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# THE TRUTH BEHIND LEGAL DOMINANCE FEMINISM'S "TWO PERCENT FALSE RAPE CLAIM" FIGURE

*Edward Greer\**

## I. INTRODUCTION

For at least the last decade, Legal Dominance Feminism (LDF)<sup>1</sup> has been the predominant voice on sexual abuse within legal academia.<sup>2</sup> However, many of its empirical claims regarding the sexual abuse of women are erroneous.<sup>3</sup> Unlike the exemplary scholarship

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\* Brookline, Massachusetts; J.D. Yale, 1966.

1. There is no universally agreed-upon nomenclature for referring to the various strands of feminist legal thought, but the school discussed here is often called "dominance theory." See Kathryn Abrams, *Songs of Innocence and Experience: Dominance Feminism in the University*, 103 YALE L.J. 1533, 1549 n.66 (1994) (referring to "the entire range of feminists who have worked theoretically, and often through political practice, to raise consciousness about male sexualization of and aggression against women").

2. See Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304, 304 (1995) ("Over the past decade, dominance feminism has become the ascendant feminist legal theory . . .") (footnote omitted); see also Deborah J. Merritt & Melanie Putnam, *Judges and Scholars: Do Courts and Scholarly Journals Cite the Same Law Review Articles?*, 71 CHI.-KENT L. REV. 871, 905 tbl.7 (1996) (illustrating that, of articles cited from 1991—the last year canvassed—two of the top six are authored by legal dominance scholars, Professor Catherine A. MacKinnon and Professor Kathryn Abrams).

3. See MARTHA S. NUSSBAUM, *SEX AND SOCIAL JUSTICE* 136 (1999) (stating that it is "difficult to elicit accurate figures on sexual force by survey or interview techniques" and acknowledging Sommers's critique, *infra*, of existing sex abuse data); DAPHNE PATAI, *HETEROPHOBIA: SEXUAL HARASSMENT AND THE FUTURE OF FEMINISM* 61-62 (1998) (discussing the "absence of serious research on the incidence of false or baseless accusations against men, as another result of the gender bias in the [sexual harassment] field"); CHRISTINA HOFF SOMMERS, *WHO STOLE FEMINISM?: HOW WOMEN HAVE BETRAYED WOMEN* 225-26 (1994) (stating that gender feminists are pushing forth their agenda by "alarm[ing] the public with inflated statistics"); Neil Gilbert, *The*

of other feminist academics,<sup>4</sup> LDF has in recent years promulgated a series of social science myths about rape in the American legal system. Often resting upon a highly problematic methodology, LDF significantly misrepresents empirical reality. This Article attempts to demonstrate that the LDF discourse on rape is fundamentally flawed.

At the core of LDF discourse on rape is the proposition that "women don't lie" about sexual abuse.<sup>5</sup> The foundation for such a bold statement is the claim that false accusations of rape are very rare; specifically, its proponents claim that no more than two percent of such complaints are invalid.<sup>6</sup> In an attempt to shift the laws governing rape to correspond with this purported social reality, LDF advocates shifting the burden of proof from the woman complaining of the alleged sexual wrong to the man defending against it.<sup>7</sup> As discussed in Part III, changes to the legal definitions of rape and any corresponding shifts in the burden of proof are ill-advised and dangerous.

Unlike those who oppose the LDF program because of its alleged "malebashing,"<sup>8</sup> this Article concedes that were it empirically true that only two percent of those charged with rape were innocent,

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*Phantom Epidemic of Sexual Assault*, 103 PUB. INTEREST 54, 63 (1991) (stating that "estimates of sexual assault calculated by feminist researchers are advocacy numbers, figures that embody less an effort at scientific understanding than an attempt to persuade the public that a problem is vastly larger than commonly recognized . . . [and are] . . . derived not through outright deceit but through a more subtle process of distortion"); Edward Greer, *Tales of Sexual Panic in the Legal Academy: The Assault on Reverse Incest Suits*, 48 CASE W. RES. L. REV. 513 (1998) (showing that incidence of incest based on retrieved memory is wildly inflated).

4. Three excellent feminist articles, Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1 (1977), Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986), and David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194 (1997), thoroughly and thoughtfully canvass the central doctrinal issues and review much of the extant empirical data.

5. See *infra* Part III.

6. See *infra* Part II.

7. See LINDA BROOKOVER BOURQUE, *DEFINING RAPE* 110 (1989) (stating that the ultimate objective of rape reform is to shift "the burden of proof from the victim to the offender").

8. See Susan H. Williams & David C. Williams, *A Feminist Theory of Malebashing*, 4 MICH. J. GENDER & L. 35 (1996). If LDF's empirical data were true, it would be largely irrelevant that many men find its positions outrageous.

LDF's solutions might represent a reasonable public policy. But if, as may well be the case, as many as a quarter of the men currently accused of rape are actually innocent, then the goals of LDF are truly destructive. First, the proportion of wrongful convictions would certainly rise if LDF's program were fully implemented. Second, as demonstrated in Part V, wrongful convictions would fall disproportionately on black youths.

## II. AT THE HEART OF THE TWO PERCENT FALSE CLAIM FIGURE

### A. *The Overwhelming Consensus*

One highly respected legal academic, elected by her peers as president of the prestigious Association of American Law Schools, recently reported that "the overwhelming consensus in . . . research relying on government data is that false reports account for only about 2 percent of rape complaints."<sup>9</sup> It is indisputably true that, largely through the efforts of legal dominance feminists, there now exists a consensus among legal academics that only two percent of rape complaints are false.<sup>10</sup> This purportedly empirical statement is ubiquitously repeated in legal literature. Dozens of law review articles reiterate that no more than one in fifty rape complaints is false.<sup>11</sup> This empirical fact, however, is an ideological fabrication.<sup>12</sup>

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9. DEBORAH L. RHODE, *SPEAKING OF SEX: THE DENIAL OF GENDER INEQUALITY* 125 (1997).

10. See Bryden & Lengnick, *supra* note 4, at 1298 ("The conventional wisdom now is that the proportion of false reports is negligible, perhaps as low as 2% . . .").

11. See JULIE A. ALLISON & LAWRENCE S. WRIGHTSMAN, *RAPE: THE MISUNDERSTOOD CRIME* 205 (1993) ("[T]he actual frequency of false rape reports is estimated to be a low 2% . . ." (citing KATZ & MAZUR, *infra*)); SEDELLE KATZ & MARY ANN MAZUR, M.D., *UNDERSTANDING THE RAPE VICTIM: A SYNTHESIS OF RESEARCH FINDINGS* 209 (1979) (citing, *inter alia*, two unpublished studies, one of which is the study cited by Brownmiller (see *infra* notes 40-41 and accompanying text)); see, e.g., Christopher Bopst, *Rape Shield Laws and Prior False Accusations of Rape: The Need for Meaningful Legislative Reform*, 24 J. LEGIS. 125, 126 (1998) (referring to "studies that have shown that the frequency of rape reports proven false [is] approximately two percent") (citing Torrey, *infra*); Carolyn Stewart Dyer & Nancy R. Hauserman, *Electronic Coverage of the Courts: Exceptions to Exposure*, 75 GEO. L.J. 1633, 1687 n.255 (1987) ("Research indicates that about two percent of rape reports are false . . .") (citing KATZ & MAZUR, *supra*); Karla Fischer,

*Defining the Boundaries of Admissible Expert Psychological Testimony on Rape Trauma Syndrome*, 1989 U. ILL. L. REV. 691, 698 n.43 (“When researchers replicated these studies using policewomen or trained rape investigators, however, the unfounded rape rate dropped to two or three percent.”) (citing BROWNMILLER, *infra* note 34); Louise F. Fitzgerald, *Science v. Myth: The Failure of Reason in the Clarence Thomas Hearings*, 65 S. CAL. L. REV. 1399, 1404 (1992) (“[R]eliable statistics demonstrate that approximately one to two percent of rape charges are found to be false . . . .”); Deborah Gartzke Goolsby, *Using Mediation in Cases of Simple Rape*, 47 WASH. & LEE L. REV. 1183, 1194 n.112 (1990) (“Authorities estimate false reports of rape . . . at about two percent.”) (citing BROWNMILLER, *infra* note 34); W.H. Hallock, *The Violence Against Women Act: Civil Rights for Sexual Assault Victims*, 68 IND. L.J. 577, 596 n.134 (1993) (favorably quoting that “[e]stimates indicate that only 2 percent of all rape reports prove to be false”) (citing Torrey, *infra*, at 1028); Kathy Mack, *Continuing Barriers to Women’s Credibility: A Feminist Perspective on the Proof Process*, 4 CRIM. L.F. 327, 336 (1993) (“Empirical studies have generally shown a rate of false reports for [rape] of less than 2 percent . . . .”) (citing Julie Taylor, *infra*); A. Thomas Morris, *The Empirical, Historical and Legal Case Against the Cautionary Instruction: A Call for Legislative Reform*, 1988 DUKE L.J. 154, 166 (“A Rape Analysis Squad chaired by female police officers discovered that only two percent of the rape charges brought were false . . . .”) (citing BROWNMILLER, *infra* note 34); Wendy J. Murphy, *Minimizing the Likelihood of Discovery of Victims’ Counseling Records and Other Personal Information in Criminal Cases: Massachusetts Gives a Nod to a Constitutional Right to Confidentiality*, 32 NEW ENG. L. REV. 983, 1006-07 n.120 (1998) (“In fact, the false accusation rate in rape cases is between only one to two percent.”) (citing Taylor, *infra*, and Torrey, *infra*); John E.B. Myers et al., *Expert Testimony in Child Sexual Abuse Litigation*, 68 NEB. L. REV. 1, 112 (1989) (“Katz and Mazur studied adult rape victims, and concluded that two percent of allegations were false.”) (citing KATZ & MAZUR, *supra*, at 214); Roberta J. O’Neale, *Court Ordered Psychiatric Examination of a Rape Victim in a Criminal Rape Prosecution – or How Many Times Must a Woman Be Raped?*, 18 SANTA CLARA L. REV. 119, 141 (1978) (“The commander of the Rape Analysis Squad in New York City reported an estimated unounding rate of 2% . . . .”); Elizabeth A. Pendo, *Recognizing Violence Against Women: Gender and the Hate Crimes Statistics Act*, 17 HARV. WOMEN’S L.J. 157, 171 (1994) (The estimates are “that only two percent of all rape reports prove to be false.”) (citing Torrey, *infra*); Beverly J. Ross, *Does Diversity in Legal Scholarship Make a Difference?: A Look at the Law of Rape*, 100 DICK. L. REV. 795, 812 (1996) (“New York City had similar statistics until the city began requiring all reports on alleged rapes to be taken by female police officers. The rate of unfounded rape charges then dropped to two percent.”) (citing KATZ & MAZUR, *supra*, at 207-09); Julie Taylor, *Rape and Women’s Credibility: Problems of Recantations and False Accusations Echoed in the Case of Cathleen Crowell Webb and Gary Dotson*, 10 HARV. WOMEN’S L.J. 59, 97 (1987); Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1028 (1991) (“Estimates indicate that only two percent of all

*B. The Problems with Determining the Percentage of  
False Rape Claims*

As far as can be ascertained, no study has ever been published which sets forth an evidentiary basis for the “two percent false rape complaint” thesis.<sup>13</sup> “Measuring false allegations is all the more difficult since policies on unfounded criminal complaints differ from one jurisdiction to another, resulting in very different numbers.”<sup>14</sup>

The basic problem with accurately ascertaining the percentage of wrongful accusations is that the overwhelming majority of rape cases result in plea bargains, a “black box” in which there is neither adversarial process, jury fact-finding, appellate review, nor even a record for scholarly analysis. There are numerous reasons why both

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rape reports prove to be false . . . .”); James A. Vaught & Margaret Henning, *Admissibility of a Rape Victim’s Prior Sexual Conduct in Texas: A Contemporary Review and Analysis*, 23 ST. MARY’S L.J. 893, 904 & n.56 (1992) (“[S]tatistical data reveals that a low percentage of rapes reported are false.”) (citing Torrey, *supra*, at 1028); Margaret A. Clemens, Note, *Elimination of the Resistance Requirement and Other Rape Law Reforms: The New York Experience*, 47 ALB. L. REV. 871, 883 (1983) (“[O]nly 2% of all reported rapes prove to be false . . . .”) (citing BROWNMILLER, *infra* note 34, at 386-87); Lisa R. Eskow, Note, *The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing Its Prosecution*, 48 STAN. L. REV. 677, 694 (1996) (“[S]tudies indicate that the statistic for false rape reports is only 2 percent . . . .”) (citing Eloise Salholz, *Sex Crimes: Women On Trial*, NEWSWEEK, Dec. 16, 1991, at 22) (quoting Torrey, *supra*, at 1028); Julie F. Kay, Note, *If Men Could Get Pregnant: An Equal Protection Model for Federal Funding of Abortion Under a National Health Care Plan*, 60 BROOK. L. REV. 349, 356 n.23 (1994) (“Other researchers put the figure at only 2 percent.”) (quoting HELEN BENEDICT, *infra* note 57, at 18); Catherine L. Kello, Note, *Rape Shield Laws—Is It Time for Reinforcement?*, 21 U. MICH. J.L. REFORM 317, 344 (1987) (“Studies have demonstrated that the rate of false rape reports filed corresponds to . . . two percent.”) (citing BROWNMILLER, *infra* note 34, at 387); Linda Robayo, Note, *The Glenn Ridge Trial: New Jersey’s Cue to Amend Its Rape Shield Statute*, 19 SETON HALL LEGIS. J. 272, 293 n.148 (1994) (“[L]ess than two percent of rape complaints are false.”) (discussing Mack, *supra*, at 336); Jaye Sitton, Comment, *Old Wine in New Bottles: The ‘Marital’ Rape Allowance*, 72 N.C. L. REV. 261, 267 n.39 (1993) (“Overall, the number of false rape charges has been estimated at two percent . . . .”) (citing BROWNMILLER, *infra* note 34, at 387).

12. See *infra* Part IV.

13. For a discussion tracing the source of the problematic “two percent” figure, see *infra* Part II.D.

14. CATHY YOUNG, CEASEFIRE!: WHY WOMEN AND MEN MUST JOIN FORCES TO ACHIEVE TRUE EQUALITY 150 (1999).

innocent and guilty defendants accept plea bargains, including avoiding the risks of going to trial.<sup>15</sup> There is thus no firm evidence that the plea bargaining process differentiates between innocence and guilt any more accurately than trials. Whether by trial or by plea-bargaining, roughly half of accused rapists are convicted.<sup>16</sup> Even if we assume *arguendo* that all those convicted are indeed guilty, and that a full two-thirds of those acquitted at trial were also guilty, we would still wind up with a situation in which one-sixth of those actually tried are really innocent.

### C. Indirect Measures of Wrongful Rape Accusations

Despite the difficulties in measuring wrongful accusations, there is *indirect* data available that is highly suggestive that far more than two percent of rape accusations are false. In a significant fraction of instances, the accusers recant their charges;<sup>17</sup> in others, where no formal recantation occurs but where rape may have occurred, there are good reasons to believe that the accusation must nevertheless be wrong about the identity of the assailant. One illustration of this phenomenon are the instances where DNA testing has determined that the man actually imprisoned for rape after trial was not the individual the victim claimed was the assailant.<sup>18</sup>

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15. See Richard Birke, *Reconciling Loss Aversion and Guilty Pleas*, 1999 UTAH L. REV. 205, 207 (stating that in the vast majority of cases, defendants accept plea bargains rather than taking a risk and going to trial).

16. See LAWRENCE A. GREENFELD, U.S. DEPT. OF JUSTICE, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT 12, fig.12 (1997).

17. Empirical data on the frequency of recantations is sparse, but suggests that recantations are not uncommon. See Eugene J. Kanin, *False Rape Allegations*, 23 ARCHIVES OF SEXUAL BEHAVIOR 81, 83-85 (1994) (stating that one police department's records indicate that 41% of victims expressly recanted, despite warnings that if they did so they might be criminally prosecuted for making a false report); see YOUNG, *supra* note 14, 150-51 (citing to reporters' inquiries where large fractions of women stated they had lied).

18. See, e.g., Bob Herbert, *In America: Two Victims*, N.Y. TIMES, July 8, 1999, at A25 (describing a case where conclusive DNA evidence was used to seek exoneration of a man who has already spent 17 years in prison for rape); see also Bryden & Lengnick, *supra* note 4, at 1309 (summarizing study in Philadelphia hospital where the evidence suggested that 13% of rape complaints were false).

Moreover, commencing in 1989 in cases of rape and rape-murder where there has already been either an arrest or an indictment, the FBI has conducted large numbers of DNA tests<sup>19</sup> “to confirm or exclude the person. In 25 percent of the cases where they can get a result, they excluded the primary suspect.”<sup>20</sup> As several of the weakest cases have already been screened out, either by the police determining that the claim is unfounded or by the prosecution deciding not to go forward,<sup>21</sup> this fraction may indicate the lower boundary of formal misidentifications of the culprit.

Furthermore, there is no plausible reason to believe that almost all complaints of rape are true. On the contrary, aside from the limited probative empirical evidence on the issue, there are a number of good reasons to think that a significant fraction of rape complaints, far in excess of two percent, are false. By way of comparison, there is an elaborate body of literature and numerous examples suggesting that a significant number—way beyond the two percent range—of capital murder convictions are of innocent men.<sup>22</sup> Why should criminal trials involving sexual assaults on women be more accurately discriminating than those involving capital homicide? If an assertion that one out of four or five rape claims is false sounds counterintuitive to the legal academic ear, then this further demonstrates that the two percent false claim proposition is now embedded in our commonsense notion of reality.<sup>23</sup> This commonsense notion,

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19. FBI and private crime laboratories combined have performed 18,000 criminal DNA tests. See BARRY SCHECK, PETER NEUFELD & JIM DWYER, *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* xv (2000).

20. Bob Herbert, *How Many Innocent Prisoners?*, N.Y. TIMES, July 18, 1999, § 4, at 17 (quoting Professor Barry Scheck, Director of the Innocence Project legal clinic at Benjamin N. Cardozo School of Law).

21. See *id.* (paraphrasing Professor Barry Scheck).

22. See, e.g., Andrew Bluth, *Illinois Man Is Finally Cleared in Two Murders*, N.Y. TIMES, Mar. 12, 1999, at A20 (“Since the death penalty was reinstated in Illinois in 1977, 11 inmates have been executed and 11 others have been released after new evidence raised questions about their guilt . . .”); Dirk Johnson, *12th Death Row Inmate in Illinois is Cleared*, N.Y. TIMES, May 19, 1999, at A14 (citing another death row inmate who was exonerated and where after the conviction was overturned, prosecutors declined to bring a new trial).

23. See Bryden & Lengnick, *supra* note 4, at 1310 (empirical study concluding that two-fifths of rape claims are false is “perhaps the most striking and counter-intuitive in the history of rape scholarship”).



however, does not resolve the underlying empirical question of whether a significant minority of women who bring rape charges do so erroneously.

*D. The Two Percent False Claim Figure Is Unreliable*

At the outset, it becomes apparent that LDF's two percent false claim figure is highly problematic. An examination of its genesis reveals that the two percent false claim figure is an illusion that sprang from a mimeoed handout in Susan Brownmiller's file.<sup>24</sup> To support this proposition, one needs to engage in a sort of academic archaeology and consider one of the main exponents of the two percent figure. For instance, Professor Morrison Torrey writes, "Estimates indicate that only 2 percent of all rape reports prove to be false, a rate comparable to the false report rate for other crimes. Unfortunately, reports of a high proportion of 'unfounded' rape complaints may have contributed to this myth that women falsely cry rape."<sup>25</sup>

Professor Torrey begins her law review article by explaining that in preparation for her study, she "became familiar with the enormous amount of empirical research in the area of rape myths and their power."<sup>26</sup> Then Professor Torrey cites a main source and two back-up sources for her two percent figure: an article in *The Rape Victim*,<sup>27</sup> a law review article by Roberta J. O'Neale,<sup>28</sup> and another law review article by Margaret A. Clemens.<sup>29</sup>

*The Rape Victim* article reads in relevant part: "[S]tatistics reveal that the percentage of unfounded accusations in the area of rape is about two percent, according to Lt. Julia Tucker, former Commanding Officer of the New York City Sex Crimes Analysis Unit. This is approximately the same percentage of unfounded charges which are found in other felonies."<sup>30</sup>

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24. See *infra* note 43 and accompanying text.

25. Torrey, *supra* note 11, at 1028 (footnote omitted).

26. *Id.* at 1013 n.1.

27. Patricia A. Hartwig & Georgette Bennett Sandler, *Rape Victims: Reasons, Responses and Reforms*, in *THE RAPE VICTIM* 13 (Deanna R. Nass ed., 1977).

28. O'Neale, *supra* note 11.

29. Clemens, *supra* note 11.

30. Hartwig & Sandler, *supra* note 27, at 13.

The second source, Roberta J. O'Neale's article, reads: "The commander of the Rape Analysis Squad in New York City reported an estimated unfounding rate of 2%, no more than the rate for other crimes."<sup>31</sup> In turn, for this sentence Ms. O'Neale cites to a student law review comment,<sup>32</sup> which itself relies upon an unpublished grant application from the Portland, Oregon, district attorney's office.<sup>33</sup> Because O'Neale's language tracks that of Ms. Brownmiller's *Against Our Will*<sup>34</sup> and relates to New York City rather than Portland, it is quite possible that citation to Ms. Brownmiller was omitted by scrivener's error. Alternatively, because the cited grant application preceded publication of Ms. Brownmiller's book, perhaps the district attorney's office relied upon the speech that was Ms. Brownmiller's source<sup>35</sup> or upon Grace Lichtenstein's article discussed *infra*.<sup>36</sup>

Finally, the law review article by Margaret Clemens, the third source cited by Torrey as the basis for her use of the two percent figure, asserts: "Estimates indicate that only 2% of all reported rapes prove to be false, which is comparable to the rate for false reports of other crimes."<sup>37</sup> Only one source is cited by Ms. Clemens for her two percent figure—Brownmiller's *Against Our Will*.<sup>38</sup> All three of Professor Torrey's sources turn out to be derived from the same single source. Moreover, as best as this author could ascertain, without exception *every* scholarly or semi-scholarly source that utilizes the two percent false claim proposition can ultimately be traced back to *Against Our Will*.

Despite the plethora of pyramided citations, it turns out that there is one, and only one, underlying source—feminist publicist

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31. O'Neale, *supra* note 11, at 141.

32. Sally Ellis Mathiasen, Comment, *The Rape Victim: A Victim of Society and the Law*, 11 WILLAMETTE L.J. 36, 49 & n.81 (1974).

33. Portland Research, Advocacy, Prevention, Education (R.A.P.E.) Project, Law Enforcement Assistance Administration Grant Application, at 15 (submitted by the Multnomah County District Attorney, Portland, Oregon).

34. SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 410 (1976).

35. See *infra* text accompanying notes 40-44.

36. See *infra* text accompanying notes 48-51.

37. Clemens, *supra* note 11, at 883.

38. See *id.* at 883 n.61.

Susan Brownmiller's interpretation of some data, now a quarter-century old, of unknown provenance from a single police department unit. There are no other published studies that this author could find. All of the sources cited at the outset of this Article<sup>39</sup> trace back to Ms. Brownmiller.

Susan Brownmiller set forth the following in her book: "When New York City created a special Rape Analysis Squad commanded by policewomen, the female police officers found that only 2 percent of all rape complaints were false—about the same false-report rate that is usual for other kinds of felonies."<sup>40</sup> When one looks at her "Source Notes" for this proposition, she states it to be: "NYC Rape Analysis Squad found only 2 percent of complaints were false: 'Remarks of Lawrence H. Cooke, Appellate Division Justice, Before the Association of the Bar of the City of New York,' Jan. 16, 1974 (mimeo), p.6."<sup>41</sup>

Ms. Brownmiller, who is a very meticulous and organized writer,<sup>42</sup> very kindly on my request located and sent me a copy of this xeroxed speech.<sup>43</sup> In relevant part, the judge's speech reads: "In fact, according to the Commander of New York City's Rape Analysis Squad, only about 2 percent of all rape and related sex charges are determined to be false and this is about the same as the rate of false charges of other felonies."<sup>44</sup>

These judicial remarks do not suffice to determine whether or not there was an underlying written report, although the locution used is suggestive of being based on a quotation from a newspaper article rather than a formally written text. When I contacted the then-judge's law clerk, and he made inquiry of all those directly

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39. See *supra* note 12.

40. BROWNMILLER, *supra* note 34, at 410.

41. *Id.* at 505.

42. In her *Tales of the Lavender Menace: A Memoir of Liberation*, Karla Jay observes that at the time of writing *Against Our Will*, when she and Ms. Brownmiller were members of the feminist group Media Women, the latter was already reputed to be "[a] meticulous researcher." KARLA JAY, *TALES OF THE LAVENDER MENACE: A MEMOIR OF LIBERATION* 113-14 (1999).

43. Remarks of Lawrence H. Cooke, Appellate Division Justice, Before the Association of the Bar of the City of New York, Jan. 16, 1974 (on file with author).

44. *Id.*

involved in the preparation of Judge Cooke's speech, their best recollections are that they did not rely upon any report but cannot remember precisely how they did obtain the two percent figure.<sup>45</sup> Of course, it remains possible that some such report was generated, but as of this date, no one is able to adduce it.<sup>46</sup> Without the document, one cannot analyze the underlying data, the protocol used in evaluating it, or even whether it met minimum criteria of accuracy.<sup>47</sup>

A few weeks after the delivery of this speech, a *New York Times* reporter, Grace Lichtenstein, published a piece on that group in the *New York Times Magazine* entitled "Rape Squad."<sup>48</sup> The article discussed the very brief tenure of Lieutenant Julie Tucker, and how the squad, exclusively composed of police, not social scientists, was "primarily a statistic-gathering operation."<sup>49</sup> Although all of this squad's police "members . . . [were] trained in judo," they were not, as far as can be ascertained, trained in statistical analysis.<sup>50</sup> Toward the end of her article, Ms. Lichtenstein states that even under the then-newly reformed New York state rape statute, convictions were difficult to achieve "despite studies showing that the percentages of rape complaints later discovered to be unfounded was only 2 percent—the same as for all unfounded felonies."<sup>51</sup>

It may well be that both Judge Cooke and Ms. Lichtenstein—followed by her friend<sup>52</sup> Ms. Brownmiller in her book—relied on the same unknown original source advanced by someone in the Rape

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45. Telephone conversations of author Mar. 3 & 7, 2000.

46. In an e-mail dated June 25, 1995, Ms. Brownmiller objects to criticism of Judge Cooke's speech as her source for *Against Our Will* but does not provide any citation to, or even contend that she had ever read or seen a copy. See Susan Brownmiller Replies (visited Mar. 27, 2000) <<http://www.vix.com/pub/men/falsereport/commentary/brownback.html>>.

47. See, e.g., STATISTICAL STRATEGIES FOR SMALL SAMPLE RESEARCH (Rick Hoyle ed., 1999) (discussing various techniques for effectively conducting small-sample research and analysis).

48. Grace Lichtenstein, *Rape Squad*, N.Y. TIMES MAG., Mar. 3, 1974, at 10.

49. *Id.* at 61.

50. *The Cities: The Rape Wave*, NEWSWEEK, Jan. 29, 1973, at 59.

51. Lichtenstein, *supra* note 48, at 65.

52. See SUSAN BROWNMILLER, IN OUR TIME: MEMOIR OF A REVOLUTION 88 (1999) (referring to Grace Lichtenstein as "my neighbor and friend"); see also JAY, *supra* note 42, at 115 ("We also called in a few 'friendly' members of the press, including Grace Lichtenstein of the *New York Times* . . .").

Squad. Whether that original source was a press release, a more formal report, or simply an oral statement to a reporter, remains lost in antiquity. Here the trail currently ends.

*E. The Unreliable Figures of the Dominance Feminists Enter the Academic Mainstream*

Turning back to Professor Deborah Rhode, her belief that “two percent false = other felonies” is a consensus fact<sup>53</sup> that more than likely comes from having perused numerous dominant feminist articles and books which endlessly recycle it from its original source—Susan Brownmiller’s *Against Our Will*. Professor Rhode tells us that her manuscript was read by a baker’s dozen of law professors and that her editor at Harvard University Press “prepared this manuscript with painstaking care.”<sup>54</sup> Apparently none of them challenged the two percent false claim, resulting in a sort of second-order consensus. Professor Rhode in her scholarly notes<sup>55</sup> advanced three sources for the two percent proposition: a newspaper article by reporter Candy Cooper,<sup>56</sup> a book,<sup>57</sup> and a law review article.<sup>58</sup> Each source will be examined in turn.

Ms. Cooper’s initial article appeared on September 16, 1990. Nowhere, either in this article or in its two accompanying sidebars, is there anything on the proportion of rape claims (or any other felony) that are false. Nor is there anything from which one could infer what proportion of rape charges is false. Her second article, dated February 1, 1991, reports that the Oakland police, in response to her prior article, re-categorized 184 of 203 previously “unfounded” rape

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53. See RHODE, *supra* note 9 and accompanying text.

54. See *id.* at 322.

55. See *id.* at 295 n.93.

56. Candy J. Cooper, *Nowhere to Turn for Rape Victims: High Proportion of Cases Tossed Aside by Oakland Police*, S.F. EXAMINER, Sept. 16, 1990, at A1.

57. HELEN BENEDICT, VIRGIN OR VAMP: HOW THE PRESS COVERS SEX CRIMES 18 (1992); cf. Peggy Reeves Sanday, *Rape Discourse in Press Coverage of Sex Crimes*, 91 MICH. L. REV. 1414 (1993) (reviewing *Virgin or Vamp* and generally supporting the book’s propositions).

58. Lynn Hecht Schafran, *Writing and Reading About Rape: A Primer*, 66 ST. JOHN’S L. REV. 979, 1013 (1993).

reports.<sup>59</sup> In addition to reexamining the 203 original cases, the Oakland police added an additional 29 as a spot-check.<sup>60</sup> Of these 232 cases, seventy-six victims could not be located, thirty-six did not want to cooperate, and eighty-five did not return phone calls or letters because they had either given bad addresses or moved without leaving a forwarding address.<sup>61</sup> Of those who were located, only twelve of the victims cooperated with renewed police investigation, and only two cases were presented to the district attorney; none has been prosecuted.<sup>62</sup> Again, nowhere in these numbers can one find support for a two percent false rape claim figure.

Ms. Benedict's *Virgin or Vamp*, the second source, reads: "The tendency of women to lie about rape is vastly exaggerated in popular opinion. The FBI and other researchers find that false reports of rape run at 2 percent, the same as those for other crimes."<sup>63</sup> The authority for this proposition was the following quote from *Newsweek*: "Research suggests that the notion that women invent rape charges is statistically unfounded and psychologically implausible. DePaul University law professor Morrison Torrey says about 2 percent of rape reports are false—approximately the same percentage as other crimes."<sup>64</sup>

Torrey, as shown above, was simply based on Brownmiller.<sup>65</sup>

Attorney Schafran's law review article, the third source, makes a number of valuable and useful observations about rape. On the issue at hand, however, she avers: "But on a statistical basis [false rape allegations] appear to be infrequent, even less frequent than false allegations in other types of cases."<sup>66</sup> In addition to relying on law review articles by Morrison Torrey and Deborah Goolsby,<sup>67</sup> Ms.

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59. See Candy J. Cooper, *Oakland Admits 184 Rapes Ignored*, S.F. EXAMINER, Feb. 1, 1991, at A1.

60. *See id.*

61. *See id.*

62. *See id.*

63. BENEDICT, *supra* note 57, at 18.

64. Eloise Salholz, *Sex Crimes: Women on Trial*, NEWSWEEK, Dec. 16, 1991, at 23.

65. *See supra* notes 25-38 and accompanying text.

66. Schafran, *supra* note 58, at 1012 (italics omitted).

67. Deborah Goolsby avers that "false reporting rates for rape are no higher than for any other crime." Goolsby, *supra* note 11, at 1194. In Professor Goolsby's footnote, only one source is cited for the two percent false rape

Schafran cites to another scholarly source—a third law review article by Karla Fischer.<sup>68</sup>

The cited pages in Fischer's article do not address the issue at hand; but further in her text, one encounters the following footnote: "When researchers replicated these studies using policewomen or trained rape investigators, however, the unfounded rape rate dropped to two or three percent. *Id.*"<sup>69</sup> No one who has read this far will be surprised to discover that the prior citation in the Fischer article to which the "*Id.*" refers is none other than Brownmiller's *Against Our Will*.<sup>70</sup>

Transmuted by repetition in one feminist article after another until its problematic origin is lost, these multiple repetitions led the last writer in the chain, the President of the AALS, Professor Deborah L. Rhode, to write of a research "consensus" in academia based on one single unpublished speech Susan Brownmiller quoted a quarter of century ago.

### III. THE MYTH THAT "WOMEN DON'T LIE ABOUT RAPE"

#### A. The "Second Rape" Disincentive

LDF literature advances the proposition that "women don't lie about rape" as an axiomatic substrate to their proposed policy changes fueled by the purported two percent false claim figure.<sup>71</sup> As further justification, LDF proclaims that women are deterred from making false rape charges because, inter alia, rape complainants are subjected to a harrowing "second rape."<sup>72</sup> Simultaneously, LDF

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claim figure: *Against Our Will*. See *id.* at 1194 n.112.

68. See Schafran, *supra* note 58, at 1012 n.133 (citing Fischer, *supra* note 11, at 691-92).

69. Fischer, *supra* note 11, at 698 n.43.

70. See *id.*

71. See RHODE, *supra* note 9; see also Part II (discussing the lack of an evidentiary basis and its consequences).

72. "Second rape" refers to the trauma experienced by rape victims during subsequent reporting and court proceedings. See, e.g., Mary Leonard, *Just Keep Quiet*, BOSTON GLOBE, Mar. 22, 1998, at E1, E5 (summarizing new understanding among some feminist psychologists that, for victims of sexual harassment in the workplace, the adverse emotional impact of entering the litigation sphere "is as damaging, if not more damaging, than the acts of misconduct themselves") (quoting Louise Fitzgerald, Professor, University of Illinois).

wants alterations in the processing of rape charges by reducing the sanctions, costs and trauma—i.e., the “second rape”—that face women who come forward and press rape charges. However, LDF’s essentially static view of false claims simply does not take into account that as the sanctions and costs of bringing rape charges are reduced, an individual’s calculation of whether to deliberately make a wrongful charge correspondingly shifts. LDF exponents do not acknowledge that if the “second rape” disappears, so too does the very disincentive which is advanced as the main reason underlying the existence of few false reports. As Daphne Patai and Noretta Koertge put it:

The greater feminism’s success in raising our feelings of moral outrage at sexual harassment . . . the more likely it is that members of a protected group will find it in their interest to make a false or frivolous accusation. In a rape trial, for example, it is now ironic that, as we—properly—destigmatize the woman accuser, we simultaneously undermine the old feminist argument that the process of accusing someone of rape is so self-vilifying that no woman would ever intentionally make a false accusation.<sup>73</sup>

### B. *Other Lies in the Legal System*

The assertion that women don’t lie about rape also rings untrue because men and women often lie about everything else in the legal system.<sup>74</sup> For complaints of rape advanced against present or previous intimates, misreporting may well be closer to what commonly occurs in civil family proceedings involving contested issues of child custody.<sup>75</sup> As the penalties for false allegations in the child custody

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73. DAPHNE PATAI & NORETTA KOERTGE, *PROFESSING FEMINISM: CAUTIONARY TALES FROM THE STRANGE WORLD OF WOMEN’S STUDIES* 80 (1994).

74. 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, 127 (1987) (saying that sex is perhaps the “one thing women lie about more than any other”).

75. See, e.g., Cynthia Grant Bowman & Elizabeth Mertz, *A Dangerous Direction: Legal Intervention in Sexual Abuse Survivor Therapy*, 109 HARV. L. REV. 549, 578 n.178 (1996) (showing that in child custody battles involving allegations of sexual abuse, as many as one-seventh are malicious, and up to



setting appear both more serious and more likely to be imposed than the penalties for false rape charges,<sup>76</sup> one should suspect that mothers would be *less* likely to lie in child custody situations. And as such false charges, whether given credence or not, might harm the couple's child psychologically, we would again expect that proportionately fewer women would be willing to advance deliberately false rape claims. However, it may well be that as much as twenty percent of sexual abuse claims may be false in divorce settings with respect to children.<sup>77</sup> If this is true, then it is not implausible that at least twenty percent of non-stranger rape claims are false.

#### IV. TRANSFORMING RAPE INTO A STRICT LIABILITY OFFENSE

The veracity of the two percent false claim figure itself is less of a concern than the social policy changes that are advocated based on this illusory figure. Currently, about half of those accused of felony rape are convicted, whether through the trial or by plea bargaining.<sup>78</sup> However, according to LDF, since only two percent of rape claims are false, this conviction rate is radically insufficient to achieve justice for women within the legal system. Thus, because of its axiom that virtually all complaints of rape are legitimate, a central goal of LDF is to reform the legal definition of "consent"<sup>79</sup> in rape settings to become more favorable to women,<sup>80</sup> thereby making conviction at

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one-third are unlikely); John E.B. Myers, *The Child Sexual Abuse Literature: A Call for Greater Objectivity*, 88 MICH. L. REV. 1709, 1726 (1990) ("[T]he most methodologically rigorous studies indicate that in divorce litigation the incidence of fabricated allegations of child sexual abuse may be as high as twenty percent.").

76. See Mary E. Becker, *The Abuse Excuse and Patriarchal Narratives*, 92 NW. U. L. REV. 1459, 1463-65 (1998) (stating that if the accuser in custody proceeding is disbelieved, she may lose custody).

77. See Myers, *supra* note 75, at 1726.

78. See GREENFELD, *supra* note 16, at 12 fig.12.

79. See McKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 653-55 (1983) (suggesting that consent should be an affirmative defense); see also Robin D. Wiener, *Comment, Shifting the Communication Burden: A Meaningful Consent Standard in Rape*, 6 HARV. WOMEN'S L.J. 143, 155-57 (1983).

80. As Professor Martha Minow observes, however, a more variegated position than that taken by the LDF is necessary "because of the basic feminist insight into the variety of women's positions and interests. Some women are the mothers, daughters, or sisters of men facing retributive justice, even as some women are the victims of male violence . . ." Martha Minow, *Between*

trial easier to accomplish.<sup>81</sup> A higher conviction rate can be accomplished by making mens rea irrelevant to the crime, thereby redefining rape as a new breed of strict liability offense. As Professor Susan Estrich observes, "To refuse to inquire in *mens rea* . . . [may turn] rape into a strict liability offense where, in the absence of consent, the man is guilty of rape regardless of whether he (or anyone) would have recognized nonconsent in the circumstances."<sup>82</sup>

Although LDF does not expressly contend that rape generally ought to be transformed into a strict liability offense, it is hard to avoid observing that the LDF perspective is close. At the extreme, the felony would be redefined such that its elements reduce to sexual intercourse plus *retroactive* nonconsent.

LDF proponents have asserted that "incidents in which the victim herself has not labeled the experience a rape" can be validly criminalized.<sup>83</sup> Where the victim did not at the time of the event label being compelled at knifepoint to submit sexually as "rape" because she was not aware that she was within the protected ambit of the law, e.g., a married woman who does not know that the marital rape exemption has been repealed in her jurisdiction, prosecution is unexceptionable.

The difficulty arises, however, when the putative victim's "non-consent" is presumed—for example, because she was intoxicated. Some LDF proponents contend that women are incapable of consenting to sexual activity whenever they are under the influence of alcohol.<sup>84</sup> Consider, for example, a setting in which both parties have become voluntarily intoxicated. In the course of sexual activity, the man may reasonably believe that the woman wants to engage

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*Vengeance and Forgiveness: Feminist Responses to Violent Injustice*, 32 NEW ENG. L. REV. 967, 972 (1998).

81. See STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 134-35 (1998) (arguing against physical force requirement in difficult-to-prove quid pro quo sexual harassment cases).

82. Estrich, *supra* note 4, at 1098.

83. Lani Anne Remick, *Read Her Lips: An Argument for a Verbal Consent Standard in Rape*, 141 U. PA. L. REV. 1103, 1142 (1993).

84. See, e.g., Ruth Rosen, *Curb Abuse of Power, Not Sex*, L.A. TIMES, Aug. 17, 1993, at B7 (discussing university policy whereby anyone who drinks alcohol or takes drugs is viewed as incapable of giving consent).

in intercourse in light of her words and deeds.<sup>85</sup> If afterwards the woman comes to think and contend that she did not consent to this sexual contact, most people would oppose finding the man's behavior felonious. A number of LDF proponents, however, would categorize this as rape. Such a position amounts to transforming rape into a strict liability offense.

A second type of serious problem ensues from the way in which LDF seeks to reconstruct the legal import of the woman's consent. If a man brings forth a gun or knife, regardless of whether the woman then verbally agrees to intercourse, her behavior would presumably be that of someone under duress. Hence, the man's guilt would be a proper inference in the factfinder's determination. Problems arise, however, when the situation is consistent with two opposite meanings, e.g., no weapon, but the pair are alone in the woods. Perhaps the silent woman is afraid to object; perhaps her consent is unvoiced. Many of the cases that LDF points to as horrible miscarriages of justice fall into this latter scenario.<sup>86</sup> However, such a characterization of these cases rests on the assumption that the woman's complaint is valid. Absent this unsupported assumption, one could readily infer either consent or non-consent. Provided the man's testimony is plausible, however, it is difficult without further evidence, such as how they got there or their prior amorous interactions, to determine whether there is consent, much less to infer guilt.<sup>87</sup> This is the underlying reason that the elements of rape are defined so narrowly—e.g., requiring force.<sup>88</sup>

Once one removes these parameters, the definition of the felony becomes wildly over-inclusive. For instance, if consent required express verbal speech acts on the part of the woman, there would probably be hundreds of times as many acts defined as rape as there are today. Only *after* a cultural change in which such verbal statements become effectively universal would it make sense to use

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85. As a practical matter, neither party's inner psychic state may be clear nor may the acts of each resolve uncertainties in the other's interpretations.

86. See Mustafa K. Kasubhai, *Destabilizing Power in Rape: Why Consent Theory in Rape Law Is Turned on Its Head*, 11 WIS. WOMEN'S L.J. 37, 53-58 (1996).

87. See Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 690-93 (1999).

88. See, e.g., OHIO REV. CODE ANN. § 2907.01(A)(1)(a) (Anderson 1999).

silence—or even rhetorical “no’s”<sup>89</sup>—as one *per se* element of the felony.

Many who adopt an LDF approach insist, however, that there should be a change in the legal rules governing rape such that in the absence of a woman’s verbal statement of assent, rape has occurred.<sup>90</sup> There is both a stronger and a weaker version of this proposed reform.

In the stronger version, any act of intercourse that occurs in the absence of an express oral consent is rape.<sup>91</sup> Most within the LDF do not seriously dispute that currently a large portion of women fail to meet this proposed standard of behavior; and they probably even agree that it would be unjust currently to imprison the male sexual partners. Exponents of the stronger version argue, however, that passage of such legislation would prospectively create a beneficial social change, such that women would regularly speak up as sexual encounters transpired. Thus, “[i]f women could rely on the legal presumption that all escalation of intimacy required a clear, affirmative assent, it might be easier for them to decline to go forward.”<sup>92</sup> Once women did generally behave in line with this new legal reality, the absence of a rhetorical assent would suffice to give fair warning to the man of nonconsent and would warrant his criminalization if he had intercourse without having obtained such consent. This position is at best rather speculative.

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89. Empirical evidence indicates that very large numbers of women say “no” when they mean “yes.” See SCHULHOFER, *supra* note 81, at 59-68 (citing data sources). Even today, few courts will consider verbal non-consent sufficient to convict a man of rape unless there is evidence that (1) the woman resisted with sufficient vigor to have constituted non-consent, or (2) there was sufficient force used by the attacker to overcome the will of the woman. See Kasubhai, *supra* note 86, at 53.

90. See Remick, *supra* note 83, at 1105, 1131.

91. See Beverly Balos & Mary Louise Fellows, *Guilty of the Crimes of Trust: Nonstranger Rape*, 75 MINN. L. REV. 599, 601 (1991); cf. Martha Chamallas, *Consent, Equality and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 800 (1988) (contending that there are a few state statutes that should be read to require affirmative words or deeds by a woman).

92. Baker, *supra* note 87, at 665. See generally LINDA R. HIRSHMAN & JANE E. LARSON, *HARD BARGAINS: THE POLITICS OF SEX 2* (1998) (“Over time, the legal terms of sexual exchange have defined the social rules of social behavior, influenced the gender division and, ultimately, affected the relative bargaining power of persons.”).

More commonly within LDF there are calls for public policy implementation of the weaker version: that "no means no," i.e., that once the woman has rhetorically expressed nonconsent, sexual intercourse is rape. This is a seemingly reasonable notion, but in a society in which numerous women say "no" when they mean "yes,"<sup>93</sup> it suffers from the same practical defect as the stronger version. Functionally, adoption of a rule that criminalizes all acts of sexual intercourse that occur after the woman has said "no" means that all of those many millions of real life instances occurring daily in which women use that locution become potential strict liability crimes. By simply averring that the "magic word" was spoken, any very difficult rape case to prove would be transformed into a relatively simple one. This would have the unfortunate collateral effect of creating a strong incentive for prosecutors and individual complainants to provide false testimony.

All of these reforms would address the numerous instances where LDF asserts that rapes have occurred in the *absence* of a contemporaneous belief on the part of the woman that she was raped. These instances are described as frequent, by a combination of generously characterizing a large share of "unwanted" sexual intercourse episodes between intimates as rape of the female participant,<sup>94</sup> adding in large numbers of instances where the sexual encounter *is* desired,<sup>95</sup> and including instances of all sorts in which

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93. See *supra* note 89; see also JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 33.05 (2d ed. 1995) (asserting that under current cultural practices "no means no" is sufficiently episodic as meant literally in sexual encounters that a defendant ought to be allowed to claim mistake-of-fact defense as to consent even if the women explicitly had said "no").

94. Compare Torrey, *supra* note 11, at 1017 n.15 ("I believe any coerced sexual activity is 'rape.'"), with Estrich, *supra* note 4, at 1093 (highlighting the impracticality of punishing all coercive sex). The more expansive notion has now become the academic mainstream "common sense." See SCHULHOFER, *supra* note 81, at 134.

95. Under the legal dominance feminist rubric, in addition to the general categories of men with whom women cannot help but be raped automatically whenever they have sex (for example, their ministers, doctors, therapists, teachers, employers, etc.), some tenured law faculty have gone so far as to argue that rape prosecutions should lie against married men regardless of whether the wife "consented to the sexual contact with positive words or positive conduct" so long as the husband had ever *previously* physically assaulted his wife. Balos & Fellows, *supra* note 91, at 609.

women have sex with dates after drinking alcohol.<sup>96</sup>

Rather than recognizing that its definition of rape is radically overbroad, LDF in effect criticizes the women involved for false consciousness. For instance, one leading feminist scholar specializing in the so-called "date rape" issue expressly states that the majority of raped college students did not realize at the time that they were raped.<sup>97</sup> Others potentially falling in this category would be wives who think that their husbands cannot rape them, and those who have sex while inebriated, because, as some assert,<sup>98</sup> women cannot consent in this state. Presuming that *after* sexual intercourse such a woman was persuaded that her contemporaneous view was false and that she really did not consent, that woman could truthfully testify at trial that she now believes that she did not consent when the sexual intercourse occurred. Her sexual partner could then be lawfully imprisoned as a felon. Their doctrinal notion of retroactive strict liability rape would seem to serve as a justification for punishing the men involved *ex post facto*.

Eliminating any *mens rea* requirement would surely raise the conviction rate toward the ninety-eight percent benchmark. By definition, if the woman testified at trial that she currently believes that she did not contemporaneously consent, the man would have to be found guilty. As with other strict liability crimes which encompass millions of violators, it is impossible to enforce such laws; all that can occur is a handful of selective prosecutions.<sup>99</sup> This proposed version of strict liability would approach retroactive absolute

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96. Professor Mary Koss acknowledges that in her own principal study—the survey of 6000 women at 32 colleges published in *Ms. Magazine* (which launched the category "date rape")—"only 27% of college women labeled their experiences with forced, unwanted intercourse as rape." Mary P. Koss, *Detecting the Scope of Rape: A Review of Prevalence Research Methods*, 8 J. INTERPERSONAL VIOLENCE 198, 208 (1993).

97. *See id.* at 211.

98. *See id.* at 217.

99. *See generally* DAVID J. LANGUM, CROSSING OVER THE LINE: LEGISLATING MORALITY AND THE MANN ACT (1994) (illustrating that the Mann Act, which makes it a felony knowingly to transport women or girls in interstate or foreign commerce for the purpose of any sexual activity for which any person can be charged with a criminal offense, was deployed in an entirely capricious way, and that it ultimately was effectively repudiated as unworkable and unjust).

liability, whereby at her sole discretion, the woman could imprison any current or former sexual partner as far back as the controlling statute of limitations allows.

Such a revolution in the legal process would be justifiable if and only if some defensible reason could be articulated to authorize a heightened evidentiary status for a woman's complaint of sexual mistreatment. The rationale advanced by LDF to justify such special treatment is that women do not lie about rape since only two percent of rape complaints are invalid. However, as demonstrated in Part II.D, this figure is thoroughly unreliable.

### V. RAPE LAW AND RACISM

To further advocate its changes in social policies regarding rape, LDF sometimes advances the notion that rape is tolerated in American society.<sup>100</sup> However, rape has been, and continues to be, treated as a felony by the Anglo-American legal system, with severe penalties upon conviction.<sup>101</sup> Currently, for example, the average length of time served in prison for rape is more than sixty-two to eighty-one percent of that served for murder.<sup>102</sup> And while there has been in recent years a general increase in imprisonment of those arrested for felonies,<sup>103</sup> the likelihood of

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100. See, e.g., LIZ KELLY, *SURVIVING SEXUAL VIOLENCE* 156 (1998) ("In the public sphere, women's experiences of rape are often redefined as sex . . ."); Ross, *supra* note 11, at 806-10 (noting several stereotypes that are reinforced by a dominant male perspective on rape).

101. See, e.g., Berger, *supra* note 4, at 8 ("A second distinctive feature of rape is its penalty structure: always harsh, often draconian."); Lynne N. Henderson, *Review Essay: What Makes Rape a Crime?*, 3 *BERKELEY WOMEN'S L.J.* 193, 220 (1987) ("Rape has traditionally carried the harshest penalties in the criminal law, including the death penalty."); see also DEBORAH L. RHODE, *JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW* 246 (1989) (explaining that "the punishments for certain forms of rape have remained severe throughout the nineteenth and twentieth centuries").

102. See Fox Butterfield, *Inmates Serving More Time, Justice Department Reports*, *N.Y. TIMES*, Jan. 11, 1999, at A10.

103. See Ronet Bachman & Raymond Paternoster, *A Contemporary Look at the Effects of Rape Law Reform: How Far Have We Really Come?*, 84 *J. CRIM. L. & CRIMINOLOGY* 554, 568 (1993) (illustrating that between 1981 and 1993, the increased likelihood of winding up behind bars for robbery and assault was 9% and 25%, respectively).

imprisonment for those charged with rape "has increased by over 200%."<sup>104</sup>

Moreover, in America, where racism has always been ubiquitous in the deployment of the criminal law,<sup>105</sup> the fate of blacks is radically disproportionate rates of arrest<sup>106</sup>—even higher when corrected for mental illness<sup>107</sup>—and, if found guilty,<sup>108</sup> exceptionally severe punishment.<sup>109</sup> While the evidence is not conclusive, it appears

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104. *Id.*

105. See generally ROGER LANE, MURDER IN AMERICA: A HISTORY (1997) (discussing the fear of criminal violence as a driving force behind much of our politics, pattern of settlement, and relation among races and social classes).

106. See FRANKLIN E. ZIMRING, AMERICAN YOUTH VIOLENCE 24 fig.2.4 (1998) (describing that black adolescents are arrested for rape at a rate 4.2 times the rate for non-black adolescents; as adults the black/non-black arrest ratio is 6.2:1).

107. Currently, prisons are the reservoir for seriously mentally ill individuals, some of whom commit crimes, including rape. See Fox Butterfield, *Prisons Brim with Mentally Ill, Study Finds*, N.Y. TIMES, July 12, 1999, at A10; see also ZIMRING, *supra* note 106, at 24. If we correct the arrest ratios by deducting the 22.6% of whites who are mentally ill, as compared with the 13.5% of blacks, and also take into account that among those who are mentally ill, 12.4% were convicted of sexual assault (as opposed to 7.9% of other prisoners), see Butterfield, *supra*, at A10, the proportionate ratio of non-mentally ill blacks to non-mentally ill whites who are incarcerated for rape is an astounding 8:1. See *id.*

108. See *United States v. Wiley*, 492 F.2d 547, 555 (D.C. Cir. 1973) (Bazelon, J., concurring) ("Of the 455 men executed for rape since 1930, 405 (89 percent) were black. In the vast majority of these cases the complainant was white.") (citations omitted); see also ERIC W. RISE, THE MARTINSVILLE SEVEN: RACE, RAPE, AND CAPITAL PUNISHMENT (1995) (describing cases where black defendants accused of rape were sentenced to death despite questionable testimony).

Recently, in at least one southern state, the death penalty has been reinstated for certain egregious rapes. See *State v. Wilson*, 685 So. 2d 1063 (La. 1996), *cert. denied*, 520 U.S. 1259 (1997). See generally Yale Glazer, *Child Rapists Beware! The Death Penalty and Louisiana's Amended Aggravated Rape Statute*, 25 AM. J. CRIM. L. 79 (1997) (discussing the amendment to Louisiana's aggravated rape statute allowing child rapists to face capital punishment). And at least one student note argues that the death penalty should be imposed on HIV positive rapists who know their medical status. See Stefanie S. Wepner, *The Death Penalty: A Solution to the Problem of Intentional AIDS Transmission Through Rape*, 26 J. MARSHALL L. REV. 941 (1993) (noting that "the imposition of the death penalty in this setting would serve both the interests of the victims and society as a whole").

109. While blacks generally serve somewhat longer sentences than do whites



that black men are no more likely to rape than white men.<sup>110</sup> The radical disproportion in rape imprisonment rates can then be seen as a key marker as to just how racist the criminal justice process, as deployed, actually is.<sup>111</sup>

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for similar crimes, “[t]he difference is most pronounced for rape, with black inmates serving an average of 70 months while whites serve 56 months.” Butterfield, *supra* note 102, at A10.

110. See LAUMANN ET AL., *THE SOCIAL ORGANIZATION OF SEXUALITY: SEXUAL PRACTICES IN THE UNITED STATES* 337 tbl.9.8 (1994) (showing that, by self-report, white women are 25% more likely to have been forced to do something sexually). Even assuming *arguendo* that on the average white women have a somewhat lower threshold for considering themselves to have been “forced,” it is hard to avoid concluding that black women are not apt to have much higher rates of rape victimization; and as it is not disputed that rapes are overwhelmingly intraracial, that would indicate rough parity between the races in actual rates of crime commission. See SCHULHOFER, *supra* note 81, at 250 (illustrating that only 6% of rapes are interracial).

111. The extent of selective enforcement is staggering. In a recent hearing at the New Jersey state house, one black dentist from East Orange “testified that he was pulled over on the New Jersey Turnpike more than 50 times over three years and ultimately sold his BMW so that he would attract less attention.” David Kocieniewski, *Minority Drivers Tell of Troopers’ Racial Profiling*, N.Y. TIMES, Apr. 14, 1999, at B1. An official study by New Jersey on its state police highway stops found that blacks were stopped at double their proportionate share of drivers; out of those who were stopped, blacks had their cars searched at double their proportionate share—so that ultimately “77.2 percent of motorist searches were of blacks or Hispanics, while only 21.4 percent involved white motorists.” Thomas Martello, *New Jersey Acknowledges Racial Profiling by Police*, BOSTON GLOBE, Apr. 21, 1999, at A11. This racial bias also extends to patterns of searches of hotel rooms for drugs. See David Kocieniewski, *New Jersey Troopers Use Hotel Staffs in Drug War*, N.Y. TIMES, Apr. 29, 1999, at A1. Similarly, a lawsuit brought by the NAACP against the state of Maryland revealed that the New Jersey phenomenon was hardly restricted to that jurisdiction: Even though only 17% of motorists were black, 73% of the motorists pulled over and searched by the Maryland State Police were black. See *ACLU National Member’s Bulletin*, 4 SPOTLIGHT 1, 2 (1999).

If anything, there is good reason to believe that these disturbing figures, derived from police records, have already been sanitized. For example, when two New Jersey State Police officers were being seriously investigated for improperly shooting several young black students on the way to a basketball try-out, it was ascertained that they had engaged in a practice so commonplace as to have been given the appellation of “ghosting”: “Two state police supervisors said it was common practice for troopers on the turnpike to jot down the license plate number[s] of white motorists who were not stopped and use them on the reports of blacks who were pulled over.” David Kocieniewski, *Trenton Charges 2 Troopers With Falsifying Race of Drivers*, N.Y. TIMES, Apr. 20, 1999, at B1. Thus, it appears that those police officers who are most egre-

It is hard to avoid the sense, therefore, that LDF's proposal is implicitly racist. Surely *any* reform of rape law must address this extreme disproportion and have at least a modest propensity to reduce it. Yet for most of the LDF discourse, race is simply an occluded category. And there is no reason to think that the LDF reconstruction of rape law would make an iota of difference in its racist outcome. Indeed, any net increase in the total number of miscreants imprisoned via such "reforms" would further (disproportionately) burden the black community. There is something unseemly about upper-middle class, white professionals, who are already in the most physically secure and protected stratum in the community,<sup>112</sup> zealously advocating policies essentially guaranteed to put more poor, black male youth in prison for many years while characterizing their efforts as a freedom struggle against patriarchy.

## VI. CONCLUSION

It seems clear that the two percent false claim figure, which has pervaded LDF discourse, has no basis in fact. Since this figure is clearly unsupported, there is no justification for shifting the burden of proof or redefining consent in rape crimes in accordance with this figure.

As with many sociological myths, those about rape advanced by exponents of LDF have untoward practical consequences. Generally speaking, further efforts to revise the law of rape along the axis they advocate<sup>113</sup> would be unwise. As Professor Elizabeth M. Iglesias observes, it would be more profitable to "rechannel . . . reform efforts

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giously racist in their behavior are the most apt to provide deliberately false data.

This kind of racist "intake" into the criminal justice system—even if one is naive enough to presume that everything within the legal process is perfectly racially impartial—will necessarily result in a radically and racially unfair "output" of disproportionate criminalizing of young black men.

112. See GREENFELD, *supra* note 16, at 24 fbl.3; cf. KATZ & MAZUR, *supra* note 11, at 125-26 (indicating that the likelihood of adult women in "the richer suburbs" being sexually assaulted is very low).

113. See *supra* Part IV. See generally Bryden & Lengick, *supra* note 4, at 1198-99 ("The reformers' main goals [have been] to facilitate prosecution of the perpetrators."); Remick, *supra* note 83, at 1107 ("[W]hereas current rape law merely reflects our sexually coercive society, a standard based on affirmative verbal consent would prescribe sexual equality for men and women.").

from the criminal justice apparatus to the public policies that construct women's sexual vulnerability and the culturally dominant images of women and men upon which these policies are based."<sup>114</sup>

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114. Elizabeth M. Iglesias, *Rape, Race and Representation: The Power of Discourse, Discourses of Power, and the Reconstruction of Heterosexuality*, 49 VAND. L. REV. 869, 886 (1996); see Sharon Marcus, *Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention*, in FEMINISTS THEORIZE THE POLITICAL 385, 388 (Judith Butler & W. Joan Scott eds., 1992) (criticizing the emphasis of feminists on achieving more effective punishment of rape because "an almost exclusive insistence on equitable reparation and vindication in the courts has limited effectiveness for a politics of rape prevention"); cf. Henderson, *supra* note 101, at 228-29 ("The best solution [to the current rape problem in our society] may be . . . to enforce the laws that exist while concentrating feminist efforts on fostering an understanding that rape . . . is *always* a crime.").