against women. The Violence Against Women Act addresses this problem in several ways. It provides, for example, a substantial number of grants aimed at battling violence against women63 and establishes or provides assistance for

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61 See, e.g., State v. Lachtermann, 812 S.W.2d 759, 768 (Mo. Ct. App. 1991) ("Evidence of repeated acts of sexual abuse of children demonstrates, per se, a propensity for sexual aberration and a depraved sexual instinct and should be recognized as an additional, distinct exception to the rule against the admission of evidence of uncharged crimes."); State v. Raye, 326 S.E.2d 333, 335 (N.C. Ct. App. 1985) (older sister allowed to offer corroborating evidence of incest "for the purpose of showing intent as well as the unnatural lust of the defendant"); State v. Tobin, 602 A.2d 528, 531 (R.I. 1992) (evidence of prior acts previously allowed to demonstrate motive, design, plan, and scheme now admissible to demonstrate defendant's "lewd disposition"); see also Maynard v. State, 513 N.E.2d 641, 647 (Ind. 1987) (testimony concerning prior sexual acts was admissible to "show a continuing plan on [defendant's] part to exploit and sexually abuse [plaintiff]"); overruled by Lannan v. State, 600 N.E.2d 1334, 1339 (Ind. 1992) (prior sexual misconduct admitted only to demonstrate proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake and not to demonstrate "bad character"); State v. Edward Charles L., 398 S.E.2d 123, 131 (W.Va. 1990) (evidence admissible so long as prior acts were used to establish defendant's identity, absence of mistake or accident, and intent); State v. Tarrell, 247 N.W.2d 696, 702 (Wis. 1976) (determining that a consideration of all sexual incidents might establish a general plan and therefore a motive or intent to commit the alleged act).

62 See Taylor, 735 S.W.2d at 415 ("[T]he commission of a sex crime has an inherent significance as evidence the perpetrator has previously committed . . . [similar acts]."); see also Lannan, 600 N.E.2d at 1335-37 (noting that high rates of recidivism in child molestation cases and difficulties of proof form the basis for this exception). For an excellent description of the lustful disposition exception, see Baker, supra note 10, at 582 ("Not all courts accept [the lustful disposition] exception, but those that do rest the exception on the previously discussed misconceptions that rapists are rare and particularly recidivistic, and on a belief that the private nature of the act justifies letting in prior act evidence due to the absence of corroborating witnesses."). See also David P. Bryden & Roger C. Park, "Other Crimes" Evidence in Sex Offense Cases, 78 MINN. L. REV. 529, 559 (1994) (asserting that these exceptions "do[] not justify the admission of uncharged misconduct to show a 'depraved sexual instinct'").

63 See, e.g., 42 U.S.C.A. § 13931 (West 1995) (grants for capital improvements to prevent crime in public transportation); id. § 13971 (grants to government entities to assist in rural domestic violence and child abuse enforcement assistance).
information-gathering and training programs.\textsuperscript{64} By far its most significant provision, however, was its now defunct civil rights remedy,\textsuperscript{65} which provided a federal civil remedy for victims of gender-motivated crimes of violence.\textsuperscript{66} The civil rights remedy had two distinct requirements. First, it required a woman bringing a claim to show that she was the victim of a violent felony under state or federal law.\textsuperscript{67} Second, a VAWA plaintiff was required to show that the crime of violence was “motivated by gender,” that is, that it was committed “because of gender or on the basis of gender; and due, at least in part, to an animus based on the victim’s gender.”\textsuperscript{68}

VAWA arose out of the belief that “[o]ur country has an unfortunate blind spot when it comes to certain crimes against women. Historically, [such] crimes . . . have been perceived as anything but crime—as a ‘family’ problem, as a ‘private’ matter, as sexual ‘miscommunication.’”\textsuperscript{69} Recognizing the

\textsuperscript{64} See id. § 13941 (training programs for parole officers and other personnel working with sex offenders); id. § 13961 (encouraging National Research Council to develop research agenda regarding increased understanding of violence against women); id. § 13963 (requiring Secretary of Health and Human Services to study the nationwide incidence and cost of injuries resulting from domestic violence).

\textsuperscript{65} The Supreme Court recently struck down VAWA as beyond Congress’ regulatory powers. See United States v. Morrison, 120 S. Ct. 1740, 1744 (2000) (neither the Commerce Clause nor the enforcement clause of the Fourteenth Amendment provides Congress with the authority to enact a civil remedy). Despite the Supreme Court’s action, examination of that provision and its relationship to the crazed rapist myth is nevertheless useful. First, it provides an example of how otherwise laudable legislation may still reinforce stereotypes. Second, the civil rights action presents issues similar to bias-crime statutes including gender that are increasingly popular in many states. See Julie Goldscheid, \textit{Gender-Motivated Violence: Developing a Meaningful Paradigm for Civil Rights Enforcement}, 22 HARV. WOMEN’S L.J. 123, 139 (1999) (noting that by 1998, 40 states and the District of Columbia carried a bias crime law on their books with 19 of those states specifically addressing gender-based bias crimes).

\textsuperscript{66} See 42 U.S.C.A. § 13981(c) (West 1995) (victim of a crime of violence motivated by gender may recover damages and any other relief the court deems appropriate). Although the statute is gender-neutral, this Article refers to victims of gender-bias as “she,” reflecting that Congress was primarily concerned with violence against women.

\textsuperscript{67} See id. § 13981(c) (providing a cause of action against any person “who commits a crime of violence motivated by gender and thus deprives another of the right [to be free from crimes of violence]”). The civil rights remedy provides that a “crime of violence” is “an act or series of acts that would constitute a felony against the person or that would constitute a felony against property if the conduct presents a serious risk of physical injury to another” and comes within the meaning of state and federal offenses described in section 16 of Title 18. Id. § 13981(d)(2)(A). Section 16 of Title 18 states that a “crime of violence” includes “an offense that is a felony and that “by its nature, involves a substantial risk that physical force . . . may be used in the course of committing the offense.” 18 U.S.C.A. § 16(b) (West 1995).

\textsuperscript{68} 42 U.S.C.A. § 13981(d)(1) (West 1995).

\textsuperscript{69} S. REP. NO. 102-197, at 37 (1991).
barriers historically blocking rape victims' redress, VAWA's supporters intended the Act to educate the public and members of the legal system regarding "archaic prejudices that blame women" for sexual assault, give women assurance that their attackers would be prosecuted and ensure that trials would "concentrate on the conduct of the attacker rather than the conduct of the victim."70 With respect to the civil rights action, in particular, Congress acknowledged through VAWA that traditional civil rights remedies against discrimination had been largely unavailable to women suffering from gender-biased attacks.71 By "[p]lacing this violence in the context of the civil rights laws," Congress sought to embrace the feminist position that "recognizes [sexual violence] for what it is— a hate crime."72

II. DECONSTRUCTING RAPE

Do the above-referenced laws comport with feminist ideals regarding rape prosecution and punishment? To answer that question we must first examine the traditional legal paradigm and accompanying myths regarding rape as well as feminist efforts to debunk such myths and to expand our understanding of the crime of rape.

A. A Brief History of Rape Prosecution and Feminist Reform Efforts

The Anglo-American tradition has historically treated rape—generally defined as the "carnal knowledge of a woman forcibly or against her will"73—as a serious crime.74 In the eighteenth century, Blackstone noted that rape of a

71 See id. at 48 (past legislature has not filled the "gender gap" left by traditional anti-bias crime law). Congress noted that:

Whether the attack is motivated by racial bias, ethnic bias, or gender bias, the results are often the same. The victims of such violence are reduced to symbols of hatred; they are chosen not because of who they are as individuals but because of their class status. The violence not only wounds physically, it degrades and terrorizes, instilling fear and inhibiting the lives of all those similarly situated.

Id. at 49.

72 Id. at 49.
73 4 WILLIAM BLACKSTONE, COMMENTARIES *209 (1803). Although states have built upon and altered current definitions of rape, it is still conceived to be remarkably similar to Blackstone's definition—forcible and non-consensual sex. See, e.g., MO. ANN. STAT. § 566.030 (West 1999) ("A person commits the crime of forcible rape if such person has sexual intercourse with another person by the use of forcible compulsion."); Stephen J. Schulhofer, Taking Sexual Autonomy Seriously, 11 LAW & PHIL. 35, 39 (1992) [hereinafter Schulhofer, Sexual Autonomy] (noting that most laws "[i]n one form or another . . . preserve[,] as essential requirements both force and non-consent").
74 In fact, the punishment of rape goes back to ancient and Roman law. See, e.g., Donald Dripps, Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent, 92 COLUM. L. REV. 1780, 1781-82 (1992) (noting that the rape of a virgin was a serious crime that ancient code, roman law, and early English law punished
woman was historically punishable by death. Until relatively recently, death was a potential punishment for rape in several states. While the death penalty is no longer available as punishment, most state laws currently impose substantial penalties for rape, and most citizens consider it second only to homicide in terms of its heinousness. Although rape is considered a serious and despicable crime in the abstract, feminist scholarship over the last three decades exposed that an underlying misogyny and a desire to protect male domination over women have traditionally impaired the enforcement of rape laws. Few rape cases, feminist scholars noted, actually resulted in successful convictions of accused rapists. According to these scholars, at least part of this failure, was attributable to

75 See BLACKSTONE, supra note 73, at *210 (noting that rapists were punished by death under early Saxon, old Gothic and Scandinavian law).


77 See Coker, 433 U.S. at 584 (striking down Georgia law authorizing death penalty for rape of an adult woman as “grossly disproportionate and excessive punishment and ... therefore forbidden by the 8th Amendment as cruel and unusual punishment”). Relying on a narrow reading of Coker, Louisiana recently enacted a law authorizing the death penalty for rape of a child under 12 years of age. See LA. REV. STAT. ANN. §14.42(A)(4), (D)(2) (West Supp. 1999). The Louisiana Supreme Court upheld the constitutionality of the statute. See State v. Wilson, 685 So.2d 1063, 1063 (La. 1996) (upholding death sentence for a man convicted of raping three girls under ten on grounds that the punishment is not out of proportion with the severity of the crime). Other states are also considering such legislation. See Meryl P. Diamond, Assessing the Constitutionality of Capital Child Rape Statutes, 73 ST. JOHN'S L. REV. 1159, 1160 n.6 (1999) (discussing pending legislation in Georgia and Pennsylvania).

78 See, e.g., MO. ANN. STAT. § 566.030 (West 1995 & Supp. 2000) (potential sentence of life imprisonment for forcible rape); see also Kim Lane Scheppel, The Re-Vision of Rape Law, 54 U. Chi. L. Rev. 1095, 1095 (1987) (reviewing SUSAN ESTRICH, REAL RAPE (1987)) (“Convictions for rape often have brought the most severe sentences the law can impose.”).

79 See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, BULLETIN: THE SEVERITY OF CRIME 2 (1984) (survey of 60,000 people revealed that the they put rape and child abuse second only to murder in terms of their seriousness); see also GARY D. LAFREE, RAPE AND CRIMINAL JUSTICE: THE SOCIAL CONSTRUCTION OF SEXUAL ASSAULT 62 (1989) (“[P]eople regard rape as a heinous offense worthy of the most serious punishment.”).

80 See Lynne Henderson, Getting to Know: Honoring Women in Law and in Fact, 2 TEX. J. WOMEN & L. 41, 41 (1993) (“[S]uccessful prosecution of cases not meeting the stereotype of real rape, while no longer impossible, remains improbable.”); Scheppel, supra note 78, at 1098 (“One study ... indicated that men who raped had about a 13% chance of being convicted, assuming the victim reported the crime to the police. Another study revealed the chances were closer to 2%.”); Comment, Rape and Rape Laws, Sexism in Society and Law, 61 CAL. L. REV. 919, 927 (1973) (commenting on the relatively few apprehended rapists charged and convicted, and noting that in California there is a higher acquittal rate for rape than for any other felony).
formal legal rules posing substantial barriers to prosecution. Such rules included the requirement that a woman physically oppose a man to the “utmost” before violent and forcible sexual intercourse could be construed as rape. The rules also imposed onerous and unusual evidentiary requirements, designed to cast doubt on the victim’s truthfulness. They further demanded cautionary jury instructions explicitly advising jurors to be skeptical of victims’ claims. Scholars also pointed to cultural barriers to rape

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81 See generally Estrich, Rape, supra note 7, at 1105-25 (discussing that this requirement defines rape in terms of a woman’s resistance rather than male force used to overcome female nonconsent). “Utmost resistance” amounts to physical struggle, short of putting oneself at significant risk of death, necessary to prevent the rape from occurring—i.e., the kind of struggle that leaves visible marks as proof of the victim’s defense of virtue. See, e.g., Brown v. State, 106 N.W. 536, 538 (Wis. 1906) (“Not only must there be entire absence of mental consent or assent, but there must be the most vehement exercise of every physical means of faculty within the woman’s power to resist the penetration of her person, and this must be shown to persist until the offense is consummated.”). Courts viewed the victim’s failure to resist as evidence of her consent to sex. See Estrich, Rape, supra note 7, at 1105-25 (noting that failure to resist may result in a determination that the woman victim, rather than the man, was the party acting unreasonably).

82 See Fischer, supra note 7, at 696 (“Rape prosecutions have also included evidentiary requirements not imposed in other criminal trials.”); see also Dubois, supra note 7, at 1098 (“In New York, a woman’s charge of rape was subject to the strictest corroboration requirements in the country... [a] woman’s complaint of rape standing alone was ‘incredible as a matter of law.’”).

83 Many courts, for example, adhered to the “prompt complaint” and “corroboration” requirements. See Dubois, supra note 7, at 1088 (“The prompt complaint doctrine is a specific exception to the rule against prior consistent statements founded upon a distrust of rape complainants and a fear of false accusations.”); Estrich, Rape, supra note 7, at 1139 (the MPC adopted the “prompt complaint” requirement and required some corroborating proof due to fear of blackmail); Fischer, supra note 7, at 696 (“Until recently, the state could only prove rape where some piece of independent evidence corroborated the victim’s story.”). The prompt complaint requirement stems as far back as Blackstone who noted that “in order to prevent malicious accusations, [Anglo law]... required that the woman should immediately after... go to the next town, and there make discovery to some credible persons of the she injury she has suffered.” BLACKSTONE, supra note 73, at *211. In rape trials, evidence of failure to complain promptly was presented to the jury and created a strong presumption against the victim’s credibility. See, e.g., Baccio v. People, 41 N.Y. 265, 268 (1869) (noting that it is natural for a woman to immediately complain of crime to a close friend/relative and failure to do so “would be strong evidence that her affirmation on the subject... was false”). The corroboration requirement similarly stemmed from the notion that women lie about sex, as reflected in Lord Hale’s statement that rape “is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho[ugh] never so innocent.” 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 634 (1778); see also MODEL PENAL CODE § 213.6 comment at 428 (1980) (“In no other context is felony liability premised on conduct that under other circumstances may be welcomed by the ‘victim.’”).

84 See Torrey, Rape Myths, supra note 7, at 1046 (commenting on MPC advice that “the
convictions. At all stages of prosecution, they argued, police, prosecutors, judges, and juries relied on rape myths to discount the possibility that a rape had occurred. Such myths included notions that "women, motivated by revenge, blackmail, jealousy, guilt, or embarrassment falsely claim rape after consenting to sex," that women fantasize about being raped, that only "bad" women are raped, and that women provoke rape through their appearance.

jury shall be instructed to evaluate the testimony of a victim or complaining witness with special care in view of the emotional involvement of the witness and the difficulty of determining the truth with respect to alleged sexual activities carried out in private

85 See ZSUZSANNA ADLER, RAPE ON TRIAL 17 (1987) (maintaining that it has become "increasingly clear that rape victims were systematically subjected to institutionalized sexism, which began with their treatment by police, continued through the legal system . . . and ended with the acquittal of many de facto rapists"); Shirley Feldman-Summers & Karen Lindner, Perceptions of Victims and Defendants in Criminal Assault Cases, 3 CRIM. JUST. & BEHAV. 135, 135-36 (1976) (noting that a "major factor" in the failure of rape prosecutions "is related to the judgmental policies of the police, the prosecuting attorneys, and the juries"); Torrey, Rape Myths, supra note 7, at 1047 (discussing the reflection of rape myths in juror and judicial misconceptions about rape).

86 Torrey, Rape Myths, supra note 7, at 1025; see Mary I. Combs, Telling the Victim's Story, 2 TEX. J. WOMEN & L. 277, 282 (1993) ("The assumption inherent in some myths is that the woman is consciously lying to hide her sexual complicity or to harm the man."). The drafters of the Model Penal Code, for example, argued that the prompt complaint doctrine was necessary to protect against the possibility that "unwanted pregnancy or bitterness at a relationship gone sour might convert a willing participant in sexual relations to a vindictive complainant." MODEL PENAL CODE § 213.6 comment at 421 (1980). Others similarly used women's vindictiveness to support the corroboration requirement. See MORRIS PLOSCOWE, SEX AND THE LAW 187-90 (1951) (false rape charges might be brought for blackmail, pure fantasy, revenge, spitefulness, or psychopathic reasons); Note, Corroborating Charges of Rape, 67 COLUM. L. REV. 1137, 1138 (1967) (women accuse men falsely because of mental illness, delusions, shame, bitterness, pregnancy, hatred, or preference for a false explanation to a true one).

87 See Martha R. Burt, Rape Myths and Acquaintance Rape, in ACQUAINANCE RAPE: THE HIDDEN CRIME 31 (Andrea Parrot & Laurie Bechhofer eds., 1991) [hereinafter ACQUAINANCE RAPE] (commenting the continuing belief that some women like to be "treated violently and that force is sexually stimulating to women"); Torrey, Rape Myths, supra note 7, at 1026 (despite the past prevalence of the theory that women fantasized about rape, the theory has been widely discredited). In Rusk v. State, for example, several justices of the Maryland Supreme Court argued that the victim, who verbally resisted but did not physically resist, was not a rape victim because her verbal requests to desist did not transform a seducer into a rapist." Rusk v. State, 424 A.2d 730, 733 (Md. 1981) (Cole, J., dissenting).

88 See Torrey, Rape Myths, supra note 7, at 1025 ("A study of rape done in the District of Columbia found that in 82% of the rapes studied, the rape victims had a 'good reputation.'"). The prompt complaint doctrine reflects this myth in operation. Courts
and behavior.89

Scholars argued that legal rules and cultural myths focusing on female veracity and malice diverted attention from the defendant’s behavior, effectively putting the rape victim on trial.90 More particularly, they noted, victim-blaming rules and myths prevented successful prosecution of “acquaintance” rape.91 Because acquaintance rape often centered on the issue

89 See Joyce E. Williams & Karen A. Holmes, The Second Assault: Rape and Public Attitudes 118 (1981) (recounting study results in which “most respondents . . . saw women’s behavior and/or appearance as the second most frequent cause of rape”). The behavior sufficient to doom a woman’s rape claim is quite varied, see Stephen J. Schulhofer, Unwanted Sex 28 (1998) (jury acquitted on grounds of questionable occupations, past consensual sex, and unconventional family values), including such things as her manner of dress, see Jury: Woman in Rape Case “Asked for It,” Chi. Trib., Oct. 6, 1989 (jury acquitted a rape suspect on grounds that the woman wore a lace mini-skirt without underwear), her past employment, see Susan Griffin, Rape: The All-American Crime, Ramparts 56 (1971) (upon cross-examination woman “admitted” to working as a cocktail waitress on occasion), her appearance unescorted in a bar, especially if she voluntarily consumed alcohol, see Karen Kramer, Note, Rule By Myth: The Social and Legal Dynamics Governing Alcohol-Related Acquaintance Rapes, 47 Stan. L. Rev. 115, 121 (1994) (women who drink are perceived as more sexually available by both men and women), and her past sexual activity, whether during the encounter at issue or a different one. See Vivian Berger, Man’s Trial, Woman’s Tribulation: Rape Cases in the Courtroom, 77 Colum. L. Rev. 1, 14 (1977) (defense attorneys were permitted to “delve into issues like the victim’s use of birth control, her attendance (unescorted) at bars, the existence of any illegitimate children, and the number of her prior sexual experiences”).

90 See Laurie Bechhofer and Andrea Parrot, What is Acquaintance Rape?, in ACQUAINTANCE RAPE, supra note 87, at 9-12 (the fact that an acquaintance rape victim knows her assailant seems to make her appear partially to blame for the incident); Susan Estrich, Sex at Work, 43 Stan. L. Rev. 813, 829-32 (1991) [hereinafter Estrich, Sex at Work] (contending that the court holds women responsible for their “own torment” by basing the determination of harassment of women on their behavior); Torrey, Rape Myths, supra note 7, at 1058 (“The female victim must prove her innocence, while the male defendant is treated as if he has been defamed.”); see also Susan Brownmiller, Against Our Will: Men, Women and Rape 29-30 (1975) (tracing the modern concept of rape as a personal injury and corresponding suspicions of female motivations dating back to the 13th Century).

91 See Lynne Henderson, Rape & Responsibility, 11 L. & Phil. 127, 128 (1992) (noting that the meaning of “nonconsensual” and “forcible” are bitterly contested in all but the most stereotypical case of rape); see also Beverly J. Ross, Does Diversity in Legal Scholarship Make a Difference?: A Look at the Law of Rape, 100 Dick. L. Rev. 795, 821-22 (1996) (in cases lacking physical evidence of rape the focus often turns to the woman’s state of mind to the exclusion of the man’s).
of consent, "the victim's character [was] inevitably a critical issue." Accordingly, the operation of rape myths regarding the victim presented a particularly difficult obstacle to overcome. Ultimately, the duality of rape prosecutions—the willingness to convict men who raped strangers but not those who raped acquaintances—led scholars to conclude that rape law reflected a profound misogyny. According to Lynne Henderson:

[A] primary impediment to recognition that rape is a real and frequent crime [is the] unspoken "rule" of male innocence and female guilt in law[...][the] unexamined belief that men are not morally responsible for their heterosexual conduct, while females are morally responsible both for their conduct and for the conduct of males. Indeed, men are entitled to act on their sexual passions, which are viewed as difficult and sometimes impossible to control; this belief also says that women should know this and avoid stimulating them if they do not wish to have sexual intercourse . . . . The male innocence/female guilt story is inapplicable only in the case of heterosexual relations and rape involving black men and white women, where the story is reversed: the theme in this context becomes male guilt and female innocence both in law and in culture. But otherwise, the defining story for interpreting rape in law and fact is that of male innocence/female guilt. In an effort to broaden legal recognition of rape and to overcome victim blaming myths and practices, many feminists lobbied for, and were largely successful in effecting, legal reforms. Pursuant to their efforts, many states

93 Henderson, supra note 91, at 130-31; see also CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 181-83 (1989) (condemning focus on the male rapist's lack of perception in realizing that the woman did not want him, rather than what the female victim felt); Estrich, Sex at Work, supra note 90, at 815 ("[Rape] is the only crime whose victims are almost exclusively female. And it is the only crime which is defined more by the actions, reactions, motives, and inadequacies of the victim than by those of the defendant."); Torrey, Rape Myths, supra note 7, at 1014 ("The legal treatment of rape seems to be structured to make it as difficult as possible to establish that any given man has raped any given woman.").

This story of male innocence/female guilt is so prevalent that many acquaintance rape victims either do not realize they were raped, see generally ROBIN WARSHAW, I NEVER CALLED IT RAPE: THE MS. REPORT ON RECOGNIZING, FIGHTING AND SURVIVING DATE AND ACQUAINTANCE RAPE 11-26 (1988) (discussing how acquaintance rape victims are perceived as responsible, or more responsible, than their assailant based on the cultural perception that "bad things" do not happen to "good girls"), or refuse to report the rape and subject themselves to often scalding attacks on their character at trial. See sources cited in Bryden & Lengnick, supra note 92, at 1224 nn.187, 188 (listing scholars attributing victim reluctance to report the rape to the legal system's treatment of acquaintance rape victims).
94 See Bryden & Lengnick, supra note 92, at 1198-99 (discussing goals behind rape law reforms).
abolished or substantially softened the corroboration requirement, cautionary jury instructions, marital rape exemptions, and the “utmost” resistance requirement. In response to feminist efforts, states also adopted rape shield laws designed to protect victims from brutal cross-examinations about their past sexual history. Many states also redefined rape as “sexual assault,” reflecting the feminist belief that “rape is a crime of violence [rather than] uncontrollable sexual passion.”

Whether these legal reforms effected feminist goals, however, is questionable. While society is now more familiar with acquaintance rape, most research shows only marginal improvement in the legal system’s response to rape. Women still do not report rape and the proportion of rape

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95 See Schulhofer, Sexual Autonomy, supra note 73, at 37; Estrich, Rape, supra note 7, at 1137 n.155; Bryden & Lengnick, supra note 92, at 1198-99.

96 See Bryden & Lengnick, supra note 92, at 1198.

97 The common law definition of rape specifically excluded the possibility that a wife could claim rape by her husband. See Lalenya Weintraub Siegel, Note, The Marital Rape Exemption: Evolution to Extinction, 43 CLEV. ST. L. REV. 351, 352-53 (1995). Many states have repealed the exemption entirely although several retain a partial exemption in some circumstances. See id.

98 See Schulhofer, Sexual Autonomy, supra note 73, at 36-38; Estrich, Rape, supra note 7, at 1123-24 (noting the elimination of the “utmost resistance” requirement). To some extent, the elimination of the utmost resistance requirement began before the feminist movement. During the 1950s, the drafters of the Model Penal Code advocated abolition of the standard. See Schulhofer, Sexual Autonomy, supra note 73, at 36-38.

99 See KATHERINE T. BARTLETT & ANGELA P. HARRIS, GENDER & LAW 832 (2d ed. 1998) (discussing rape shield laws enacted in response to feminist critique). Every state currently has a statutory or common law rape shield doctrine. See id. (noting that by 1997 only Utah and Arizona, states which had common law rape shield doctrines, had not passed rape shield laws). The Federal Rules of Evidence also contain a rape shield provision. See FED. R. EVID. 412.


102 See, e.g., Bryden & Lengnick, supra note 92, at 1263 (citing to noted New York City prosecutor Linda Fairstein’s assessment that juries currently are more sympathetic to the notion of acquaintance rape than in the past).

103 See generally CASIA SPOHN & JULIE HORNEY, RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT 157-75 (1992) (containing a survey of rape law reform demonstrating the limited improvement of the legal system’s response to rape); Ronald J. Berger, et al., The Dimensions of Rape Reform Legislation, 22 L. & SOC’Y REV. 329, at 334-36 (1988) (pointing out the limitations of rape reform laws); Bryden & Lengnick, supra note 92, at 1283-94 (asserting that rape law reforms have had a low impact on conviction rates
prosecutions and convictions to reported rapes has not dramatically increased.\(^{104}\) Nor have legal reforms necessarily shifted the focus of the trial away from the victim. The issues of force and non-consent remain part of the law\(^{105}\) and "criminal justice officials still believe that resistance by the victim and corroboration of her testimony are important determinants of whether a rape case will result in conviction."\(^{106}\) Additionally, rape shield laws often provide only minimal protection to victims, who are still subjected to questioning regarding their sexual practices, especially in acquaintance rape situations.\(^{107}\)

The failure of legal reforms can be partly attributed to feminists themselves. Much reform came about as a result of the "liberal" feminist movement whose primary focus was to gain recognition of female autonomy and individual choice.\(^{108}\) Accordingly, liberal feminists did not substantially question traditional rape law's focus on female non-consent as the dividing line between sex and rape. Rather, they concentrated their efforts on eradicating or mitigating legal tactics that undermine the victim's credibility regarding the issue of consent.\(^{109}\) Given that so much of the misogyny underlying rape law manifested itself in victim-blaming rules and myths, the liberal feminist focus was understandable. Nevertheless, by failing to question the traditional, non-consent model of rape law, liberal feminist efforts eventually failed:

[Feminist] attempts to change the standards set by legislation and common law to reflect the "objective" conditions of sexual assault . . . [were] fundamentally inconsistent with the social reality of rape: Women who are sexually attacked are concerned with their survival, not with the demonstration of nonconsent . . . . The need to legitimate women's claims, in terms of [traditional] legal discourse, forced the comparison between all acts of sexual violence and the hypothetical "real rape" (i.e., a

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\(^{104}\) See Spohn & Horney, supra note 103, at 160 (noting that rape reforms "did not produce an increase in the likelihood of conviction, and they produced an increase in reports and the likelihood of indictment in only one of the six [studied] jurisdictions").

\(^{105}\) Anne M. Coughlin, Sex & Guilt, 84 VA. L. REV. 1, 17 (1998); see also Schulhofer, Sexual Autonomy, supra note 73 (discussing continuing problems with the traditional view of consent as well as efforts to expand the conception of force).

\(^{106}\) Spohn & Horney, supra note 103, at 159.

\(^{107}\) Id. at 164-71 (criticizing rape shield laws as failing to exclude evidence of the victim's sexual history, particularly the history of sexual relations between the victim and the defendant).

\(^{108}\) See Torrey, Feminist Scholarship, supra note 101, at 38 (noting that liberal feminism's emphasis on issues of "privacy, autonomy, and individual choice shaped emerging rape reform").

woman resisting a stranger with a lethal weapon on the street). The liberalization of the law depended on establishing the validity of women's claims that were least likely to fit into the law's "ideal type." In order to avoid unfavorable comparisons between the "real" rape paradigm and the actual incidence of rape, "dominance" feminists took a different tack. To combat rape effectively, they argued, feminists cannot simply shoehorn reforms into the traditional rape paradigm or define rape solely in terms of violence. Rather, they must gain a richer understanding of the crime, its complex interaction between sex and violence, and its roots in the societal, political, and economic power that men maintain over women. Thus, dominance feminists have expanded their efforts beyond counteracting the "female guilt" aspect of the male innocence/female guilt narrative to include a closer examination of the "male innocence" portion of that story. The next section discusses the myth of the crazed rapist, an aspect of the "male innocence" story critical to understanding the traditional rape paradigm.

B. The Myth of the Crazed Rapist

In the male innocence/female guilt equation, the relationship between the two parts is relatively straightforward—blaming the victim for the rape is a critical step in creating and reinforcing the presumption of male innocence. Equally important to that presumption, however, is the notion that some men are not innocent. For example, Lynne Henderson notes that the presumption of

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10 Id. at 77 (footnote omitted).
11 See Jo Dixon, Feminist Reforms and Sexual Coercion Laws, in SEXUAL COERCION: A SOURCEBOOK ON ITS NATURE, CAUSES, AND PREVENTION 161, 170 (Elizabeth Grauerholz & Mary Koralewski eds., 1991) (criticizing liberal feminist characterization of rape as "violence" rather than "sex" as making more difficult the prosecution of acquaintance rape, which often lacks physical violence); Dorothy Roberts, Rape, Violence, and Women's Autonomy, 69 CHI.-KENT L. REV. 359, 362 (1993) ("If rape is violence as the law defines it (weapons, bruises, blood) then what most men do when they disregard women's sexual autonomy is not rape."); Henderson, supra note 91, at 157 ("In calling rape 'violence,' feminists have enabled many men to distinguish what they have done from what the rapists do, because they haven't caused external physical damage that they can understand as violence.").
12 See MacKinnon, supra note 93, at 171-83 (discussing, inter alia, the relationship between sex and violence and the roots of the subject's jurisprudence in social, political, and economic male dominance); see also Brownmiller, supra note 90, at 16-30 (describing the history of the law of rape as rooted in male predations of women); Roberts, supra note 111, at 369-81 (discussing the relationship between sex, power, and violence in the context of the eroticisation of dominance).
13 See Torrey, Feminist Scholarship, supra note 101, at 46 (observing that feminists have recently begun to focus their attention on the "myths of male innocence and female guilt" and have emphasized men's responsibility for their own conduct).
male innocence is reversed when a black man is accused of rape. Thus, in order to preserve a typical man’s innocence while still acknowledging rape as a crime, there also must exist an image of the type of man who does commit rape. As discussed below, that image exists in the notion that rapists are psychopathic, violent, sexually-compulsive (usually black) strangers.

The image of the rapist as psychopath has a long history in this country. Early in the twentieth century, psychiatrists began to view sex offenders as mental deviants with little ability to control their behavior or rehabilitate themselves. A series of sexual murders of children in the first half of the century further popularized the image of the sexual psychopath. Characterizing these events as “pathological,” an article appearing in The Nation argued that “abnormal sexual expression was at work in the land.” J. Edgar Hoover similarly declared “war on the sex criminal,” suggesting that “degenerate sex offenders,... depraved human beings more savage than beasts are permitted to rove America almost at will.” Eventually, the image of the sex offender as psychopath came to represent not only those who victimized children but those who forcibly raped adult women. As Judge Morris Ploscowe wrote in 1951:

Rape is a word of fearsome connotations. It calls forth visions of men who lurk in dark alleys and hallways, in vacant lots and behind bushes, ready to spring and attack the first female who passes by. It conjures up pictures of women who have been brutally attacked by beasts in human form and who have defended themselves to the point of death . . . .

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114 Lynne Henderson, Criminal Law Symposium: Commentary: Co-Opting Compassion: The Federal Victims’ Rights Amendment, 10 ST. THOMAS L. REV. 579, 584 (noting that “the image of the criminal is the ominous, if undifferentiated, poor, angry, violent, black or Latino male” and that the “popular image of the ‘criminal’ certainly does not include a white fraternity member who participates in the gang-rape of a young woman he knows”).


116 See Freedman, supra note 115, at 199 (discussing the media’s obsession with violent sexual murders during that period); PEGGY REEVES SANDAY, A WOMAN SCORNED: ACQUAINTANCE RAPE ON TRIAL 144 (1996) (discussing the preoccupation with the notion of the “sex psychopath” brought on by a “wave of brutal, seemingly sexually motivated child murders” during the 1930s). These murders set off nationwide “sex panics” regarding a perceived increase in such crimes. J. Edgar Hoover, for example, claimed that “the most rapidly increasing type of crime is that perpetrated by sex offenders.” Freedman, supra note 115, at 205-06. Statistics, however, did not support his claim. See id. at 206 (noting the “lack of evidence that the incidence of rape, child murder, or minor sex offenses has increased”).

117 SANDAY, supra note 116, at 144.

118 Id.
rapist is an object of universal detestation.\textsuperscript{119}

Judge Ploscowe’s vivid picture persists today. Research by Joyce Williams and Karen Holmes reveals that the public strongly embraces the belief that rapists are “sick, emotionally disturbed men.”\textsuperscript{120} Most people also believe that men commit rape out of sexual frustration and an inability to control themselves,\textsuperscript{121} thus reinforcing the notion of their psychopathy. In addition, most people classify rape in narrow terms. Williams’ and Holmes’ research revealed that of nine scenarios (eight of which legally constituted rape), respondents asked to categorize the scenarios as rape could agree on only one—the stereotypic violent street rape committed by a stranger with a weapon.\textsuperscript{122} Taken together, these beliefs reveal a public image of rapists as “psychopaths lurking in dark alleys waiting to pounce on any likely victim and inflict their uncontrollable desires upon her.”\textsuperscript{123} Social science research suggests that this image also prevails among members of the legal system, including police officers,\textsuperscript{124} prosecutors,\textsuperscript{125} judges,\textsuperscript{126} and jurors.\textsuperscript{127} Many rape

\textsuperscript{119} PLOSCOWE, supra note 86, at 165.

\textsuperscript{120} WILLIAMS & HOLMES, supra note 9, at 118-19 (indicating that a large proportion of the subjects participating in the authors’ study believed rapists to be “crazy,” “mentally ill,” or “emotionally disturbed”). According to Williams & Holmes, 91% of white men and 92% of white women, 83% of black men and 98% of black women, and 87% of Mexican-American men and 63% of Mexican-American women believe that rapists are “sick.” See id. at 136.

The myth of the crazed rapist has had a particular impact on black men. See, e.g., ESTRICH, REAL RAPE, supra note 78, at 32 (noting that “one is hard pressed to find a conviction of a stranger, let alone a black stranger, who jumped from the bushes and attacked a virtuous white woman, reversed for lack of resistance”); BROWNMILLER, supra note 90, at 216 (noting that in a study of rape convictions in Baltimore, “blacks received the stiffest sentences for raping white women and the mildest sentences for raping black women”); id. at 210-55 (chronicling “the mythified spectre of the black man as rapist”); Bumiller, supra note 109, at 86-88 (detailing the “pattern of excessive punishment for interracial sexual assault [that] continued into the twentieth century”) (footnote omitted).

This is not to say that the public believes that black men are mentally ill but that it is willing to believe accusations against black men because of racist beliefs about their uncontrollable and “animalistic” sexuality. See, e.g., Andrew Taslitz, Patriarchal Stories I: Cultural Rape Narratives in the Courtroom, 5 S. Cal. Rev. L. & Women’s Studies 387, 453-57 (1996) (noting the widely held myth of black men “as in a ‘state of savage promiscuity’”) (footnotes omitted).

\textsuperscript{121} See HUBERT S. FEILD & LEIGH B. BIENEN, JURORS AND RAPE 55 (1980) (noting the historical depiction of men as subject to uncontrollable sexual desires when stimulated by women).

\textsuperscript{122} See WILLIAMS & HOLMES, supra note 9, at 187; see also LAFREE, supra note 79, at 31 (noting the predominance of narrow perceptions of rape as a sudden, violent attack by a stranger in a deserted public place).

\textsuperscript{123} Stevi Jackson, The Social Context of Rape, in RAPE & SOCIETY 16 (Patricia Searles & Ronald J. Berger eds., 1995).

\textsuperscript{124} See Hubert S. Feild, Attitudes Toward Rape: A Comparative Analysis of Police,
victims characterize their experience as something other than rape because they were not victimized in accordance with public perceptions of rape.\textsuperscript{128}

\textit{Rapists, Crisis Counselors, and Citizens}, 36 J. Personality & Soc. Psychol. 156, 169 (1978) (discussing police attitudes towards rapists including their belief, similar to that of rapists themselves, that they are not mentally normal); Duncan Chappell & Susan Singer, \textit{Rape in New York City: A Study of the Material in the Police Files and Its Meaning, in Forcible Rape: The Crime, the Victim & the Offender} 245 (Duncan Chappell et al., eds. 1977) (noting that New York police found 24\% of acquaintance rape cases to be without merit as opposed to only 5\% of stranger rape cases); see also Estrich, \textit{Rape, supra} note 7, at 1087-88 (describing police officers’ response to her rape by a stranger with a weapon as legitimate because of circumstances).

\textsuperscript{125} Many prosecutors, like police, consider stranger rape to be more serious than acquaintance rape and more vigorously pursue those cases. See, e.g., Robert A. Weninger, \textit{Factors Affecting the Prosecution of Rape: A Case Study of Travis County}, 64 VA. L. REV. 357, 380 (1978) (noting that “the probability of an indictment was highest in cases of strangers and lower, not in cases of friends, but in those cases of acquaintances’”); id. at 385 (suggesting that juries may demand greater evidence of nonconsent in acquaintance rape, and “[t]hese expectations of jury reaction seem likely to have influenced prosecutors’ perceptions of their chances for success at trial and, therefore, their decisions to indict”). To be sure prosecutors’ reluctance to pursue acquaintance rape cases could be related to their belief in their likelihood of success at trial rather than to a firmly held belief regarding the “crazed” nature of rapists. See Bryden & Lengnick, \textit{supra} note 92, at 1246-54 (discussing prosecutorial disinclination to pursue “unwinnable” cases and noting that acquaintance rape cases are more difficult to win than stranger rape cases). Even so, the decision to prosecute is directly related to what a prosecutor thinks the public will believe. Given the public’s firmly held belief in the crazed rapist, prosecutors at least partly utilize the myth in their decision-making. Moreover, prosecutors frequently use the image of rapist as “crazed beast” in their arguments in stranger rape cases, thus solidifying the myth. See Lisa A. Binder, “With More Than Admiration He Admired”: Images of Beauty and Defilement in Judicial Narratives of Rape, 18 HARV. WOMEN’S L.J. 265, 274 (1995) (discussing and citing instances of prosecutorial use of the image of rapists as beasts).

\textsuperscript{126} See \textit{Williams & Holmes, supra} note 9, at 19 (citing a study of judicial attitudes classifying “genuine” rape as those involving women attacked by “a stranger leaping out of the shadows of a dark alley”).

\textsuperscript{127} In a comprehensive jury study, Professors Kalven and Zeisel revealed that juries were far less likely to convict an accused man of rape when the rape was not stereotypical – i.e., where there was no extrinsic violence or multiple assailants and where the victim and assailant knew one another. See \textit{Harry Kalven, Jr. & Hans Zeisel, The American Jury} 252-3 (1966); see also Bryden & Lengnick, \textit{supra} note 92, at 1263 n.442 (citing later studies tending to confirm Kalven & Zeisel’s conclusions); Feild & Bienen, \textit{supra} note 121, at 56 (study of potential jurors revealed that 85\% viewed rapists as “not normal” and 57\% viewed them as mentally ill); Wenniger, \textit{supra} note 125, at 370 (noting that the rape victim often carried a greater burden because “grand jurors were especially inquisitive if a prior relationship existed or if there was any question concerning consent to intercourse”).

\textsuperscript{128} See Mary P. Koss et al., \textit{Stranger and Acquaintance Rape}, 12 PSYCHOL. WOMEN Q. 1, 4 (1988) (57\% of women surveyed who were raped did not realize that the sex in which they were forced to engage was rape); \textit{Warshaw, supra} note 93, at 26 (only 26\% of women
Despite its prominence, the image of the crazed rapist is unsupported in fact. First, as feminists have been pointing out for decades, most women are not raped by strangers. While stranger rape clearly occurs, statistics indicate that over seventy-five percent of rape victims are raped by someone they know. Second, most men who rape adult women are neither mentally ill nor compulsive. Social science studies suggest that "[l]ess than 5 percent of rapists are psychotic at the time of the commission of the [rape]." In addition, despite sex offenders' claims of helplessness in the face of female sexuality, there is no evidence that sex offenders are unable to control their actions. As Katharine Baker notes, many researchers conclude that "men who rape are 'normal' to the extent that psychologists fail to find evidence of abnormality." In fact, men who rape are, from a psychopathology standpoint, essentially indistinguishable from the male population as a whole. To be sure, men who rape do share some identifiable characteristics

129 See RAPE IN AMERICA, supra note 11, at 4 ("The National Women's Survey clearly dispels the common myth that most women are raped by strangers."). The offender statistics break down as follows: husbands or ex-husbands (9%), fathers or step-fathers (11%), boyfriends or ex-boyfriends (10%), other relatives (16%), and non-relative acquaintances (29%). See id.


131 Steven J. Morse, Fear or Danger, Flight From Culpability, 4 PSYCHOL. PUB. POL'Y & L. 250, 263 (1998) ("Most arguments that facilely suggest that sexual impulses or desires, or any other kind, are necessarily uncontrollable are conceptually and empirically unsupported."). Many scholars note that while sexual offenders often claim to feel unable to control their desires, there is "a considerable difference between a desire not resisted and an irresistible desire." Bruce J. Winick, Sex Offender Law in the 1990s: A Therapeutic Jurisprudence Analysis, 4 PSYCHOL. PUB. POL'Y & L. 505, 521 (1998).


133 See Paul Schewe & William O'Donohue, Rape Prevention: Methodological Problems and New Directions, 13 CLINICAL PSYCHIATRY REV. 667, 668 (1972) ("At this point... it appears that deviant arousal may not be a necessary or sufficient cause of rape, as some researchers have failed to find significant differences between rapist and nonrapist populations."). Studies reporting that a substantial portion of college males indicate a likelihood of committing rape if there were no negative consequences also support the proposition that rapists are relatively normal. Check & Malamuth, supra note 132, at 416 (study found that 35% of men questioned would rape if they were assured of not getting caught); Neil M. Malamuth, Rape Proclivity Among Males, 37 J. SOC. ISSUES 138, 140 (describing the results of the previously cited study). Moreover, a number of "normal" college men have admitted to committing rape. See Mary P. Koss, Hidden Rape: Sexual Aggression and Victimization in a National Sample of Students in Higher Education, in 2 RAPE & SEXUAL ASSAULT 1, 11 (Ann Wolbert Burgess ed., 1988) (nationwide survey of...
distinguishing them from the non-rapist population. Those characteristics, however, tend to be socially constructed rather than related to psychopathology. Thus, men who have raped or who admit to a likelihood of committing rape have greater acceptance of rape myths, violence against women, and sexual stereotypes. Far from being mentally deviant, men who rape have simply internalized certain cultural and sex role norms.

Third, men who rape are not abnormally dangerous in that they do not commit their crimes at an appreciably higher rate than other criminals. Statistics differ but all support the conclusion that rates of recidivism for rape are no greater than for other crimes. Although a rapist may be more likely to commit another rape, he is, at the very least, no different from other criminals who show an even greater likelihood to commit similar crimes.

over 6100 college males revealed that 1 in 12 admitted to committing rape); Karen Rapaport & C. Dale Posey, Sexually Coercive College Males, in ACQUAINTANCE RAPE, supra note 87, at 217, 219-20 (43% of college males surveyed admitted to engaging in coercive sex); see also sources cited in Baker, supra note 10, at 576 n.61 (describing the results of the Rapaport & Posey study and surveying the results of several other studies that "found lower, but nonetheless startling percentages of men who admit to engaging in coercive sex").

See Check & Malamuth, supra note 132, at 415 (describing studies linking sexual aggressivity to "socially acquired attitudes about rape, women, and sexual relations" and a self-reported likelihood of committing rape to "acceptance of rape myths... violence against women, and sex-role stereotyping"); Mary P. Koss et al., Nonstranger Sexual Aggression: A Discriminant Analysis of the Psychological Characteristics of Undetected Offenders, 12 SEX ROLES 981, 989 (1985) (noting that sexually aggressive men are more likely to "attribute adversarial qualities to interpersonal relationships, to accept sex-role stereotypes, to believe myths about rape, to feel that rape prevention is the woman's responsibility, and to view as normal an intermingling of aggression and sexuality").

See, e.g., PATRICK J. LANTAN, U.S. DEP'T OF JUSTICE, RECIDIVISM OF FELONS ON PROBATION, 1986-1989, 6 (1992) (noting that while there exists "a tendency for offenders to repeat the crime they were previously convicted of," the recidivism of rapists (3%) was no greater than for those convicted of murder (5%), robbery (17%), or assault (9%)); ALLEN J. BECK, U.S. DEP'T OF JUSTICE, RECIDIVISM OF PRISONERS RELEASED IN 1983 (1989); Joseph J. Romero & Linda Meyer Williams, Recidivism Among Convicted Sex Offenders: A 10-Year Follow-up Study, 49 FED. PROBATION, Mar. 1985, at 58 (noting that most early studies did not reveal sex offenders to be "serious recidivists"). Several articles thoroughly survey the numerous studies on recidivism rates. See Baker, supra note 10, at 578-80 (comparing Bureau of Justice statistics for rape recidivism with statistics of recidivism for other crimes); Aluise, supra note 59, at 173-84; Moreno, supra note 44, at 554-57 (citing various studies and articles in support of the proposition that recidivism rates for sexual offenders are no greater than those for other sorts of offenders).

See BECK, supra note 135, at 6 (finding that rapists are 10.5 times more likely to be arrested for another rape than were criminals who had committed different crimes).

Beck found that 7.7% of convicted rapists were later rearrested for rape within three years of their earlier conviction, as compared to 33.5% of larcenists who were rearrested for larceny, 31.9% of burglars rearrested for burglary, 19.6% of robbers rearrested for robbery, and 21.9% of aggressors rearrested for assault. See id.; see also LANAN, supra note 135, at 6 (2.9% of rapists rearrested for rape, 12.2% of larcenists rearrested for larceny, 17.2% of
Moreover, there is little evidence to suggest that men who rape an acquaintance are substantially less likely to recidivate than men who rape strangers. While the lack of comprehensive studies on acquaintance rape recidivism make it difficult to compare acquaintance rape recidivism rates with the recidivism rates of men who rape strangers, research suggests that perpetrators of acquaintance rape also recidivate. A study of almost 3,000 male college students performed by researcher Mary Koss indicated that forty-seven percent of the men who had committed rape, "stated that they expected to engage in a similar assault at some point." A nationwide survey conducted by the Ms. Foundation for Education and Communication and funded by the National Institute of Mental Health further revealed that men who had raped admitted to having engaged in that behavior with their victim an average of 2.29 times. Anecdotal evidence also supports this conclusion. In Peggy Sanday's study of gang rape in college fraternities, for example, the young men accused of raping a woman known to them clearly reveled in a pattern of sexual aggression toward women. Likewise, the student athletes accused of raping a fellow high school student in Glen Ridge, New Jersey were known for their sexual exploitation and coercion of girls prior to the rape of which they were accused. Men who rape acquaintances thus appear to be quite capable of repeating and do repeat their crimes.

Fourth, most rapes do not involve violence extrinsic to the rape itself. A burglar rearrested for burglary, 17.3% of robbers rearrested for robbery, 9.4% of aggressors rearrested for assault.

The feminist claim that most rapes go unreported casts some doubt on the relevance of arrest statistics as a measure of recidivism. Self-reported data from sex offenders seems to indicate a much higher rate of recidivism than found in the Beck and Langan studies, which relied on arrest and conviction rates. See Aluise, supra note 59, at 181-83 (surveying studies). However, this fact does not distinguish rapists from other criminals, many of whom also committed unreported crimes prior to their first arrest or conviction. See Baker, supra note 10, at 579.

Most studies of rape recidivism are based on re-arrest rates or self-reported subsequent offenses of convicted sex offenders. The focus on men who have already been convicted excludes most men who have committed acquaintance rape but who, for reasons entirely unrelated to their guilt, are never arrested much less convicted. It is thus difficult to determine whether they rape with more or less frequency than do men who sexually assault strangers.

Mary P. Koss, Hidden Rape: Sexual Aggression and Victimization in a National Sample of Students in Higher Education, in RAPE & SOCIETY, supra note 123, at 45.

See WARSHAW, supra note 93, at 63 (stating the results of the cited survey).

See PEGGY REEVES SANDAY, FRATERNITY GANG RAPE 46-47, 56-59 (1990) (describing the manner in which the accused men's sexual exploits are used as tools for gaining status within their fraternity).

BERNARD LEPKOWITZ, OUR GUYS: THE GLEN RIDGE RAPE AND THE SECRET LIFE OF THE PERFECT SUBURB 146-48 (1997) (chronicling how several high school students who were later accused of sexually assaulting a mentally retarded classmate frequently physically and emotionally abused other female students).
comprehensive nationwide study revealed that over two-thirds of rapes involve no physical injury other than the rape itself and only four percent involved serious physical injuries.\(^{143}\) According to a 1991 report by the Bureau of Justice Statistics, only fifteen percent of non-stranger rape and thirty percent of stranger rape cases involved a weapon.\(^{144}\) The lack of extrinsic violence or the failure to use a weapon, however does not mean that non-violent assailants\(^{145}\) are less dangerous or that the victims are less affected by the rape. Nearly half of the victims of one survey admitted to being afraid of serious injury or death even absent overt violence,\(^{146}\) and many women remain passive during assaults because they are caught off guard, frightened, or are trying to avoid what they perceive might become a violent attack.\(^{147}\) The assumption that rape must include excessive violence ignores the fact that “men's greater size and strength are in themselves threatening to women and are often enough either to intimidate the victim or overcome her resistance.”\(^{148}\) The equation of rape and extrinsic violence further diminishes the very real psychological harms that victims of non-violent acquaintance rape suffer, which are often comparable to victims of stranger rape.\(^{149}\) If anything, research reveals that the psychological impact of victimization by an acquaintance is particularly severe as it represents a betrayal of trust.\(^{150}\)

None of the above is meant to imply that the “crazed rapist” does not exist. Nor do we mean to diminish the harms suffered by women victimized by such

\(^{143}\) See RAPE IN AMERICA, supra note 11, at 4 (reporting that “[a]nother common misconception about rape is that most victims sustain serious physical injuries”).


\(^{145}\) We recognize that the term “non-violent” rape is an oxymoron. See generally Lynne Hecht Schafran, Maiming the Soul: Judges, Sentencing and the Myth of the Non-Violent Rapist, 20 FORDHAM URB. L.J. 439 (1993) (discussing the relationship between the terming of rapes as violent or non-violent and the resulting sentences imposed). However, we use it to distinguish between rapes accompanied by overt extrinsic violence or weapons and those which are not.

\(^{146}\) See RAPE IN AMERICA, supra note 11, at 4 (reporting that 49% of rape victims surveyed “described being fearful of serious injury during the rape”).

\(^{147}\) Lynne Hecht Schafran, Writing and Reading About Rape: A Primer, 66 ST. JOHN’S L. REV. 979, 990-91 (1993) (discussing reasons why some rape victims do not physically resist).

\(^{148}\) Id. at 990 (emphasis omitted).

\(^{149}\) Koss, Stranger and Acquaintance Rape, supra note 128, at 13 (noting that victims of acquaintance and stranger rape did not differ markedly in their psychological symptoms, which included depression, anxiety, and a decrease in relationship and sexual satisfaction). Koss and her colleagues concluded that there existed a “lingering, potentially clinically significant [psychological] impact of rape which did not vary in severity according to the victim-offender relationship.” Id. at 22.

\(^{150}\) Massaro, supra note 8, at 429; Schafran, supra note 145, at 1018-20 (analyzing statistical data on the impact of the different types of rape on the victims).
men. We do argue, however, that such rapists and rape situations are an extraordinarily small number of all rapes. The enormous amount of attention devoted to rapes committed by such men reinforces the ‘crazed rapist’ myth and substantially hinders efforts to prosecute acquaintance rape because it diverges from the common perception of rape.\footnote{Bechhofer & Parrot, supra note 90, at 10 (noting that, contrary to the common understanding of the stereotypical rape, date rape or acquaintance rape is much more common); id. at 27 (noting the difference between date rape and so-called “real” rape).} Eradication of this myth and laws that reflect it is as essential to broadening rape prosecutions as the eradication of victim myths, perhaps even more so given the widely-held perception that the most prevalent cause of rape is the rapist’s mental or emotional disturbance.\footnote{Williams & Holmes, supra note 9, at 118 (noting that mental illness ranked first as a reason for rape among whites, blacks, and victims of rape, and second behind the woman’s appearance and behavior among Mexican-Americans).} The next section examines the manner in which the new legislation embraces the myth and, consequently, undermines the feminist agenda regarding rape.

III. THE CRAZED RAPIST MYTH AND THE NEW LEGISLATION

On some level, the legislation discussed in Part I is consistent with the feminist agenda. The new FRE, for example, attempt to bolster a complaining victim’s testimony to overcome the rape myth that women lie.\footnote{Id. \textsuperscript{152} Orenstein, supra note 9, at 687-90 (canvassing feminist arguments in support of FRE 413); Debra Sherman Tedeschi, \textit{Federal Rule of Evidence 413: Redistributing “The Credibility Quotient.”} 57 U. Pitt. L. Rev. 107, 124-27 (1995) (arguing that FRE 413 is necessary to eradicate the myth of the lying woman).} Similarly, VAWA’s grounding of the civil rights action in a bias crime paradigm reflects a feminist view of rape as pervasive and hateful.\footnote{Goldscheid, supra note 65, at 124 (noting that “[e]nactment of the Civil Rights Remedy reflects increased acceptance of the feminist position that crimes such as rape and sexual assault are bias crimes that violate women’s civil rights”).} One can even say that registration, notification, and sexual predator laws recognize that sentences for rape are woefully short and thus attempt to provide some manner of protecting women from further assaults. By accepting the myth of the crazed rapist, however, the new legislation ultimately works counter to the feminist agenda’s effort to expand the notion of rape and to remove obstacles lying in the path of rape prosecutions.

A. Registration and Notification Laws

Registration and notification laws undoubtedly embrace the myth of the crazed rapist. Many of such laws explicitly justify their existence in terms of the dangerous and psychopathic nature of the sexual offender. New Jersey’s law, for example, states that “[t]he danger of recidivism posed by sex offenders . . . and the dangers posed by persons who prey on others as a result
of mental illness, require a system of registration that will permit law enforcement officials to identify and alert the public when necessary for the public safety."^155 New York’s registration law similarly bases its necessity in the “danger of recidivism posed by sex offenders, especially those sexually violent offenders who commit predatory acts characterized by repetitive and compulsive behavior.”^156 Additionally, the laws are a response to several high-profile and admittedly heinous rape/murders of children by strangers or near-strangers with previous sex crime convictions.^157 Thus, the statutes presume an image of sexual offenders as monstrous individuals, incapable of controlling themselves and preying on the helpless (usually children). The notification laws’ grounding in the crazed rapist paradigm substantially undercuts feminist efforts to broaden our understanding of rape although they do so differently depending on the type of notification required.

The federal law and many state laws, for example, involve single-tier notification statutes that require broad public disclosure regarding any defendant convicted of forcible rape,^158 including any man convicted of acquaintance rape. The disconnection between the crazed rapist image prompting the statutes and the actual incidence of rape may lead to differential

^157^ See Earl-Hubbard, supra note 23, at 794-95 (discussing incidents spurring laws). Indeed, many such laws are named after especially well-known victims. The shorthand term for them—“Megan’s laws”—is highly recognizable as referring to Megan Kanka, a young, New Jersey girl raped and killed by a new neighbor with two previous convictions for sexual assault of minors. See Jenny A. Montana, Note, An Ineffective Weapon in the Fight Against Child Sexual Abuse: New Jersey’s Megan’s Law, 3 J.L. & POL’Y, 569, 569-71 (1995) (describing the crime and the perpetrator and how the law became named after the victim). The incident was highly publicized in national newspapers. See, e.g., Man Charged in 7-Year-Old Neighbor’s Killing, N.Y. TIMES, Aug. 1, 1994, at B5; Suspect Confessed in the Murder of a 7-Year-Old, Prosecutors Say, N.Y. TIMES, Aug. 2 1994, at B2; Jan Hoffman, New Law is Urged on Freed Sex Offenders, N.Y. TIMES, Aug. 4, 1994, at B1, B7. Within three months the New Jersey legislator enacted a law requiring registration of sex offenders. See Ryan A. Boldan, Note, Sex Offender Registration and Community Notification: Protection, Not Punishment, 30 NEW ENG. L. REV. 183, 183-84 (1995). The federal law, named the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program, is similarly named after a child victim. Lewis, supra note 32, at 91.

^158^ The Jacob Wetterling Act encourages states to enact registration and notification laws applicable to, among others, persons convicted of a “sexually violent offense.” See Lewis, supra note 32, at 94 (noting that failure to enact registration laws results in the state losing 10% of its funding from the 1968 Omnibus Crime Control and Safe Streets Act). The federal guidelines further make clear that the purpose of the latter phrase is “to require registration of persons convicted of rape or rape-like offenses.” Megan’s Law; Final Guidelines for the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act, as Amended, 64 Fed. Reg. 572, 577 (1999).
treatment of sex offenders by courts unwilling to publicly brand seemingly “normal” men as monsters. Although rationalized as a method of protecting the public, the registration and notification laws are quite stigmatizing. Scholars acknowledge that public notification of a convicted sex offender’s status subjects him to public opprobrium. Although many courts reject constitutional challenges to registration and notification laws, they too recognize that the laws have a stigmatizing effect. Moreover, sex offenders whose status has been made public are often subject to harassment and ostracism from the community.

While courts generally reject constitutional challenges based upon this stigma and potential violence, the philosophical

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159 See Doe v. Poritz, 662 A.2d 367, 373-77 (N.J. 1995) (finding that laws are designed to protect society from sexual predators by informing the public of their presence); Simeon Schopf, “Megan’s Law:” Community Notification and the Constitution, 29 COLUM. J.L. & SOC. PROBS. 117, 131 (1995) (“[T]he purpose of ‘Megan’s law’ is to facilitate the protection of the community and its children.”).

160 See Wayne A. Logan, Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws, 89 J. CRIM. L. & CRIMINOLOGY 1167, 1193-94 (1999) (noting that “notification entails a more acute and sustained harm . . . and, depending on applicable law, [the offender] can suffer this public ignominy well past the end of their prison sentence, and, indeed, for the rest of their lives”); Mel L. Greenberg, Just Deserts in an Unjust Society: Limitations on Law as a Method of Social Control, 23 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 333, 338-39 (1997) (noting that constitutional questions arising from the Massachusetts registration statute have yet to be addressed by the courts); Earl-Hubbard, supra note 23, 813-14 (noting that the California Supreme Court has found that questioning of those registered when a similar crime occurs constitutes an “affirmative disability”).

161 See cases cited infra note 164.

162 See, e.g., Neal v. Shimoda, 131 F.3d 818, 830 (9th Cir. 1997) (noting the “stigmatizing consequences of the attachment of the ‘sex offender’ label”); Poritz, 662 A.2d at 419 (noting that public notification “would expose plaintiff to public opprobrium, not only by identifying him as a sex offender but also by labeling him as potentially currently dangerous, and thereby undermining his reputation and standing in the community”).

163 See Jane A. Small, Note, Who Are The People In Your Neighborhood? Due Process, Public Protection, and Sex Offender Notification Laws, 74 N.Y.U. L. Rev. 1451, 1467-69 (detailing accounts of vigilantism against sex offenders or alleged sex offenders as a result of notification programs); Mark E. Rath, Comment, Michigan’s Scarlet Letter Laws: Are Changes In Order?, 15 T.M. COOLEY L. REV. 291, 291 (1998) (describing attacks on registered sex offenders by members of the community in which they have moved); Elizabeth Kelley Cierzniak, Note, There Goes the Neighborhood: Notifying the Public When a Convicted Child Molester is Released Into the Community, 28 IND. L. REV. 715, 715 (1995) (detailing the burning of a registered offender’s home in Washington less than a day before his scheduled release).

164 Courts have rejected claims that notification statutes violate the Eighth Amendment’s prohibition on cruel and unusual punishment, see, e.g., Roe v. Farwell, 999 F. Supp. 174, 193 (D. Mass. 1998); Doe v. Kelley, 961 F. Supp. 1105, 1112 (W.D. Mich. 1997); Poritz, 662 A.2d at 405, the Ex Post Facto and Double Jeopardy clauses, see, e.g., Russell v. Gregoire, 124 F.3d 1079, 1093 (9th Cir. 1997) (Ex Post Facto only); Doe v. Patakí, 120 F.3d
questions nevertheless remain. Society may tolerate the questionable aspects of registration and notification laws as long as the defendant appears monstrous (i.e., a real rapist) rather than human. When, however, the person publicly branded is not a sadistic pedophile or excessively violent but a college student convicted of raping a young woman at a fraternity party, the potential constitutional and stigmatic defects seem far more severe and his possible ruination that much more unreasonable. *State v. Scott* reflects the manner in which some courts may try to avoid such ruination.

In *Scott*, the defendant pleaded no contest to attempted aggravated sexual battery, a crime requiring registration and disclosure under Kansas law. His plea agreement resulted from an incident in which he assaulted a female friend at her apartment where the two apparently had been drinking alcohol and


165 Despite court rulings, numerous commentators question the constitutionality of registration and notification laws. See, e.g., Logan, supra note 160, at 1197-1212 (discussing the degree to which notification laws impact registrants’ lives in comparison with laws that created lesser stigmas that nevertheless received procedural due process safeguards); Stephen R. McAllister, *Megan’s Laws: Wise Public Policy or Ill-Considered Public Folly*, 7 KAN. J.L. & PUB. POL’Y 1, 19-20 (1998) (discussing potential ex post facto violations); Small, supra note 163, at 1486-92 (discussing potential procedural due process violation); Rath, supra note 163, at 304-14 (discussing ex post facto violations resulting from community notification); Earl-Hubbard, supra note 23, at 815-49 (discussing cruel and unusual punishment and due process violations); Bedarf, supra note 31, at 924-39 (discussing cruel and unusual punishment problems).

166 This is not to say that we should use different standards for such defendants. As Stephen Schulhofer notes, however, society is more willing to heap harsh sentences on criminal defendants it can describe as “someone hostile to civilized values, devoid of human sensibilities, utterly ‘other.’” Stephen J. Schulhofer, *The Trouble with Trials: The Trouble With Us*, 105 YALE L.J. 825, 852 (1995) (reviewing George Fletcher, With Justice For Some: Victim’s Rights in Criminal Trials (1995)).


168 *Scott*, 947 P.2d at 468.
watching television. The victim had retired for the night, leaving Scott watching television. He later entered her bedroom and sexually assaulted her, ultimately bloodying her nose and breaking several of her ribs in the ensuing struggle. Scott challenged the public disclosure requirement as applied to him, claiming that it constituted cruel and unusual punishment. The appellate court agreed. Noting that the disclosure provision likely would result in "isolation, harassment, [and] loss of opportunities" for defendant, the court held that the punishment inflicted was disproportionate to Scott’s crime:

There is no evidence in the record to support a reasonable inference that Scott is a repeat sex offender posing a danger to the community. To the contrary, the record strongly suggests that Scott, in an intoxicated condition, impulsively committed a serious violent crime against the victim under very situational circumstances not likely to arise in the future. Scott is not a pedophile or a child molester, and there is no indication that he has a mental illness or personality disorder that would suggest he will reoffend. Scott is being required to register as a sex offender solely because of the crime he committed, with no risk assessment whatsoever. We further note the incongruity in [defendant’s] minimal sentence of 14 months with presumptive probation, while at the same time requiring [him] to register as a sex offender for 10 years. The guiding principle of the Kansas sentencing guidelines is to put violent offenders in prison, with nonviolent offenders granted probation. The inconsistency in these two punishments is difficult to reconcile.

The influence of the crazed rapist myth on Scott is apparent. Although Scott committed the crime while drunk (an easily repeated behavior that normally does not excuse crime) and broke the bones of a woman who once considered him a friend (one of the few rapes with extrinsic physical injuries), Scott was not a violent, compulsive, mentally ill sex offender posing a threat to the community. Rather, the appellate panel found him to be a normal, if somewhat misguided, young man undeserving of the stigma caused by the notification requirement. The court’s refusal to see Scott’s dangerousness and its perception of the notification requirement’s stigmatic effect on him reflects the disconnection between the defendant and the paradigmatic crazed rapist. It

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169 Id. at 468.
170 See id.
171 See id.; State v. Scott, 961 P.2d 667, 668 (Kan. 1998) (noting that the victim had a bloody nose and several bruises on her face, arms and legs in addition to broken ribs).
172 Scott, 947 P.2d at 470.
173 Id. at 470-71.
174 Eventually, the Kansas Supreme Court reversed the appellate court, noting that “Scott committed a very violent crime after an acquaintance refused to have sex with him”, Scott, 961 P.2d at 673, and that the statute’s “punitive effect... resulting from an interest in public safety [were] not so disproportionate to Scott’s violent, sexually motivated crime” that it violated the prohibition against cruel and inhumane punishment. Id. at 673-76.
further bears a striking resemblance to earlier courts' attitudes and manipulative practices so heavily criticized by feminists.\textsuperscript{175}

Not all notification statutes raise the \textit{Scott} problem. Rather than requiring public disclosure of all sex offenders, and thus encouraging courts to manipulate the statute when "normal" men are involved, states with three-tiered registration statutes allow disclosure of offender status to the general public only with the most egregious sex offenders.\textsuperscript{176} With notification to the general public limited to those most likely to re-offend,\textsuperscript{177} there is less likelihood that courts will engage in the sleight-of-hand practiced by the \textit{Scott} court. To that extent, such statutes do not force courts to formalize the twisted logic of earlier courts and the \textit{Scott} court. Nevertheless, these statutes build upon the crazed rapist myth in a manner that detracts from the feminist agenda regarding rape.

In New Jersey, the prototypical tiered-classification state, the factors to be used by the prosecutor to determine an offenders' risk of re-offense include (1) release conditions minimizing the risk of re-offense, such as parole supervision or psychiatric treatment, (2) physical conditions minimizing the risk of re-offense, such as old age or illness, (3) whether psychological profiles present a risk of recidivism, and (4) criminal history factors, including whether the offender served the maximum term, whether he committed a sex offense against a child, whether his conduct involved repetitive or compulsive behavior, whether his crime involved the use of a weapon, violence or infliction of serious bodily injury, the status of his relationship with the victim, and the number and date of prior offenses.\textsuperscript{178} While some of the listed factors bear a relationship to risk of re-offense (e.g., release and physical conditions), many of them do not. Instead, they represent subjective judgments that are too easily manipulated to reflect stereotypical beliefs regarding who is "dangerous."

There is no evidence, for example, that the relationship between the victim

\textsuperscript{175} See supra notes 85-93 and accompanying text.

\textsuperscript{176} In states such as New Jersey, New York and Massachusetts, all sex offenders must register but their period of registration and the entities to whom their status is disclosed differ. Thus, Tier 1, or non-egregious sex offenders, are known only to the police and other law enforcement officials, while Tier 3, the most egregious sex offenders, are subject to widespread public disclosure regarding their status. See supra note 26.

\textsuperscript{177} See, e.g., N.J. STAT. ANN. §2C:7-8(c) (West 1994),

\textsuperscript{178} N.J. ANN. STAT. §2C:7-8(b) (West 1994); see also N.Y. CORRECT. LAW § 1681(5) (McKinney 1995) (listing factors similar to New Jersey Law). Unlike the New Jersey requirements, the New York law merely lists some, but not necessarily all, of the factors to be used by the board directed to establish guidelines for tier assessment. See Doe v. Pataki, 120 F.3d 1263, 1268 (2d Cir. 1997). Elaborating on the New York law, the board created a multi-factor assessment guide with factors similar to the New Jersey statute, including, among others the defendant's use of violence, number of victims, age of the victim, relationship between offender and victim, and the number and nature of prior crimes. See id. at 1268 n.6.
and attacker affects recidivism rates. If anything, there is much evidence that
the victim/offender relationship is not relevant to whether an offender will
recidivate. 179 Focusing on that relationship in determining which tier to place a
sex offender allows prosecutors and other law enforcement officials to excuse
men they believe are less “bad” not necessarily those who are less likely to re-
offend. It buys into the myth that stranger rapists are the only “real” rapists
and the only ones of which the public needs to be made aware.

Other factors in the statute similarly reflect stereotypical beliefs regarding
men who rape. The focus on prior convictions as an indicator of
dangerousness reflects a strong bias against acquaintance rape. Any
consideration given to this factor will surely catch stranger rapists, who are the
most likely offenders to have past convictions. Reliance on that factor ignores,
however, perpetrators of acquaintance rape, who also may repeat their crimes
but who are rarely convicted of them. Similarly, the statute’s focus on the
presence of a weapon or extrinsic violence as criteria reinforces the notion that
real rape involves a violently assaulted and physically injured woman who
barely survives the machinations of a murderous lunatic. Like traditional rape
law, reliance on this factor reflects a particularly male view of “violence,”
ignoring women’s view of dangerousness and discounting the emotional
injuries that result from rape aside from physical harm. 180

Reliance on factors such as those discussed above will not result in the most
dangerous offenders receiving the “high risk of re-offense” designation that
triggers public disclosure. Instead, it will result in the most stereotypical
offenders receiving that designation. 181 In turn, the public will hear only of
those sex offenders, thus reinforcing the commonly-held myth and cementing
barriers to prosecution of acquaintance rape.

B. Sexual Predator Laws

Laws requiring the indefinite civil commitment of certain sexual predators
similarly reinforce the myth of the crazed rapist. The avowed purpose of such
laws is to protect society from its “most dangerous” criminals. 182 Taken in

179 See supra notes 138-42 and accompanying text (discussing evidence of recidivism in
acquaintance rapists).

180 See supra notes 145-49 and accompanying text (discussing the common
misconception that the absence of extrinsic violence means women do not suffer severe
psychological harm as the result of rape).

181 For example, if the Scott court had been considering defendant’s challenge to his
classification as an egregious sex offender rather than a constitutional challenge to the
notification statute generally, its reasoning is unlikely to have changed.

182 In hearings before the Minnesota legislature regarding the commitment of sexual
predators, for example, the state attorney general characterized the issue as how to “protect
the public from some of the most dangerous criminals in society.” Eric Janus, Sex Offender
Commitments: Debunking the Official Narrative and Revealing the Rules-in-Use, 8 STAN. L.
& POL’Y REV. 71, 80 (1997) [hereinafter Janus, Sex Offender Commitments] (quoting
Minnesota Attorney General Hubert Humphrey, III). Similarly, the Wisconsin Supreme
isolation, that goal is not problematic—the state has legitimate public safety interests in protecting against dangerousness and calibrating its protection to perceived degrees of dangerousness.\textsuperscript{183} Sexual predator statutes, however, make assumptions regarding dangerousness that rely more on the crazed rapist myth than on fact.

This is most obviously true with those statutes providing for commitment of offenders who suffer from a mental defect that makes them likely to commit future “predatory acts of sexual violence.” Such statutes generally define “predatory acts of sexual violence” as acts directed only to strangers or to a person with whom the offenders have formed a relationship specifically for the purpose of victimization.\textsuperscript{184} In other words, the victim’s status is a critical aspect of the determination of dangerousness for commitment purposes. As discussed above, however, the status of the victim is not related to the dangerousness of sex offenders.\textsuperscript{185} Whether the victim is a stranger or an

\textsuperscript{183} There is controversy, however, regarding whether the State may use civil commitment procedures to protect against dangerousness in the absence of mental illness. The Court has indicated the State could not do so. Fouche v. Louisiana, 504 U.S. 71, 86 (1992) (overturning a Louisiana rule requiring commitment of defendants found not guilty by reason of insanity until the defendant can show he or she is not dangerous to society, even if they are no longer insane). However, in upholding Kansas’s sexual predator statute—which allows commitment based upon dangerousness and something less than mental illness, the Supreme Court cast some doubt on whether serious mental illness is necessary to support civil commitment proceedings. See Kansas v. Hendricks, 521 U.S. 346, 359-60 (1997) (holding that states could set their own criteria for defining who should be civilly confined). Many scholars disagree with Hendricks, characterizing sexual predator statutes as penalogical or punitive in nature and, thus, deserving of criminal procedural protections. See, e.g., Cynthia A. King, Fighting the Devil We Don’t Know: Kansas v. Hendricks, A Case Study Exploring the Civilization of Criminal Punishment and Its Ineffectiveness in Prevent Child Sexual Abuse, 40 WM. & MARY L. REV. 1427, 1440-51 (1999) (criticizing the Supreme Court’s analysis in Hendricks); Moreno, supra note 44, at 544-47 (noting that Justice Thomas’ opinion upheld the statute in Hendricks while refusing the only possible bases for its legitimacy); Stephen J. Schulhofer, Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, with Particular Reference to Sexually Violent Predator Laws, 7 J. CONTEMP. LEGAL ISSUES 69, 94-96 (1996) [hereinafter Schulhofer, Two Systems] (disagreeing with the Court’s allowance of civil confinement absent mental illness). The civil/criminal debate regarding sexual predator statutes is beyond the scope of this article, although we generally concur with the scholars listed above.

\textsuperscript{184} See, e.g., CAL. WELF. & INST. CODE § 6600(a), (e) (West 1999); MO. ANN. STAT. § 632.480(3) (West 1998); WASH. REV. CODE ANN. § 71.09.020(4) (West 1998).

\textsuperscript{185} See supra notes 138-42 and accompanying text (noting that there is significant evidence that acquaintance rapists recidivate as often as stranger rapists).
acquaintance has little bearing on whether the man who rapes her is likely to recidivate or on the extent of the damage caused by the rape—the two factors most often associated with danger. Sexual predator statutes with such limitations ignore the bulk of potentially dangerous sex offenders and solidify antiquated notions that acquaintance rape is a wholly different caliber of crime.

Admittedly, some sexual predator statutes are not so limited. Kansas, for example, defines “sexually violent predators” as those who have “a mental abnormality or personality disorder which makes [them] likely to engage in repeat acts of sexual violence.” To that extent, such statutes do not explicitly equate stranger rape and dangerousness. Nevertheless, these statutes, by conditioning commitment on the existence of a “mental abnormality” or “personality disorder,” reinforce the myth of the crazed rapist. At the outset, we want to emphasize that we do not argue that a sex offender who is truly mentally ill, one whose “impaired psychological process renders [him] incapable of... adequate functioning,” should not be the subject of civil commitment proceedings. Men essentially divorced from reality who distinctly manifest the potential for sexual violence may be sufficiently dangerous to warrant such commitment. If such men are truly mentally ill, however, they can be committed under existing statutes designed to allow involuntary commitment of mentally ill persons regardless of their commission.

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186 See supra notes 145-49 and accompanying text.

187 See Robin L. West, The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory, 3 Wis. Women’s L.J. 81, 82 (1987) (noting that injuries particular to women, such as rape and sexual harassment, are often conceived of as private issues rather than legal injuries capable of redress).

188 Kan. Stat. Ann. § 59-29a02(a) (West Supp. 1999); see also Mass. Gen. Laws Ann. ch. 123A § 1 (West Supp. 2000) (defining “sexually dangerous person” to include juvenile delinquents, people charged with sexual offenses who suffer from mental abnormalities, and people previously adjudicated as “sexually dangerous” and whose behavior indicates inability to control their sexual impulses).

189 Robert F. Schopp, Sexual Predators and the Structure of the Mental Health System: Expanding the Normative Focus on Therapeutic Jurisprudence, 1 Psychol. Pub. Pol’y & L. 161, 170 (1995). Although courts have never settled on a single definition of mental illness, the definition in the text generally tracks the description of legal insanity. Physicians and psychologists define serious mental illness in a similar manner. See Brief for the National Mental Health Ass’n as Amicus Curiae in Support of Respondent at 7, Kansas v. Hendricks, 521 U.S. 346 (1997) (No. 95-1649) (“The term mental illness is reserved for psychological conditions that impair virtually every aspect of the lives of people it affects. It does not apply to those who merely cannot resist deviant sexual urges whose origin, in any case, is unrelated to medical illness.”); Eric Janus, Preventing Sexual Violence: Setting Principled Constitutional Boundaries on Sex Offender Commitments, 72 Ind. L.J. 157, 187 (1996) [hereinafter Janus, Preventing Sexual Violence] (serious mental illness for typical civil commitment proceedings is that illness which “renders the individual substantially disconnected with reality”).
of a crime.\textsuperscript{190} The critical aspect of sexual predator statutes, and their harm to the feminist agenda, comes in their reach beyond existing civil commitment regimes to allow involuntary detention of sex offenders who are not seriously mentally ill.

Many sexual predator statutes openly acknowledge that they apply to “a small but extremely dangerous group of sexually violent predators... who do not have a mental disease or defect that renders them appropriate for... existing involuntary treatment [regimes].”\textsuperscript{191} Such statutes thus expand their application to include men who have a “mental abnormality” or “personality disorder,” with the former term defined as “a congenital or acquired condition affecting the emotional or volitional capacity which predisposes the person to commit sexually violent offenses....”\textsuperscript{192} Under sexual predator statutes, then, an offender is subject to involuntary commitment merely if he has a condition of indefinite origin, which affects his emotional or volitional control. Such a definition encompasses virtually any “condition of mind, body or personality”\textsuperscript{193} and renders useless the “mental abnormality” limitation. As a result, the true determinant of whether an offender is appropriate for commitment becomes whether he is predisposed to commit sexually violent offenses.\textsuperscript{194}

\textsuperscript{190} See Schulhofer, Two Systems, supra note 183, at 70 (commenting that all states allow civil commitment of persons who are “mentally ill and dangerous to themselves or others”).

\textsuperscript{191} WASH. REV. CODE. ANN. § 71.09.090 (West 1988 & Supp. 2000) (emphasis added); see also KAN. STAT. ANN. § 59-29a01 (West 1999) (“Because the existing civil commitment procedures... are inadequate to address the special needs of sexually violent predators and the risks they present to society... a separate involuntary civil commitment process... is necessary.”).

\textsuperscript{192} MO. ANN. STAT. § 632.480(2) (West 1995 & Supp. 2000); see also, KAN. STAT. ANN. § 59-29a02(b) (West 1999); WASH. REV. CODE ANN. § 71.09.020(3) (West 1988 & Supp. 2000). The term “personality disorder” is rarely defined at all. To the extent the term is defined, it is usually so circular as to be meaningless. See MASS GEN. LAWS ANN. ch. 123 § 1 (West Supp. 2000) (defining “personality disorder” as a “congenital or acquired physical or mental condition that results in a general lack of power to control sexual impulses”).

\textsuperscript{193} Schulhofer, Two Systems, supra note 183, at 95; Samuel Jan Brakel & James L. Cavanaugh, Of Psychopaths and Pendulums: Legal and Psychiatric Treatment of Sex Offenders in the United States, 30 N.M. L. REV. 69, 78 (2000) (arguing that the scope of the statutes is not limited to the mentally ill). In fact, a large portion of committed sex offenders are diagnosed with anti-social personality disorder which has been extremely controversial in the mental health field because it does little more than indicate “that an individual is predisposed to committing unlawful, irresponsible acts.” Andrew Hammel, Comment, The Importance of Being Insane: Sexual Predator Civil Commitment Laws and the Idea of Sex Crimes as Insane Acts, 32 HOUSTON L. REV. 775, 808-09 (1995); see also Janus, Sex Offender Commitments, supra note 182, at 74 n.74 (citing sources questioning the diagnosis of anti-social personality disorder).

\textsuperscript{194} See Schulhofer, Two Systems, supra note 183, at 95 (“In effect, the predictive component of the definition is not only necessary but in practice sufficient; the mental disorder component imposes no limitation at all.”); see also Jonathan Simon, Monstrous,
The absence of a true mental illness component and reliance on predictions regarding recidivism reinforce the crazed rapist myth. Officials are forced to conclude that a particular offender has a mental abnormality predisposing him to commit sex offenses simply because he has committed sex offenses in the past. Thus, any determination regarding commitment is likely to fall most heavily on those who have been deemed sufficiently bad to warrant previous rape prosecutions and convictions—generally, those who have used extrinsic violence or those who rape victims who are unknown to them. As with statutes explicitly limited to stranger rape situations, these statutes ignore the large number of men who rape acquaintances (sometimes repeatedly) but who escape conviction. Their requirements of extrinsic violence in order to label a rape dangerous also serves to trivialize the violence caused by the rape itself. In addition, the hollowness of the mental abnormality/personality disorder requirement and its dependence on past convictions essentially amounts to a legislative declaration that sex offenses are their own psychopathology.\textsuperscript{195} Such a declaration reeks of earlier sentiments that rapists would not rape unless they were mentally ill\textsuperscript{196} and encourages society and law enforcement officials to excuse those men who do not seem mentally ill.

Arguably the presence of mental health officials in the commitment process can assuage problems resulting from the emptiness of the mental abnormality requirement. Sexual predator statutes generally require a psychological evaluation of the offender in order to support commitment. Although the standards in the statutes themselves are hollow, a mental health professional with personalized knowledge of an individual offender may adequately be able to assess his dangerousness and its relationship to a mental abnormality or personality disorder.\textsuperscript{197} Unfortunately, most laws operate to minimize the role

\textsuperscript{195} Some states explicitly make this declaration. Tennessee, for example, declares that “[s]ex offenders constitute a species of mentally ill persons in the eyes of the general assembly,” some of whom are appropriate for civil commitment. \textsc{Tenn. Code Ann.} § 33-6-302 (1984). States acknowledging that their sexual predator statutes apply only to “a small but extremely dangerous group” of offenders, see \textit{supra} note 40 (quoting Washington statute), send a more conflicting message. Their open acknowledgment regarding the small population to which they apply arguably belies the concept of sex offenses as their own psychopathology. However, the emptiness of the mental health definitions in such statutes and their reliance on recidivism as the only predictor for mental abnormality indicates an underlying vision of all sex offenders as mentally ill, although only some might be appropriate for commitment.

\textsuperscript{196} \textit{See}, e.g., \textsc{State v. Taylor}, 735 S.W.2d 412, 415 (Mo. Ct. App. 1987) (“Common sense dictates that most sex crimes are the result of a mental or an emotional state not often terminated by one act.”).

\textsuperscript{197} This proposition is not without controversy. Many mental health officials argue that predicting future criminal behavior from past acts is difficult and often inaccurate. \textit{See} Winick, \textit{supra} note 131, at 559 (arguing that the accuracy of clinical predictions has been...
and expertise of mental health professionals.

Several states put the initial determination of appropriateness for commitment in the hands of law enforcement officials, such as the presiding judge, prosecuting attorney, or prison officials. Only after this initial identification is the offender referred to a mental health professional for evaluation.\textsuperscript{198} Law enforcement officials who make the initial determination that an offender is a "sexually violent predator" have no mental health expertise and are unlikely to have personalized knowledge of an individual offender.\textsuperscript{199} Faced with culling a huge pool of sex offenders into the small number subject to commitment,\textsuperscript{200} such officials are more likely to rely on visceral and stereotyped images of offenders, like those described above, "seriously questioned"). Others, however, argue that carefully constructed models assessing risk in light of an offender’s particular characteristics and on-going behavior may adequately predict the potential for future violence. See id. at 560-61 (suggesting that information concerning an individual developed over time can predict the risk of violent behavior and perhaps reduce that risk).

\textsuperscript{198} In Kansas, for example, the agency with custody of the offender initially identifies him as potentially sexually violent predator. The agency then refers the case to the prosecutor’s review committee (a multi-disciplinary team composed of unidentified state agency representatives), who, upon determination that the individual is a sexually violent predator, refers it to the Attorney General who may file a petition requesting that a court find probable cause to make a determination regarding the offender’s status. If the court finds probable cause to believe the offender is a sexually violent predator, it will refer the offender to a professionally qualified evaluator to determine the offender’s status. See KAN. STAT. ANN. §§ 59-29a03-05 (West Supp. 1999). In Colorado, the procedure is less complex. After a defendant is convicted of a sex offense, the court, district attorney, or defendant can request that commitment proceedings begin. See COLO. REV. STAT. ANN. § 16-13-205 (1996 & Supp. 1998) (commitment proceeding can being within twenty days after conviction). After those proceedings begin, the defendant is subject to a mental health evaluation. See id. § 16-13-207 (“The examining psychiatrists shall make independent written reports to the court which shall contain the opinion of the psychiatrist as to whether the defendant, if at large, constitutes a threat of bodily harm to members of the public.”). For a review of statutes operating similarly to those in Colorado and Kansas, see supra note 37.

\textsuperscript{199} In surveying recent commitment cases, Samuel Brakel and James Cavanaugh found that the first step in the assessment process is:

[I]n effect a rough screen to determine if there is enough in the offender’s background and character to warrant that he will reoffend. The emphasis at this stage is on actuarial rather than clinical methods and the inquiries may be performed by evaluators with only modest, or no, clinical training. A review of the offender’s file alone may suffice to weed him out.

Brakel & Cavanaugh, supra note 193, at 79.

\textsuperscript{200} See id. at 79 (asserting that referral rates of sex offenders for civil commitment hearings ranged from approximately 7% to 5% of all offenders and that rates of actual commitments of those referred were even lower); see also Janus, Preventing Sexual Violence, supra note 189, at 192 n.74 (noting that only 6% of sex offenders in Minnesota were committed).
which will prove both over- and under-inclusive of the most dangerous offenders. Although mental health officials may later determine that someone is inappropriate for commitment, there is some evidence that they are more reluctant to do so when another person has already identified the offender as dangerous. Moreover, to the extent that mental health officials suggest that an identified sexual predator is inappropriate for commitment, courts are free to, and periodically do, disregard their assessment. In effect, the decision to commit an offender as a sexually violent predator lies squarely with law enforcement rather than mental health officials. Thus, sexual predator laws do little to avoid reinforcement of rape stereotypes.

C. Federal Rules of Evidence 413-415

Unlike registration, notification, and sexual predator statutes, which entirely stem from traditional stereotypes regarding rape perpetrators, FRE 413-415 embrace both traditional stereotypes and feminist notions about rape. In support of the new rules, for example, proponents adopted feminist arguments regarding the frequent credibility problems that acquaintance rape victims face as a result of the ever-present consent defense. However, they also relied heavily on the myth that rapists are a “small class of depraved criminals” who recidivate more than other offenders, thus justifying use of propensity evidence. Although their feminist goals are laudable, supporters ultimately undercut their agenda by justifying the new rules partly on traditional rape stereotypes. Although courts have allowed evidence of past acts under the new rules, as discussed below they have done so almost exclusively in cases involving stranger rape or child molestation. Adult victims of sexual misconduct by an acquaintance, which is the group identified as benefiting

201 See Brakel & Cavanaugh, supra note 193, at 91 (noting that the “laws will miss committing many who will reoffend and they will commit an undiscernible number who would not have reoffended if left free”).

202 See Janus, Preventing Sexual Violence, supra note 189, at 202-03 (arguing that several factors, such as fear of liability from a false prediction of safety and hindsight bias, induce officials to find an offender dangerous).

203 A study in Minnesota, for example, revealed that in “seventeen of fifty-five cases resulting in commitment, the trial court ordered the individual indeterminately committed despite testimony from the evaluating hospital staff that either recommended against commitment, or was neutral on the subject of commitment.” Id. at 205.

204 See Jonathan Simon, Monstrous, supra note 27, at 458 (arguing that although the trial includes examination by mental health professionals, the “underlying inquiry” is left to the jury).

205 See supra notes 81-92 and accompanying text (discussing rape myths and reliance on the victim’s character as evidence of consent).

206 Karp, supra note 60, at 24.

207 See supra notes 52-53 and accompanying text (discussing supporters’ arguments in favor of FRE 413-415).

208 We use the term “sexual misconduct” to signify that the rules apply not only to sexual
the most from the rules, rarely see such results.

The general rule barring the use of character evidence at trials is an institution in the law of evidence. To many it is one of those fundamental tenets of fairness that marks our justice system.\(^{209}\) According to some commentators, liberal introduction of propensity evidence in sex offense-cases obliterates the right to a fair trial and bears the imprimatur of an inquisition.\(^{210}\) Courts applying the rules have acknowledged those concerns and dealt with them largely by requiring a balancing of FRE 413-415 evidence under FRE 403 to determine if it is more probative than prejudicial.\(^{211}\) FRE 403’s balancing test necessarily leaves courts with great latitude to determine when otherwise relevant evidence may unfairly harm the defendant. The combination of fairness concerns, broad judicial discretion, and the new rules’ reliance on traditional stereotypes appears to have resulted in disparate application in a manner that reflects the crazed rapist paradigm.

Jane Aiken’s review of the new rules’ application in civil actions for sexual misconduct reveals that in cases involving paradigm stranger rape or child molestation, courts tend to allow propensity evidence although they routinely sustain FRE 403 objections in situations where the sexual misconduct involved an adult female acquaintance.\(^{212}\) Cases decided since Aiken’s article continue

\(^{209}\) See, e.g., Natali & Stigall, supra note 59, at 13-14 ("Th[e] ban on propensity evidence has been firmly and historically established since at least the seventeenth century. . . . It is a fundamental conception of how defendants should be tried in American courtrooms."); Sheft, supra note 59, at 73 (describing ban on character evidence as an essential component of American jurisprudence).

\(^{210}\) See Natali & Stigall, supra note 59, at 23-34 (arguing that FRE 413-415’s admission of propensity evidence violates the presumption of innocence protected by the due process clause); Sheft, supra note 59, at 77-82 (declaring that the admission of propensity evidence additionally violates the equal protection clause). The Judicial Conference Committee also raised questions regarding the constitutionality of FRE 413-415. See 159 F.R.D. at 54 (arguing that the opposing party should have the right to offer rebuttal character evidence in order to negate constitutional concerns).

\(^{211}\) See, e.g., United States v. Enjady, 134 F.3d 1427, 1430-31 (10th Cir. 1998) (acknowledging “serious constitutional due process issue” raised by rules but holding due process satisfied by application of FRE 403 balancing); see also sources cited supra note 47 (identifying cases that have applied the balancing test).

that trend. None of the courts excluding propensity evidence in sexual misconduct cases involving acquaintances explicitly bases its rejection of the evidence on the crazed rapist stereotype. Rather, the reasons cited bear the mark of neutral evidentiary policy. Thus, in some cases, the court found that past evidence was too stale, or that the past acts were sufficiently different from the pending case to be non-probative and prejudicial. Given the potentially inflammatory and prejudicial uses of propensity evidence, those reasons seem perfectly legitimate. The problem in these cases, however, lies not in their use of such reasons, but that in using them they scrutinize far more carefully cases involving acquaintances than they do child molestation or stranger rape cases.

sexual assault excluded under FRE 403 as being insufficiently similar in pending sexual assault case). For cases in which the court allowed admission of FRE 413-415 evidence after a FRE 403 balancing, see United States v. Larson, 112 F.3d 600, 605 (2d Cir. 1997) (allowing evidence of child molestation occurring 16-20 years prior in pending molestation case); United States v. Akram, No. 97 CR 78, 1997 WL 392220, at *2 (N.D. Ill. July 8, 1997) (acts of past sexual misconduct admissible in pending case alleging sexual contact with minors).

213 Courts in cases involving child molestation and stranger rape almost uniformly allow propensity evidence after a FRE 403 balancing. See United States v. Sumner, 204 F.3d 1182, 1187 (8th Cir. 2000) (allowing evidence of past molestation of children in pending child molestation case); United States v. Withorn, 204 F.3d 790, 796 (8th Cir. 2000) (allowing evidence of past forcible, child molestation in pending forcible child molestation case); United States v. McHorse, 179 F.3d 889, 899 (10th Cir. 1999) (allowing evidence of past molestation in pending molestation case); United States v. Eagle, 137 F.3d 1011, 1016 (8th Cir. 1998) (allowing prior evidence of 10-year-old conviction for carnal knowledge of a child in pending molestation case); United States v. Peters, 133 F.3d 933 (table of unpublished opinions), No. 96-2286, 1998 WL 17750, at *3 (10th Cir. Jan. 20, 1998) (allowing evidence of past convictions for forcible rape of a stranger in pending rape case).

Courts also remain unwilling to allow propensity evidence when the issue involved is sexual misconduct with an acquaintance. See United States v. Acevedo, 117 F.3d 1429 (table of unpublished decisions), No. 96-2149, 1997 WL 392253, at *5 (10th Cir. July 14, 1997) (discussing district court’s exclusion of evidence offered under FRE 413 of 18-year-old conviction for attempted sexual assault in pending forcible sexual assault case of acquaintance but allowing it as impeachment evidence on rebuttal); but see United States v. Enjady, 134 F.3d 1427, 1435 (10th Cir. 1998) (allowing evidence of prior rape of an acquaintance in pending acquaintance rape case).

214 See Acevedo, 1997 WL 392253, at *1 (discussing the district court’s assertion that the conviction was too remote in time to be admissible).

215 See Guardia, 955 F. Supp. at 118-19 (arguing that the necessity of expert testimony to determine the propriety of the defendant’s past conduct, would lead to jury confusion); Frank, 924 F. Supp. at 625-27 (arguing that the different factual scenario of the past act decreased the probative value of the propensity evidence).

216 See Baker, supra note 10, at 573-74 (raising question of whether different types of rape are probative of one another); id. at 590-97 (noting the potentially prejudicial and racist effect of FRE 413-415).
For example, in *United States v. Guardia*, a prosecution for criminal sexual penetration, two women alleged that their physician inappropriately touched them during a gynecological examination. The prosecution sought, pursuant to FRE 413, to admit evidence from four other women who alleged similar victimization by the defendant in order to show defendant had ""an on-going disposition to commit sexual assaults against his female patients." The district court deemed the four prior incidents insufficiently similar to the issue at hand and excluded the evidence under FRE 403. According to the court, the allegations in the pending case—that defendant inappropriately touched each victim’s clitoris while commenting to the effect that he “loved” his job—were qualitatively different from the earlier allegations, which involved claims of inappropriate touching of the victims’ breasts while claiming that he “enjoyed” the experience and asking if the victim “was ’having fun.” Are these allegations different? Unquestionably. But they are not qualitatively so. Unwanted sexual touching of one’s breasts and unwanted sexual touching of one’s clitoris are both unwanted sexual touching. The events are not so different as to raise the specter of jury confusion and delay cited by the court as reasons for excluding the evidence.

*United States v. Jackson* presents a similar issue. In *Jackson*, the defendant allegedly raped the victim while she was unconscious. The defendant claimed that the victim consented to intercourse. To bolster the current victim’s testimony, the prosecution sought to admit evidence of a past sexual assault in which police apprehended the defendant who was trying to have intercourse with a half-clothed, intoxicated, teenage girl. The court found the prior incident to be insufficiently similar because the teenage victim “was conscious and talking to [defendant] through most of the sexual act” unlike the pending case in which the victim was unconscious. Thus, the evidence was

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217 See *Guardia*, 955 F. Supp. at 117 (woman described defendant’s behavior as “sexual and inappropriate”).

218 See id. at 119 (quoting government’s response to defendant’s motion to preclude propensity evidence).

219 See id. at 118-20 (assessing the evidence and concluding that admitting it would result in jury confusion, which would be unfair to the defendant).

220 Id. at 118.

221 See id. at 119 (arguing that the necessity of expert testimony for each incident would confuse the jury); see also Aiken, supra note 212, at 1246-47 (discussing similarities in allegations and implications of court’s refusal to see them).


223 See id. (defendant contended that victim responded to him and made no effort to rebuff him).

224 See id.

225 Id. at *4.
not admissible under FRE 413. As in Guardia, there are differences in the incidents. But the court’s focus on the fact that the teenage victim was “conscious and talking” ignored that (1) the police testified that she was so incapacitated by alcohol that she had difficulty moving, (2) the assault on the teenage victim began or continued while she was unconscious, and (3) that the teenage victim’s “talking” during the incident consisted entirely of voicing her protests to defendant’s behavior.

If Guardia and Jackson are correct regarding the possible problems with the admission of dissimilar evidence, one would expect courts similarly to scrutinize propensity evidence in cases involving child molestation or stranger rape allegations. Those cases reveal, however, that differences in allegations are rarely obstacles to the admission of propensity evidence under FRE 413-415. Thus, in United States v. McHorse, in which prosecutors charged the defendant for the aggravated sexual abuse of his three nieces under the age of twelve, the court allowed evidence of the past sexual abuse of two other young children despite differences in the incidents. In the pending case, the allegations of the three victims included substantial sexual fondling of the victim’s genitals, including allegations of forcible rape. In the two prior incidents, however, the victim either could not describe the abuse or the abusive act involved fondling outside of the victim’s clothing. Nevertheless, the court found the propensity evidence sufficiently similar to the charged offenses as to be probative without being overly prejudicial. While one could argue that the McHorse incidents are negligibly different and do not warrant exclusion of the uncharged conduct evidence, the ease with which the court admitted the evidence stands in marked contrast to Guardia and Jackson, whose differences are no less inconsequential.

Some courts in child molestation cases are far more liberal in their application of FRE 414 than was the McHorse court, admitting, for example, evidence regarding vastly different charges. One court, for example, upheld admission of a past statutory rape charge—apparently with a consenting minor

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226 See id. at *4 (concluding that the evidence was not relevant to the case).
227 See id. at *2.
228 See id. at *3 (victim did not remember the assault).
229 See id. (victim stated that she told defendant that she did not want to have sex with him).
230 See United States v. McHorse, 179 F.3d 889, 899 (10th Cir. 1999) (concluding that district court did not abuse its discretion in allowing evidence).
231 See id. at 894 (indictment alleged that defendant engaged in sexual acts with all three victims).
232 See id. at 895 (victim stated that defendant made her touch him on the outside of his clothing).
233 See id. at 898 (stating that the defendant’s alleged conduct towards the victims “closely resemble[d]” the conduct the propensity evidence described).
who later became his wife—in a case involving forcible rape of a child. Other courts allow admission of propensity evidence in child molestation cases with no real substantive examination of the allegations to determine if they are similar to those charged. The mere fact that the evidence involves molestation of a child appears to satisfy many courts as to the probative value and admissibility of such evidence.

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234 See United States v. Eagle, 137 F.3d 1011, 1016 (8th Cir. 1998) (affirming the defendant’s conviction for aggravated sexual abuse of a child, the court upheld the admission of evidence of a past statutory rape conviction noting that the testimony of the statutory rape victim, now the defendant’s common-law wife, would provide the jury an opportunity to discount the prejudice caused by the admission of the evidence); see also United States v. Koruh, 210 F.3d 390 (table of unpublished decisions), No. 99-2138, 2000 WL 342252, at **1 (10th Cir. Apr. 3, 2000) (allowing admission of past forcible rape allegation in pending case involving allegations of sexual fondling). In Koruh, the evidence admitted was based on testimony of the defendant’s daughter, from a previous marriage, involving sexual abuse occurring more than 16 years before the present trial. See id. at **1. Upholding the district court’s decision to admit the evidence under an abuse of discretion standard, the Tenth Circuit noted that the prosecutor had argued that the alleged molestations were similar: both victims and the defendant’s daughter were female and related to the defendant; the girls were under the age of 12 years old when the alleged abuse occurred; and the molestation allegedly occurred in or near the defendant’s homes. See id. at **4.

235 See, e.g., United States v. Withorn, 204 F.3d 790, 794 (2000) (upholding the admission of testimony, in a forcible rape case, that defendant had forcibly raped his cousin several years earlier). In Withorn, there were similarities between the conduct on trial and the past conduct—both cases involved forcible rape, the victims’ ages were similar, and in both cases the defendant claimed the victims had consented. See id. The court did not address the similarities, but upheld admission of the evidence noting that there was a “‘strong legislative judgment that evidence of prior sexual offenses should ordinarily be admissible.’” Id. (quoting United States v. LeCompte, 131 F.3d 767, 769 (8th Cir. 1997)); see also United States v. Meacham, 115 F.3d 1488 (10th Cir. 1997) (in affirming a conviction of transporting a minor in interstate commerce with intent that the minor engage in sexual activity for which defendant could be charged with a crime, the court upheld admission of evidence that defendant had abused his stepdaughters, more than thirty years earlier, as evidence of defendant’s intent to go on the trip to sexually molest the victim).

236 More than one court in child molestation cases has mentioned that past molestation acts show defendant’s aberrant sexual “taste” for children. See, e.g., United States v. Charley, 189 F.3d 1251, 1260 (10th Cir. 1999) (noting that propensity evidence in child molestation cases is “exceptionally probative because it shows an unusual disposition of defendant – a sexual or sado-sexual interest in children – that simply does not exist in ordinary people”); United States v. Akram, No. 97 CR 78, 1997 WL 392220, at *1, *3 (N.D. Ill. Jul. 8, 1997) (admitting evidence of other, contemporaneous but uncharged sexual assaults under FRE 413, the court commented on defendant’s “taste” for young girls, which it argued tended to establish motive); United States v. Castillo, 188 F.3d 519 (table of unpublished decisions), No. 98-2191, 1999 WL 569054, at **1 (10th Cir. Aug. 4, 1999) (in upholding admission of uncharged conduct under FRE 414 and 403, the court found testimony relating to the uncharged conduct highly probative of the defendant’s aberrant
The disparate treatment of propensity evidence in child molestation and stranger rape cases, on the one hand, and sexual misconduct cases involving acquaintances, on the other, suggests that courts operate on a double standard. This is not to say that courts should more liberally allow admission in acquaintance misconduct cases; in fact, we rather like the general rule barring use of propensity evidence. But the pattern of decisions in FRE 413-415 cases suggests that the constitutional and philosophical questions raised by the new rules, along with the "crazed" rapist stereotype that underlies them, drive judges to treat differently those defendants who assault or harass acquaintances.

That a similar pattern has arisen in states using the "lustful disposition" exception further supports this conclusion. Courts using this exception routinely allow such evidence in child molestation cases, finding it useful to "bolster the credibility of the prosecuting witness . . . where the accusations or the acts standing alone seem improbable or where the acts are crimes in continuado in nature and it is highly probable similar acts have occurred before or will occur after." Far fewer jurisdictions extend the exception to rape cases and some courts explicitly discriminate against acquaintance rape victims, noting that rape of an adult woman is not "deviant behavior" and that "the fact that one woman was raped is not substantial evidence that another did not consent."

"sexual proclivities" towards his daughters).

See infra notes 299-307 and accompanying text for further discussion.

Lehiy v. State, 501 N.E.2d 451 455 (Ind. App. 1986) ) (citing State v. Robbins, 46 N.E.2d 691 (Ind. 1943)); see also Reichard v. State, 510 N.E.2d 163, 165 (Ind. 1987) (holding that the depraved sexual act exception, allowing evidence of past sexual criminal conduct in cases involving sodomy, sexual conduct against children, and incest, was not applicable to rape of adult woman); State v. McFarlin, 517 P.2d 87, 90 (Ariz. 1973) (upholding the admission of other acts of child molestation committed shortly before and after the charged offense of child molesting, but noting that the lustful disposition exception applied to cases of abnormal sexual conduct—such as sodomy, child molestation, and lewd and lascivious conduct—and not to adult rape cases).

See Bryden & Park, supra note 62, at 557-59 (finding that a survey of past acts evidence in sex offense cases reveals that courts retaining the "lustful disposition" exception increasingly limit it to child molestation cases); Thomas J. Reed, Reading Gaol Revisited: Admission of Uncharged Misconduct Evidence in Sex Offender Cases, 21 AM. J. CRIM. L. 127, 188 n.340 (1993) (noting that a survey of 29 states retaining the lustful disposition exception reveals that a majority of cases where the exception was used involved child molestation).

See Reichard, 510 N.E.2d at 165 (holding, in a case involving violent rape of woman by her boyfriend, that evidence of prior rapes was inadmissible because they "did not involve depraved sexual conduct") (citing Lehiy v. State, 501 N.E.2d 451 (Ind. App. 1986)); see also Lehiy, 501 N.E.2d at 451, 456 (holding that "evidence of prior criminal sexual conduct was not admissible to show depraved sexual instinct in a case where only rape was being prosecuted").

McFarlin, 517 P.2d at 90 (citing Lovely v. United States, 169 F.2d 386 (1948));
Although courts may frequently have credible and legitimate reasons for excluding FRE 413-415 evidence, the pattern arising in their decisions is telling. As long as the defendant can be characterized as monstrous, courts are able to overcome their traditional qualms regarding propensity evidence and allow its use at trial. For men who do not fit that paradigm, however, courts go to great lengths to ensure that such evidence is excluded, usually to the detriment of sexual assault victim and successful prosecution. Although the new rules’ supporters hoped to further the feminist agenda regarding acquaintance rape, the rules’ acceptance of myths regarding men who rape entirely undercut the agenda.

D. The Violence Against Women Act’s Civil Rights Action

VAWA’s provision of a civil rights action for sexual assaults based upon “gender animus” similarly reinforces the myth of the crazed rapist, although VAWA’s proponents never intended that result. VAWA’s goals are clearly feminist in nature. Indeed, VAWA’s proponents characterize the Act’s primary aims as educating the public regarding the manner in which traditional judicial mechanisms routinely ignored violence against women routinely and providing women an avenue of redress for crimes that often went unpunished at the state level.\(^{242}\) VAWA’s legislative history is replete with congressional findings and discussions of the many stereotypes preventing rape victims’ vindication,\(^{243}\) which proponents hoped to eradicate with the new civil rights

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\(^{242}\) See supra notes 69-70 and accompanying text (detailing supporters’ arguments in favor of VAWA); see also Joseph R. Biden Jr., The Civil Rights Remedy of the Violence Against Women Act: A Defense, 37 Harv. J. on Leg. 1, 4-5 (2000) (noting that Congress had determined that state legal systems had “institutionalized” historic barriers against women and had prevented equal protection of the law and further noting that state officials had asked Congress to pass VAWA).

action. Unfortunately, the civil rights action’s “gender animus” requirement undercuts its otherwise feminist grounding.

From its inception, VAWA’s detractors raised concerns regarding the civil rights remedy, the most significant of which condemned it for making “every crime against a woman [a] civil rights violation.” The Conference of Chief Justices opposed VAWA for a similar reason—because of its potential to “cause major state-federal jurisdictional problems and disruptions in the processing of domestic relations cases in state courts.” In an effort to quell mounting opposition to his original bill, Senator Biden agreed to certain compromises regarding its language. First, the civil rights action was limited to certain violent acts amounting to felonies. More importantly, the original language of the bill allowing a civil rights action for crimes committed

244 Victoria F. Nourse, Where Violence, Relationship, and Equality Meet: The Violence Against Women Act’s Civil Rights Remedy, 11 WIS. WOMEN’S L.J. 1, 29 (1996) (internal quotation marks omitted). The Justice Department under President Bush opposed the civil rights remedy arguing that “‘whenever a woman is a victim of any crime, a case can be made that the criminal preyed on her thinking she would be an easier target than a man.’” Nourse, supra, at 30 n.164 (quoting the Department of Justice’s letter to Senator Biden, Chairman Senate Judiciary Committee, 14 (Apr. 9, 1991) (on file with the Senate Judiciary Committee)).


The Supreme Court recently agreed, striking down the Civil Rights provision as beyond Congress’s power to regulate. See United States v. Morrison, 120 S. Ct. 1740, 1754-55, 1759 (2000) (striking down the VAWA’s civil remedy provision as beyond Congress’s Commerce Clause regulatory powers and not within Congress’s power under section five of the Fourteenth Amendment). While an examination of the gendered aspects of this particular objection to VAWA is beyond the scope of this article, Professor Reva Siegel has thoroughly set forth the relevant arguments. See Reva B. Siegel, The Rule of Love: Wife Beating as Prerogative and Privacy, 105 YALE L.J. 2117, 2196-2206 (1996) [hereinafter Reva Siegel, The Rule of Love] (tracing the influence of traditional common law reasoning with respect to gender and domestic relations on the federalism arguments about regulation of domestic relations as raised by critics of VAWA’s civil rights remedy).

246 See Nourse, supra note 244, at 28. In the original Act’s version, the civil rights remedy referred to a federal law that covered both felonies and misdemeanors. See id. The compromise made clear that only felonies that potentially posed a threat of physical injury could be the basis of such a claim. See 43 U.S.C.A. § 13981(d)(2)(A) (West 1995) (identifying a “crime or violence” as an act that would constitute a felony if it presents serious risk of injury, whether or not the act resulted in criminal charges, prosecution, or conviction). The compromise also extended coverage of the bill to those crimes that would be felonies but for the relationship of the parties. See 42 U.S.C.A. § 13981(d)(2)(B) (West 1995) This second provision was inserted in recognition of those “cases in which state and local laws effectively ‘downgraded’ a crime (to a misdemeanor) because of the relationship of the parties.” Nourse, supra note 244, at 28.
“because of gender or on the basis of gender” was modified. The compromise language required not only that crimes be “because of gender or on the basis of gender” but also that they be “due, at least in part, to an animus based on the victim’s gender.” The “animus” language was intended to assuage concerns regarding the possibility that victims could bring civil rights actions based solely upon the fact that a disparate number of victims were of a single gender. The compromise version indicated that any action brought under the civil rights provision required proof of a specific, gender-based motive in that particular instance. Thus, the term “animus” was apparently meant to indicate a requirement that the person committing the crime have gender-bias as their “purpose” or “specific intent.” In this sense, the term was used in a manner comparable to its use in other civil rights laws.

Unfortunately, not everyone interpreted the term “animus” in this manner. For example, Senator Hatch, who sponsored later versions of VAWA, argued that the term “animus” was to be used more in the sense of “malice” or “animosity.” That is, women bringing such claims must show that their

247 See S. Rep. No. 102-197, at 28 (1991) (Section 3.01(c) and (d)(1) of proposed civil rights claim).
249 This compromise reflected an “intermediate position” between those previously advocated:

At one end of the spectrum was a “malice” or “animosity” standard. Such a standard could have required proof that the defendant . . . hated all members of the opposite sex or consciously intended to use violence as a message of gender hatred . . . . On the other side of the spectrum was a “disparate impact” standard[,] under [which] statistical evidence demonstrating the disparate impact of a particular kind of violence would have been sufficient to make out a cause of action without regard to the particular motivation or purpose of the defendant.

Nourse, supra note 244, at 29-30 (footnotes omitted).

250 See S. Rep. No. 103-138, at 64 (1993). The Senate Report accompanying the final version of VAWA indicated that the “new language elucidates the committee’s intent that a victim alleging a violation under this section must have been targeted on the basis of his or her gender. The defendant must have had a specific intent or purpose, based on the victim’s gender, to injure the victim.” Id.; see also Nourse, supra note 244, at 30-32 (discussing facts supporting an interpretation of “animus” as “purpose” or “intent”); Goldscheid, supra note 65, at 150 (discussing legislative history and noting that Congress used the terms “animus,” “purpose,” and “motivation” interchangeably, thus dispelling any notion that disparate impact would be sufficient for recovery).

251 See, e.g., 42 U.S.C. § 1985(3) (1994) (creating a civil remedy for victims of conspiracies to deprive them of equal protection of the laws). The Supreme Court, however, has noted that § 1985(3)’s animus requirement does not require “maliciously motivated, as opposed to assertedly benign (though objectively invidious), discrimination against women.” Bray v. Alexandria Women’s Health Clinic, 506 U.S. 263, 269-70 (1993) (holding that § 1985(3) does not create a federal cause of action against people who obstruct women’s access to abortion clinics and rejecting the argument that the abortion opponent’s opposition to abortion reflects an animus against women).
attacker bore some kind of hatred or ill-will toward them:

We're not opening the federal doors to all gender-motivated crimes. Say you have a man who believes a woman is attractive. He feels encouraged by her and he’s so motivated by that encouragement that he rips her clothes off and has sex with her against her will. Now let’s say you have another man who grabs a woman off some lonely road and in the process of raping her says words like, “You’re wearing a skirt! You’re a woman! I hate women! I’m going to show you, you woman!” Now the first one’s terrible. But the other’s much worse. If a man rapes a woman while telling her he loves her, that’s a far cry from saying he hates her. A lust factor does not spring from animus.252

Senator Hatch’s example thus highlights the enduring distinction between “real” rape involving a frenzied and unbalanced stranger and other, “less harmful,” rape involving acquaintances. Moreover, his equation of the term “animus” with “animosity” is not illogical given modern tendencies to conflate the term.253 One can consequently see how the civil rights action’s language might encourage courts to continue distinguishing between “real” and “not-real” rape.

Prior to the Supreme Court finding VAWA unconstitutional, at least one court apparently made such a distinction. In Brzonkala v. Virginia Polytechnic and State University,254 the district court raised the issue of whether the rape giving rise to the victim’s civil rights claim qualified under the Act. According to the complaint, two men whom the victim met “less than a half-hour earlier and whose identities she knew only by given names and by their status as football team members” repeatedly raped the victim in a university dorm room.255 The rape was clearly effected by force—the defendants pinned down

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253 Nourse, supra note 244, at 32 n.173. Some courts applying VAWA have commented upon the ambiguity of the term “animus.” See Doe v. Hartz, 970 F. Supp. 1375, 1406 (N.D. Iowa 1997) (commenting that the term “animus” was ambiguous but concluding, upon reviewing VAWA’s legislative history, that allegations of unwanted or unwelcomed sexual advances are sufficient to meet the requirement that the victim allege that the defendant targeted the victim due to his or her gender), rev’d in part on other grounds, 134 F.3d 1340 (8th Cir. 1998); Liu v. Striuli, 36 F. Supp. 2d 452, 474 (D.R.I. 1999) (analyzing the ambiguity of the term “animus,” the court reviewed VAWA’s legislative history and concluded that the existence of gender-motivated animus was determined by a totality of the circumstances).

254 935 F. Supp. 779, 784 (W.D. Va. 1996), rev’d 132 F.3d 949 (4th Cir. 1997) (holding that VAWA was within Congress’s Commerce Clause powers), vacated en banc 169 F.3d 820 (4th Cir. 1999) (holding that VAWA could not be upheld under Congress’s Commerce Clause powers and was not a legitimate exercise of congressional power under the Fourteenth Amendment), aff’d sub nom. United States v. Morrison, 120 S. Ct. 1740 (2000).

255 Brzonkala, 935 F. Supp. at 782.
the victim—and the defendants admitted that she did not consent. On these facts, the judge was satisfied that the victim raised a claim based on "gender animus."
The court made clear, however, that not all rapes would support such a claim:

All rapes are not the same, and the characteristics of the rapes here alleged, when compared to other rapes, indicated that gender animus more likely played a part in these rapes than in some other types of rapes. First the assault involved a gang rape. While any rape is egregious, all other factors the same, gang rape generally is more egregious than one-on-one rape. Second, these rapes fall somewhere in between stranger rape and date rape, and are probably closer to stranger rape. Again, while any rape is egregious, stranger rape and rapes such as the one in question generally are more egregious than date rape.

To be sure, not all courts fell into this trap. Nonetheless, the fact that some courts are willing to read the animus requirement as limiting the civil rights claim to only paradigmatic stranger or gang rape indicates the potential to reinforce, and perpetuate, the old stereotypes.

256 See id. (noting that at the university's disciplinary hearing, the defendant, Morrison, admitted that the victim said "no" twice in response to his requests for sexual intercourse).

257 See id. at 784. Although the Brzonkala court found that the particular facts of the rape indicated gender animus, it discussed two statements by defendant Morrison that reinforced the court's finding of gender animus. First, after having intercourse with the victim, Morrison had stated, "You better not have any fucking diseases," which the court said evidenced Morrison's disrespect for the victim. See id. The court said that more relevant to gender animus was Morrison's statement at a later date, and made in the presence of at least one woman, that he "like[d] to get girls drunk and fuck the shit out of them." Id. The court found that this later statement indicated a disrespect for women in general and connected this gender disrespect to sexual intercourse. See id.

258 Id. at 784-85.

259 See, e.g., Anisimov v. Lake, 982 F. Supp. 531, 540-41 (N.D. Ill. 1997) (rejecting Brzonkala's "broad characterizations" of rape and noting that "[a]lthough Congress clearly did not intend to designate rape as a per se 'crime of violence motivated by gender,' the cases where it is not would appear to this Court to be few and far between"); McCann v. Rosquist, 998 F. Supp. 1246, 1252 (D. Utah 1998) ("The notion that nonconsensual sexually oriented conduct is actually amorous and therefore not invidiously discriminatory toward the victimized class is clearly wrong."); Doe v. Hartz, 970 F. Supp. 1375, 1408 (N.D. Iowa 1997) (finding allegations of unwanted or unwelcome sexual advances sufficient to satisfy VAWA's "gender-motivated" requirement while rejecting notion that an "unwanted kiss [was] merely a 'signal of affection'").

260 Although no court has expressed its views on rape hierarchies as graphically as in Brzonkala, some courts' discussions of the gender animus requirement further suggest that it might lend itself to stereotypes. See Mattison v. Click Corp. of Amer., Inc., No. 97-CV-2736, 1998 WL 32597, at *1-*2 (E.D. Pa. Jan. 27, 1998). Mattison involved allegations by a female plaintiff that her male supervisor made repeated requests for sexual favors, verbally abused her by calling her degrading names, coerced her into a sexual relationship, and
The civil rights action might have been primed for such misuse even absent the term “animus.” Although lacking the “animus” language, even the original versions of the civil rights action required a specific motive. The legislative history supporting the “because of gender or on the basis of gender” language emphasized that “[d]iscriminatory motivation is clearly required . . . and . . . the plaintiff must prove that the crime of violence—whether an assault, a kidnapping, or a rape—was motivated by gender.” Moreover, the legislative history further emphasized that the civil rights action was intended to redress crimes of gender-bias in much the same way that current bias crimes legislation protected other categories of people. In fact, Congress specifically noted that “[g]enerally accepted guidelines for identifying hate crimes may also be useful” in giving content to the gender-motivation requirement.

Unfortunately, by basing VAWA’s civil rights action on the paradigm used in bias/discrimination cases, its supporters subtly reinforced old stereotypes regarding rape. Although such remedies, like VAWA, do not require animosity as a motivating factor, that emotion is commonly the underlying

ultimately forcibly raped her. See id. The court dismissed the defendant’s claim that his actions and remarks “demonstrate[d] an affinity, not animosity towards women,” including plaintiff. Id. at *7. The court did not rule, however, that the defense of “amorousness” was never available. Instead, it ruled simply that the detailed allegations of humiliating and degrading behavior in this case “overshadowed” defendant’s claims and “connect[ed his] gender disrespect to sexual intercourse.” Id. (citation omitted). The court in Liu v. Striuli, 36 F. Supp. 2d 452 (D.R.I. 1999), similarly relied upon extrinsic evidence, such as lewd comments, threats of deportation and the lack of any other apparent motive, to bolster the conclusion that defendant’s conduct toward a female victim, which included forcible rape, was gender-motivated. See id. at 475-76. While neither court necessarily meant to distinguish between types of rape, their desire to bolster what were obviously forcible acquaintance rapes with additional allegations of behavior showing a hostile or demeaning attitude toward women suggests that rape stereotypes operate even in these cases.

262 See id. at 50 (discussing the similarities between proof of gender motivation and the proscribed motivation in other civil rights laws).
263 Id. at 50 n.72.
264 The Anti-Defamation League’s model hate crime law, which many states have followed, defines a hate crime as a crime committed “‘by reason of the actual or perceived race, color, religion, national origin or sexual orientation of another individual or group of individuals.’” Katherine Chen, Note, Including Gender in Bias Crime Statutes: Feminist and Evolutionary Perspectives, Note, 3 WM. & MARY J. WOMEN & L. 277, 287-88 (1997) (quoting Anti-Defamation League of the B’Nai B’Rith, ADL Hate Crime Statutes: A Response to Anti-Semitism, Vandalism, and Violent Bigotry at A-I (Supp. 1990)). Similarly, the federal Hate Crimes Statistics Act defines a bias crime as one which “manifest[s] evidence of prejudice based on” various classifications. See 28 U.S.C.A. § 534 note (West 1993) (Hate Crime Statistics). Like § 1985(3), see supra note 234, neither of these requires animosity in order to manifest bias. A defendant could, for example, act against a victim not because of overt animosity so much as complete indifference to the
impetus for a defendant’s conduct in such cases. Framing the cause of action in terms of gender-bias and likening it to civil rights violations or bias crimes against minorities thus “depends in part on an assumption that gender bias will manifest itself as race discrimination manifests itself: in an emotional state called ‘hate.’” Such an assumption ignores the complexity of men’s motives for rape. As Katharine Baker has noted, some men rape because they hate women but many others do so for vastly different reasons—to bond with other men, because they view women as commodities to possess, or because they desire sex and are simply indifferent to women’s objections. These latter motives are far more likely to underlie what we think of as acquaintance rape. As a consequence, the bias paradigm may encourage the legal system and the public to make the same distinctions that the Brzonkala court made.

Most working definitions of bias crimes, for example, recognize that such crimes actually are committed out of animosity toward an individual because of their membership in a particular class. See, e.g., Elizabeth A. Pendo, Recognizing Violence Against Women: Gender & the Hate Crimes Statistics Act, 17 HARV. WOMEN’S L.J. 157, 159 (1994) (“The term ‘hate crime’ generally refers to a crime committed...out of hostility toward the group to which the victim belongs.”); Kristin L. Taylor, Note, Treating Male Violence Against Women As a Bias Crime, 76 B.U. L. REV. 575, 577 (1996) (“Bias crime offenders typically act against individuals they perceive to be members of a particular group toward which the offenders feel animosity.”).

Reva Siegel, The Rule of Love, supra note 245, at 2205.

See Baker, supra note 10, at 599 (motivated by desire for sex); id. at 602 (ignoring women’s boundaries); id. at 603 (treating women as sexual commodities); id. at 606 (bonding with other men).

A number of authors argue in favor of the bias crimes paradigm, either through VAWA or state bias crime laws. See Marguerite Angelari, Hate Crime Statutes: A Promising Tool For Fighting Violence Against Women, 2 AM. U.J. GENDER & L. 63, 100-03 (1994) (arguing that the potential benefits of treating violence against woman as hate crimes include: providing remedies that are not traditionally available to women; increasing public awareness of the seriousness and prevalence of violence against women; and directing the emphasis away from the sexual nature of certain biased-motivated violent crimes against woman, such as rape, which perpetuate the existing “rape myths”); Steven Bennett Weisbrud & Brian Levin, “On the Basis of Sex”: Recognizing Gender-Based Bias Crimes, 5 STAN. L. & POL’Y REV. 21, 33-40 (1994) (articulating reasons why gender-related crimes fit the bias crime mold); Taylor, supra note 265, at 594-604 (concluding that male violence against women is gender-motivated and is similar, in many respects, to bias crimes motivated by race, religion, or sexual orientation); Chen, supra note 264, at 288-324 (arguing that both feminist and evolutionary theories support inclusion of gender in bias crime statutes); W.H. Hallock, Note, The Violence Against Women Act: Civil Rights For Sexual Assault Victims, 68 IND. L.J. 577, 603-15 (1993) (arguing that much violence against women contains the bias factors common to other bias crimes).

Some authors even argue that acquaintance rape should be included within the confines of bias crimes and mount feminist arguments regarding the bias aspects of acquaintance rape. See, e.g., Weisbrud & Levin, supra at 40-41 (“No matter what the particular facts of a given
If a man does not use excessive violence, is not a stranger or working in a
group, and does not seem mentally unbalanced or socially unattractive, he will
be less likely to be thought of as acting out of “hatred” rather than some other,
more excusable motive. Moreover, VAWA’s proponents further exacerbated
the potential perpetuation of these rape myths by using a scenario in which a
serial rapist hurls misogynistic slurs while committing the rape as their primary
example of a gender-motivated rape. Although the drafters did not intend
for this to be the only example of a bias crime, their use of it as a paradigmatic
one has in turn caused courts to rely heavily on that paradigm for guidance
when discussing gender animus.

Finally, VAWA’s proponents’ admission that some rapes are not motivated
by gender is especially corrosive to the feminist critique of rape. While
different motives for why men rape women do in fact exist, all motives
essentially depend upon women’s subordinate status and a disregard for female
humanity. In Lynne Henderson’s words “[r]ape denies that you are a person,
that you exist . . . . When a woman’s existence just does not matter, intercourse
becomes rape.” To suggest that something other than gender or gender-

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269 The Senate Report’s unfortunate example of a gender-motivated rape stated:
Consider the case of a serial rapist who violates his victims as he hurls misogynist
slurs. The victim’s lawyers would prove exactly the same type of “circumstances” that
the lawyer in the “race” case proved: that the victim was of one sex (female) and the
attacker a different sex (male); that the attacker did not kidnap and rape men, but had a
long history of attacking women; and that the attacker shouted anti-woman epithets
during the assault. Again, the jury might not be convinced by any one of these
circumstances individually—but all together show gender bias.


270 See supra notes 254-58, 260.

271 Lynne Henderson, What Makes Rape a Crime?, 3 BERKELEY WOMEN’S L.J. 193, 226
(1987) (reviewing SUSAN ESTRICH, REAL RAPE (1987)). Catharine MacKinnon makes a
stronger version of this argument:

Women are sexually assaulted because they are women: not individually or at random,
but on the basis of sex, because of their membership in a group defined by gender . . . .
Rape is an act of dominance over women that works systematically to maintain a
gender-stratified society in which women occupy a disadvantaged status as the
appropriate victims and targets of sexual aggression.

Catharine MacKinnon, Reflections on Sex Equality Under Law, 100 YALE L.J. 1281, 1301-
02 (1991) (footnotes omitted).
hierarchies is at the root of rape not only opens the door to patriarchal arguments that rape is about a man’s psychosis, it ultimately undercuts the feminist agenda.

IV. SOME THOUGHTS ON THE FEMINIST RESPONSE TO THE NEW LEGISLATION AND PRESCRIPTIONS FOR THE FUTURE

A. The Feminist Response to the New Legislation and Its Implications

Despite the problems it poses for the feminist agenda, few feminists have spoken out against the new legislation. Of those critics, particularly noteworthy are Katharine Baker and Aviva Orenstein, who have criticized FRE 413-415 as “displaying attitudes and assumptions that betray basic anti-feminist biases.” Likewise, a handful of scholars have criticized VAWA’s anti-feminist assumptions and potential bias against acquaintance rape. In contrast, feminists have been essentially silent regarding notification and civil commitment statutes, with the bulk of scholarship on those laws involving constitutional or criminological critiques rather than feminist analysis.

Several factors could account for feminists’ lack of response to these laws.

272 Orenstein, supra note 9, at 691; see also Baker, supra note 10, at 589 (noting that “Rule 413 and its supporting rationale fail to acknowledge, much less incorporate, most of what scholars have learned about rape in the past twenty-five years”).

273 See Jennifer Gafney, Note, Amending the Violence Against Women Act: Creating a Rebuttable Presumption of Gender Animus in Rape Cases, 6 J.L. & POL’Y 247, 256-57 (1997) (arguing that the bias crime model might preclude actions for marital rape under VAWA’s civil rights action because of refusal to see marital rape as motivated by hate); see also Wendy Rae Willis, Note, The Gun Is Always Pointed: Sexual Violence and Title III of the Violence Against Women Act, Note, 80 Geo L.J. 2197, 2212 (1992) (suggesting that requiring proof of improper motivation—i.e. hate or animus toward women—as required in racial violence cases, ignores the unique nature of the sexual violence injury and arguing that the rape itself should raise a credible presumption that the assault was gender motivated).

274 Stephen Schulhofer and Lenore Simon note that civil commitment and notification statutes presume that the defendant was a stranger to his victim. Neither, however, discusses the issue primarily from a feminist perspective. The former merely mentions the issue in passing while writing from a constitutional perspective and the latter writes from a therapeutic jurisprudence rationale. See Schulhofer, Two Systems, supra note 183, at 76 (noting that sexually violent predator laws are targeted at acts committed by strangers, thus ignoring other crimes that constitute a large part of the sexual violence problem—domestic violence, child abuse by family members, and other acquaintance abuse); Lenore M.J. Simon, Sex Offender Legislation and the Antitherapeutic Effects on Victims, 41 ARIZ. L. REV. 485, 490, 496 (1999) (arguing that the fact that fear of stranger-committed violence fuels most criminal legislation, including sex offender laws, creates a misperception of the magnitude of sexually violent crimes, and promotes inadequate solutions for the majority of sexually violent crimes against children and women, which are carried out by acquaintances).
First, all of these new laws try to strengthen the conviction and/or punishment of men who rape. Accordingly, feminists may be reluctant to criticize these legislative efforts that, at least superficially, give them what they have demanded for years—that the legal system take rape seriously. This is especially true when one considers that feminists who make nuanced arguments regarding particularly difficult legal issues are often accused of being fickle or hypocritical. Rather than put rape reform efforts at risk, some may see silence as a better option.

Second, with respect to notification and sexual predator statutes in particular, it is possible that such laws simply are not on feminists’ radar screens. Because the laws apply only to offenders already convicted of rape, some feminists may see them as tangential to their principal agenda, which generally seeks to broaden substantive definitions and legal recognition of rape. While we believe that these laws have a substantive impact on the feminist rape agenda, it is certainly understandable that others, at least at first glance, do not view them in that manner.

Finally, some feminists may not have spoken out against the new legislation because they support it. As alluded to above, one can stake out credible feminist positions in support of such laws. VAWA provides the most obvious example in this regard. The legislative history reveals obvious feminist reasoning behind the civil rights action277 and many feminist scholars278 and activists279 strongly supported it. Although we disagree with supporters of VAWA regarding its impact on the feminist agenda, we do not dispute that they make legitimate feminist arguments in favor of the law.

Despite arguments in favor of the new legislation, we believe that the feminist agenda with respect to rape—i.e., the desire to broaden societal and legal understanding of rape beyond stereotypical stranger rape—is best served if feminist scholars and activists oppose the new laws. First, by perpetuating the myth of the crazed rapist, the new legislation’s lasting anti-feminist effects outweigh other, potential feminist aspects of the law. Feminist reform efforts

275 See Christina E. Wells, Hypocrites and Barking Harlots, The Clinton-Lewinsky Affair and the Attack on Women, 5 WM. & MARY J. WOMEN & L. 151, 153-54 & n.10 (1998) (countering the hypocrisy charges made by anti-feminist commentators against women’s continued support of President Clinton following revelations of his affair with Monica Lewinsky and the subsequent investigation and impeachment).

276 See id. at 153-54.

277 See supra notes 69-72, 243 and accompanying text.

278 See, e.g., Goldscheid, supra note 65, at 124 (characterizing the civil rights action as embodying a feminist position that rape is a bias crime); Reva Siegel, The Rule of Love, supra note 245, at 2206 (arguing that the “very struggle over the interpretation of VAWA’s civil rights remedy will, of necessity, modernize gender status discourse”).

initially sprang from the recognition that, although the law formally took rape seriously, myths and prejudicial attitudes impeded adequate prosecution of the crime. Researchers Ronald Berger, Patricia Searles, and Lawrence Neuman found further that feminist rape reform efforts of the 1970s and 1980s failed partly because many reforms "preserved significant features of the pre-reform legislation." It thus matters a great deal whether the statutes in question embrace traditional stereotypes. As with past laws, the new legislation's clear grounding in stereotypes is likely to undercut its potentially beneficial aspects.

Second, allowing the legislature to devote significant time and attention to laws embracing the crazed rapist myth may impede future feminist efforts to reshape rape legislation. The scale of the new laws suggests that they consumed enormous amounts of legislative resources and time, both of which are in short supply. Legislatures may balk at spending additional time on new, alternative approaches when they believe that they have already dealt with the problem adequately. Thus, feminists must educate the legislature regarding the problems with the laws in order to persuade them that future initiatives are yet appropriate.

Third, as other, similar rape-related initiatives threaten to proliferate, feminists risk a backlash against their agenda. There exist serious constitutional and philosophical questions with respect to many of the new laws. History demonstrates that just one very public case of a seemingly "normal" man falling victim to the feminist cause is all that is necessary for the

280 See supra notes 85-89 and accompanying text (discussing the manner in which rape myths decreased successful prosecution of rape).

281 See Berger, et al., supra note 103, at 335-36.

282 We recognize that in the case of the existing legislation our argument can be characterized as shutting the barn door after the animals have escaped. Ideally, feminists should speak out against such legislation before the legislature expends time and energy enacting it. However, educating legislatures regarding the flaws in the new laws still performs a useful function because it may make them less complacent and more willing to listen to future proposals. Moreover, some feminists did oppose the new laws prior to their enactment which suggests that an on-going educational effort is still necessary.

283 The U.S. House of Representatives recently passed a bill requiring that colleges enact policies regarding registration and notification of sexually violent predators (as defined in the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Program) who are enrolled at or employed by that institution. See H.R. 4504, 106th Cong., 2nd Sess. § 2(i)(7)(A) (2000) (discussing how the institution "shall make available to the campus community . . . all such information [provided to the institution by the State, pursuant to § 170101 of the Violent Crime Control and Law Enforcement Act of 1994 (42 U.S.C. 14071)] concerning" any such person enrolled or employed at the institution, how to access the information, the frequency of updates of the information, and the type of information available.).

284 See supra notes 160-65 (discussing constitutional issues raised by registration/notification statutes); see also supra note 183 (discussing constitutional issues raised by civil commitment statutes).
resulting blame to be laid at feminism's door. Feminists have struggled in the last decade to control their image in the face of accusations that they are authoritarian, "man-hating" "femi-nazis." Feminist failure to criticize the new statutes and attribution of these laws' existence to feminist politics, exacerbates those accusations and further undermines feminist efforts to expand the public's understanding of rape.

Finally, sociobiological theories attempting to debunk the crazed rapist myth and portray rape as a natural, biological byproduct are gaining popularity, suggesting that a focus on men and why they rape will be an enduring aspect of future discussions. Feminist failure both to speak out against the new legislation and to engage in a broader and more public discussion regarding rape motives and their relationship to biological, psychological, and cultural factors, may allow sociobiological theories to co-opt rape discourse. This might well result in the substitution of the crazed rapist stereotype with a different but similarly invidious notion that rape is inevitable and normal.

Some scholars already imply such blame. One commentator, while never explicitly blaming feminists for the Federal Rules of Evidence, nevertheless strongly intimates that they are at fault for what he perceives to be fundamentally unfair treatment of rape defendants. He thus argues that FRE 413-415 reflect the political trends of the time, rather than careful and proper legislative efforts and claims that the trends reflect women's growing political influence as a result of increased debates regarding women in the military/workplace, and dramatically increasing rape statistics. See Ellis, supra note 59, at 973-74.

See Linda J. Lacey, We Have Nothing to Fear But Gender Stereotypes: Of Katie and Amy and "Babe Feminism," 80 CORNELL L. REV. 612, 640 (1995) (reviewing KATIE ROIPHE, THE MORNING AFTER: SEX, FEAR, AND FEMINISM ON CAMPUS (1993)) (commenting on feminists' pervasive stereotype being that of a feminazi, as compared to the view of women generally as passive and cowering Victorian victim). Some of this criticism comes not only from right wing critics such as Rush Limbaugh, but from neo-feminists who argue that feminists focusing on date rape "betray[] feminism" by portraying women as fragile, vulnerable, and unable to negotiate the 'libidinous jostle,' of contemporary life without paternalistic rules and restrictions." Kathryn Abrams, Songs of Innocence and Experience: Dominance Feminism in the University, 103 YALE L.J. 1533, 1534 (1994) (quoting Katie Roiphe, Date Rape's Other Victim, N.Y. TIMES MAG., June 13, 1993, at 26, and discussing Camille Paglia's and Roiphe's criticism of feminists who they believe exaggerate date rape claims).

Evolutionary biologists do not all believe that rape is inevitable and thus beyond the reach of the law because of its biological bases. See, e.g., Jones, supra note 287, at 909-17
B. Possible Prescriptions Regarding the New Legislation

As discussed more fully below, we believe that the feminist agenda is best served by repeal of most of the new rape initiatives. Repeal, however, may be neither necessary nor possible. Recognizing this fact, this section briefly discusses possible approaches to each law that wholly or partly satisfy our concerns regarding the crazed rapist myth and that also promote legitimate feminist and other goals underlying the legislation.

1. Registration and Notification Laws

In our estimation, lawmakers should repeal registration and notification laws. Aside from our criticism, numerous commentators persuasively posit the laws' shortcomings, ranging from their ineffectiveness and their tendency to (discussing how, although biological influences contribute to rape patterns and incidence, it "does not automatically follow" that rape is inevitable or that rape should be tolerated). Rather, they simply seek to give rape biological origins. See id. at 838-53 (discussing theories of biological influences on rape, including natural selection theory, sexual selection theory, and the evolution of species-typical human behavior). Some scholars do argue that rape's potential biological origin excuses much of that behavior. See, e.g., RICHARD POSNER, SEX AND REASON 107, 384-85 (1992) (generally discussing rape as "primarily a substitute for consensual sexual intercourse" rather than as misogyny or attempts to subordinate women). The danger in allowing the evolutionary biology debate to occur without feminist input regarding why men rape on a social level is that the "biology as inevitability" argument will take hold, much like the crazed rapist stereotype did, to excuse men's actions rather than to try to understand them. See Katharine K. Baker, What Rape Is and What It Ought Not to Be, 39 JURIMETRICS J. 233, 240 (1999) (noting that "[i]f law is to combat rape effectively, it must attempt to change the social meaning of rape," and that the goal should be to understand how rape exists and operates on both biological and sociological levels); id. at 238-39 (noting that social constructions encourage rape); see also Robin West, Sex, Reason and a Taste for the Absurd, 81 GEO. L.J. 2413, 2438-40 (1993) (reviewing POSNER, supra) (discussing how Posner's arguments suggest that patriarchy has biological roots, that it is rooted in human nature and that the theory of sociobiology favors the sexual status quo); id. at 2444-46 (under Posner's analysis, patriarchy, rape, and other acts which subordinate women, are not practices of subordination per se, but rather efficient practices, "successful adaptations to biological market conditions for efficient evolutionary strategies").

See, e.g., McAllister, supra note 44, at 20-22 (noting that notification is often too vague to be useful and causes needless paranoia among the public); Jessica R. Ball, Comment, Public Disclosure of "America's Secret Shame:" Child Sex Offender Community Notification in Illinois, 27 LOY. U. CHI. L.J. 401, 439 (1996) (noting that 40% of offenders in Washington and 75% in California have failed to register); id. at 440 ("Rather than furthering a state's goal of preventing future sex offenses, community notification serves only as a reactive measure reflecting the community's outrage over the proliferation of sex crimes against children."); Montana, supra note 157, at 584-85 (discussing generally the difficulty criminal offenders have in reassimilating to the community, and that notification laws reinforce the stigmas they face and interfere with reassimilation attempts).
cause vigilantism,\(^290\) to their significant stigmatic and liberty-depriving effects.\(^291\) Our feminist critique highlights yet another defect in such laws and further suggests that the overwhelming evidence argues against them. Moreover, the laws are fundamentally inconsistent with a feminist approach to personhood. Feminist critiques of the legal and social treatment of women largely center on demanding recognition of female personhood. Laws which expose male offenders to extreme stigmatization, violence, and deprivation of fundamental personal liberties essentially ignore their personhood and are inconsistent with a feminist recognition of human dignity. As Deborah Rhode has noted "[a]ny ethical framework adequate to challenge gender subordination must similarly condemn the other patterns of injustice with which it intersects."\(^292\) This is not to say that sex offenders should go unpunished or should be free from all stigmatization. The appropriate way to meet punitive and protective goals, however, is through legitimate penalogical methods, such as longer prison sentences, rather than manipulation of constitutional boundaries.

In light of registration and notification statutes’ popularity, their repeal in the near future is unlikely. Given this fact, legislatures should at least calibrate notification laws to aim at a real problem rather than a stereotype. Instead of relying on broad notions that rapists recidivate, legislatures should identify concrete and particular characteristics that make offenders or classes of offenders more likely to recidivate.\(^293\) For example, there is some evidence that men who molest children may recidivate more often and in different ways than other sex offenders.\(^294\) If true, legislatures could limit notification laws

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\(^{290}\) See sources cited supra notes 160, 163.

\(^{291}\) See sources cited supra note 162.

\(^{292}\) Deborah Rhode, The "No-Problem" Problem: Challenges and Cultural Change, 100 \textit{Yale L.J.} 1731, 1736 (1991). In the specific context of rape, Aviva Orenstein has noted:

> Sometimes, particularly in . . . rape cases . . . there will be a conflict between empathy for the accused (particularly when he comes from an oppressed minority) and practical concern for what is good for women. Often, however, . . . this is a false dilemma.

> Once the problem is analyzed enlightened concern for women’s safety recognizes that women are not safer or better off in a world that treats those accused of crimes—even the crime of rape—unfairly.

Orenstein, supra note 9, at 690-91 n.113.

\(^{293}\) Legislatures likely would need to rely more heavily on psychological and mental health literature in order to identify which aspects of crime and the offender are adequate predictors of recidivism.

\(^{294}\) Sentiments seem to be mixed regarding this proposition. Some studies suggest a compulsive-like form of recidivism and that child molesters are particularly difficult to rehabilitate. See Earl-Hubbard, supra note 23, at 795 (discussing studies by legislators when "Megan’s Law" and “Zachary’s Law” were being considered including one finding 74% of imprisoned child sex offenders had a previous conviction for a similar offense and that they were the most difficult class of criminals to rehabilitate and another claiming that the average child sex offender molested 117 children during his lifetime). Others indicate that child molesters do not specialize or recidivate at higher rates than other criminals. See
only to such offenders. Although such a limitation may not eradicate
generalized notions of the registered offender as monstrous, it aims at men who
pose a concrete and identifiable harm, thus minimizing unwarranted
stigmatization. It also does not encourage courts to manipulate the laws to
avoid stigmatizing “normal” men and is thus less likely to undercut the
feminist agenda.

2. Sexual Predator Laws

Like registration and notification laws, legislatures should repeal sexual
predator laws. As numerous scholars maintain, the laws’ reliance on
questionable mental illness diagnoses treads upon constitutional rights and
has significant stigmatic effects. A state desiring to detain perceived
dangerous offenders should do so through the criminal justice system by
seeking longer sentences. Moreover, states may detain truly mentally ill
offenders who pose a danger to the public through existing civil commitment
statutes. Either alternative avoids creating the impression that sex offenders as
a class are mentally ill and, in turn, does not reinforce the myth of the crazed
rapist.

If repeal is not politically feasible, amendments to existing laws may
avoid reinforcing the crazed rapist myth. First, the limitation in certain statutes
to offenders who victimize strangers must be repealed. Second, the legal

Lenore M.J. Simon, *The Myth Of Sex Offender Specialization: An Empirical Analysis*, 23 *New Eng. J. Crim. & Civ. Confinement* 387 (1997) (noting that “[f]ew ‘rapists’ or ‘child molesters’ specialize in rape and child molestation”); *id.* at 401 (stating that “there is no evidence that child molesters . . . have higher recidivism rates or are in fact more dangerous than other types of offenders” and claiming that “it is impossible to predict which [convicted child molesters] will remolest” a child victim). We do not advocate that legislatures enact laws limited to child molestation but use this information only as an example of a possible way to limit notification statutes.

295 See *supra* notes 194-204 and accompanying text.

296 See, e.g., Janus, *Preventing Sexual Violence, supra* note 189, at 191-92 (noting that “[s]ince sex offender commitments are held out as being applicable only to the ‘most dangerous criminals,’ the stigma from sex offender commitments is arguably much worse than that of a criminal prosecution”) (footnotes omitted); *id.* at 192 (noting that the language of sex offender discourse is “objectifying and demeaning”). Other commentators note that labeling sex offenders as mentally abnormal, and as “violent sexual predators,” may “reinforce their antisocial sexual behavior” and ultimately “get in the way of change and provide [sex offenders] with an excuse for giving in to their sexual urges.” Winick, *supra* note 131, at 539.

297 Sexual predator laws do not enjoy the popularity of registration and notification laws which exist in every state. In fact, twenty-one states have rejected bills proposing such statutes. Brakel & Cavanaugh, *supra* note 193, at 87-88 (noting that although sexual predator laws have been rejected or withdrawn in 21 states, and that there has always been opposition to the laws, for example, from civil liberties lawyers and some psychiatrists, they have generally proved easy to pass). However, the statutes are politically popular in the states that have them, suggesting that they will not soon be repealed.
system’s involvement in commitment proceedings should come only after an initial evaluation by a qualified mental health professional based on personalized criteria relevant to assessing each offender’s likelihood of recidivism. In this way, mental health personnel rather than law enforcement officials determine which candidates genuinely require commitment. Statutes that are willing to brand some sex offenders as mentally abnormal may somewhat reinforce the myth of the crazed rapist, but, as with the notification statutes, the use of particularized criteria by qualified professionals aims at a concrete problem, and is more likely to avoid unwarranted stigmatization and determinations based on stereotypes.

3. Federal Rules of Evidence 413-415

Congress should also repeal FRE 413-415. In addition to our concern that such rules are applied in a manner almost uniformly ignoring the problem of acquaintance rape, scholars also argue that the new rules will likely be applied in a racially discriminatory manner or in a manner disparately affecting men already within the criminal justice system. They further note that the rules unfairly “prejudice[] the accused by offering up someone who has already been branded as a member of [a] small antisocial set.” Such stigmatization not only amounts to inhumane treatment of an accused, but departs substantially from past court practice and notions of fundamental fairness associated with evidence law. Moreover, much relevant evidence of past crimes is already admissible under FRE 404(b)’s exceptions to the character evidence ban, particularly when used to show motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Past bad acts evidence in rape cases may be especially useful to show a defendant’s motive or absence of mistake.

Using FRE 404(b) is not a perfect approach. Admission under one of the exceptions may still stigmatize an offender unreasonably and predispose the jury to convict. One can also argue that judges will simply apply FRE 404’s

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298 Some states already require an initial evaluation by a mental health professional. See supra note 37.

299 See, e.g., Baker, supra note 10, at 594-97 (noting that black men receive more severe penalties for rape than white men and that the legal system also discriminates against black women).

300 Orenstein, supra note 9, at 693.

301 See id.

302 See sources cited supra notes 209-10.

303 See Baker, supra note 10, at 612 (noting that various “motivational typologies” allow courts to admit evidence of prior acts of rape under FRE 404(b), without needing 413); id. at 613 (discussing the motive exception at length, and arguing that courts should also rely on the absence of mistake exception in 404(b)).

304 See Orenstein, supra note 9, at 696 (“Although Baker’s solution avoids some of the anti-feminist assumptions of Rule 413, it still replicates many of its evils in demonizing
exceptions in a manner similar to their application of FRE 413-415—i.e., in a manner biased against acquaintance rape. Allowing admission under existing FRE 404(b), however, does not stigmatize a rape defendant more than other criminal defendants subject to similar uses of evidence. It also has the added advantage of eradicating the new rules’ formalization of the crazed rapist myth. Moreover, to avoid disparate treatment of offenders, we could require of judges written opinions that set forth particularized (and therefore reviewable) justifications for admissions of past bad acts evidence.\(^\text{305}\) This, coupled with judicial education regarding rape stereotypes and motives for rape, should temper existing biases.\(^\text{306}\)

4. The Violence Against Women Act’s Civil Rights Action

VAWA’s civil rights action is perhaps the most salvageable of the recently-enacted rape initiatives. Its effort to expand remedies for rape by providing a federal cause of action recognizes states’ abysmal record of rape prosecution, including the invidious myths precluding acquaintance rape prosecution. To that extent, the Supreme Court’s decision in \textit{United States v. Morrison},\(^\text{307}\) striking down the civil rights action as beyond Congress’ powers, though defendants and in magnifying unfair prejudice.”).

305 See, e.g., Baker, supra note 10, at 612-14 (proposing that judges be required to include different motive typologies, and reasons for admitting prior bad acts evidence in rape cases, in written opinions, thus enabling appellate “supervision” and effective review).

306 Professor Park has urged that states adopt rules similar to FRE 413-415 but only in those cases where consent is a defense—essentially, in acquaintance rape cases. See Roger C. Park, \textit{The Crime Bill of 1994 and the Law of Character Evidence: Congress Was Right About Consent Defense Cases}, 22 FORDHAM URB. L.J. 271 (1995). Park makes this argument because in consent defense cases, the accused does not dispute that he had a sexual encounter with the complainant. There is thus no danger that the character evidence will convict an otherwise innocent defendant, or that the person “who actually committed the crime will go free.” Id. at 273; see also id. at 275-76.

Professor Park’s proposal is obviously feminist in that it aims to increase our understanding and prosecution of acquaintance rape. It also cures some of the problems with “rounding up the usual suspects” because the prosecution will not center around trying to identify a stranger who has raped before – the kind of case most likely to impact disparately men already familiar with the criminal justice system. See id. at 273-74. Furthermore, by focusing only on acquaintance rape, Park’s proposed rule emphasizes the seriousness of that crime and arguably avoids court attempts to treat acquaintance rapists more leniently after comparison with paradigmatic stranger rapists. However, the existence of a rule aimed only at the crime of rape reinforces the myth that men who rape are more mentally deviant than other criminals and could detract from the benefits of Park’s proposed rule or the feminist agenda generally. Because evidence of past convictions could be admissible under the “absence of mistake” exception in FRE 404(b), a neutral rule which does not reinforce sex offender stereotypes, we prefer it to Park’s proposal. His proposal is, however, preferable to the existing rules.

predictable, is unfortunate.\textsuperscript{308} If the Supreme Court reverses \textit{Morrison},\textsuperscript{309} we believe that a federal cause of action would substantially benefit the feminist agenda. In the meantime, of course, there exist similar discrimination and bias crime initiatives at the state level which may also benefit the feminist agenda.

In order to benefit that agenda, however, we must amend certain aspects of VAWA (and any similar state laws). Most importantly, all language referring to "animus" should be deleted. Although generally a term indicating the presence of intentional discrimination, "animus" is too easily equated with hatred and ill-will and may encourage courts and juries to reject acquaintance rape claims which do not appear to be so motivated. A more appropriate approach would use the "because of gender" language originally proposed for VAWA. That language, however, is also problematic. As we discussed earlier, using language based in a bias/discrimination paradigm may still encourage judges and juries to distinguish between rapes manifesting "hate" and those that do not. The "because of gender" language, however, does not explicitly reinforce notions of hate as does the term "animus."

Moreover, a few simple modifications to VAWA will alleviate much of the potential bias against acquaintance rape identified above. VAWA should carve out rape from other gender-based assaults and treat the "because of gender" requirement as satisfied in civil rights actions based upon rape. Because there is nothing inherently gendered in a non-rape physical assault on a woman, requiring a showing of gender-motivation is sensible. Rape, however, is a crime heavily entangled with gender or gender hierarchies. There is no need to require that a woman prove anything beyond the fact of the rape itself. In rare cases, of course, a rape may not be about gender.\textsuperscript{310} Recognizing this fact, some scholars propose that civil rights actions based upon rape cases should

\textsuperscript{308} For a feminist critique of the federalism arguments raised in opposition to VAWA's civil rights action, see Jill Elaine Hasday, \textit{Federalism and the Family Reconstructed}, 45 UCLA L. Rev. 1297 (1998) (discussing federalism and "localism" as they related to family law specifically). \textit{See also} Reva Siegel, \textit{The Rule of Love}, supra note 245.

\textsuperscript{309} The decision's close nature suggests that future courts may be willing to re-examine it. Four justices, Breyer, Stevens, Souter, and Ginsberg, argued that VAWA was an acceptable exercise of congressional powers. \textit{See} 120 S. Ct. at 1774 (Breyer, J. dissenting).

\textsuperscript{310} As the \textit{Anisimov} court noted, there are likely to be few instances where a rape is not gender-motivated. \textit{See supra} note 259. One scholar has suggested a few possible examples, including that the offender "did not care if his victim was a man or a woman, that he had a history of assaulting people of either gender, or that he is psychologically predisposed to sexually assault people of either gender." Willis, \textit{supra} note 273, at 2221-22. We agree that an offender who rapes men and women interchangeably may not show the requisite gender motivation. However, we note that men often are harassed or sexually assaulted by other men in ways that reflect evidence of gender hierarchies which greatly resemble male-female relationships. \textit{Cf.} \textit{Oncale v. Sundowner Offshore Servs., Inc.}, 118 S. Ct. 998, 1001 (1998) (holding that male workers' sexual harassment of a male co-worker was actionable under Title VII). Such rapes may be motivated by gender even if the rapist has male and female victims.
contain a rebuttable presumption that the rape occurred "because of gender."\textsuperscript{311} Adoption of these or similar proposals, coupled with instructions to the jury or expert testimony regarding the nature of rape and rape motivations, is fair to the defendant and does not reinforce the crazed rapist myth in a manner which weakens the feminist agenda.

CONCLUSION

We are not so naive as to think that our prescriptions will eradicate the myth of the crazed rapist. Beliefs so deeply held do not instantaneously disappear simply because laws embracing them no longer exist. We do believe, however, that repeal or substantial alteration of the new legislation is a step in the right direction. Such action recognizes the invidious power of the myth and, at the very least, avoids giving it the law's formal sanction. As a result, we can better promote feminist attempts to broaden our understanding and prosecution of rape. Earlier feminist reform efforts revealed that it is not enough to enact laws about rape; legislatures must enact the right laws. Our suggestions attempt to steer legislatures back onto the right path regarding rape initiatives.

\textsuperscript{311} See Gaffney, \textit{supra} note 273, at 286 (noting that "[t]he Supreme Court advocates that the concept of a rebuttable presumption is useful in discrimination cases," and that because VAWA provides a discrimination remedy (the civil rights remedy), "a rebuttable presumption . . . would similarly be useful"); Willis, \textit{supra} note 273, at 2221-22 (arguing that "[o]nce a plaintiff proves by a preponderance of the evidence that a sexual assault occurred, a rebuttable presumption should arise that the assault was motivated by gender," and that "[i]n the few cases where the sexual assault is not based on gender, the defendant should be allowed to rebut the presumption of gender motivation").