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THE "NORMAL" SUCCESSES AND FAILURES OF FEMINISM AND THE CRIMINAL LAW

VICTORIA NOURSE*

INTRODUCTION

To write of feminist reform in the criminal law is to write of simultaneous success and failure. We have seen marked changes in the doctrines and the practice of rape law, domestic violence law, and the law of self-defense. There is not a criminal law casebook in America today, nor a state statute book, that does not tell this story. Yet for all of this success, we also live in a world in which reform seems to suffer routine failures. Many believe, for example, that feminist reforms have rid rape law of the resistance requirement; however, recent scholarship makes it clear that the resistance requirement has not disappeared. Similarly, many believe that feminism has rid us of the marital rape exemption; in fact, there is evidence that marital rape immunities remain on the statute books. Finally, many believe that reform has brought widespread judicial acceptance of battered women’s self-defense claims; but the battle over this defense in the law reviews and popular media testifies to the continuing lack of settlement of the underlying issues.

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1. Even its skeptics have conceded that feminism has been one of the most influential developments in the past fifty years of the criminal law. See George P. Fletcher, The Fall and Rise of Criminal Theory, 1 BUFF. CRIM. L. REV. 275, 279 (1998) (“The only academic movement of the 1980s that made an impact on criminal law was feminism.”); Sanford H. Kadish, Fifty Years of Criminal Law: An Opinionated Review, 87 CAL. L. REV. 943, 974 (1999) (“Feminism, on the other hand, is the one major movement of the period that has had a significant impact on the shape of the criminal law.”).


4. See infra text accompanying notes 46-64.

Some have seen these events as reason for pronouncing feminism a failure despite its obvious successes. In my view, the interesting questions are about how reform both succeeds and fails, simultaneously and obviously. Indeed, the very transparency of these conflicts should merit our attention not only for feminism's sake, but also for the sake of understanding how law maintains apparent consistency and, at the same time, perpetuates injustice. One need not be a sophisticated feminist to see the difficulties of a rape law that declares women need not resist but then requires resistance, or the deceptiveness of a legal consensus that announces marital rape exemptions have been discarded when they have not. These are test cases in how the law carries forward that which it denies. For feminists, they are test cases in how the law perpetuates sexism as it proclaims sexism dead.

These are large questions that cannot be tackled in a short essay. I want to suggest here, however, a couple of angles to the problem as they relate to feminism. Old norms do not die; they are resurrected in empty spaces, deliberate ambiguities, and new rhetorics. Indeed, old norms not only do not die, but also live alongside, and are perpetuated by, the denial that they still live. It is in this sense that we may come to see the failures of feminist reform as essentially "normal." By this, I do not mean that the recurring problems of feminism and the criminal law are a good thing. Rather, I use "normal" in two senses of the word. First, these failures are "normal" in the sense that they arise from upwardly mobile social norms—in this case, norms about intimate relationships. Social norms have the power to overwhelm the best-intentioned of reforms. When rules that were supposed to go away nevertheless stay (such as resistance rules or marital rape exemptions), they stay because the new rules are interpreted in light of old, apparently discarded, social understandings. Failure is also "normal" in a second sense, the sense that it is not accidental but structurally determined. Reform is typically a "marbled" affair—the rich veins of new law cut across the "plain vanilla" of settled, conventional belief. This is a function not only of the power of social norms, but also the demands of the institutional processes essential to create reform. Legislatures cannot survive without the compromises and deliberate ambiguities that

6. See, e.g., Reva B. Siegel, "The Rule of Love": Wife Beating as Prerogative and Privacy, 105 YALE L.J. 2117 (1996). Although I do believe that rhetoric changes over time in ways that "preserve" older norms, my work here avoids the historical; I am interested, instead, in the simultaneity of contrary social and legal norms.
nurture reform’s future failures.

If this is right, feminist reforms have a kind of built-in, albeit unpredictable, capacity for failure; like the apple harboring the worm, they harbor the possibility of their own undoing. I say this not because I believe that failure’s normalcy makes reform futile, but for precisely the opposite reason—because it makes the need for continued reform equally “normal.” In what follows, I examine this possibility—the possibility of simultaneous success and failure—in three particular contexts: rape reform, marital rape reform, and reforms relating to battered woman syndrome evidence.

**SUCCESSES AND FAILURES**

There are two major areas in which feminism’s influence in the statutory criminal law is seen as important: rape and self-defense law. If there are reasons, I believe, to doubt this emphasis. I have argued elsewhere and continue to believe that this very categorization marginalizes the feminist problem. Feminist issues can be found in the criminal law every time a criminal statute touches an intimate relationship, that is, a relationship governed by society’s norms about the proper relationship of men and women, whether the “doctrinal” issue falls under the heading of murder or manslaughter, self-defense or provocation. Here, however, I will focus on the traditional areas in which reform has been claimed and consider common claims of success against reality.

**A. Rape and Resistance: Deliberate Ambiguities**

Rape reform is often cited as the most obvious example of feminist influence on the criminal law. And there is no doubt that reform efforts of the 1970s and 1980s made substantial changes in doctrine and statute. At least as a formal matter, these reform

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7. See Kaplan et al., supra note 2, at 609-35, 1099-1155; Moskovitz, supra note 2, at 385-424, 721-52.
9. See, e.g., Fletcher, supra note 1, at 279 (citing, as the first evidence of feminism’s influence, Susan Estrich’s critique of rape law); Kadish, supra note 1, at 953 (equating feminism with changing “the law of rape in America.”).
efforts ousted the worst doctrinal requirements: the prompt
complaint rule, corroboration requirements and even jury instructions
suggesting the incredibility of the charge.11 Surprisingly, large
discrepancies remain between these reforms and the law as it stands
today in practice. Indeed, this is becoming a staple of traditional
criminal law scholarship. For example, Steven Schulhofer has
recently argued, in book-length treatment, that rape law suffers from
a kind of "myth of reform," in which adherents and critics alike
appear to join hands in celebrating a set of reforms that should be
seen as partial at best.12

One prominent example of such a "myth" is the resistance
requirement; another is the very definition of force. Although courts
and commentators have seemed to assume that the resistance
requirement is virtually dead,13 we are now told by the criminal law
academy that feminists never really rid rape law of the resistance rule. Schulhofer writes: "resistance to the utmost' is an untenable
requirement that no modern court would attempt to enforce, but the
law still puts the burden on the woman to resist in some fashion."14
Similarly, if reformers thought that they shifted the focus from force
to reform rape laws in this country.").

11. See SUSAN ESTRICH, REAL RAPE 42 (1987) (noting that resistance, prompt complaint,
and corroboration rules have formally been repealed); STEPHEN J. SCHULHOFER, UNWANTED
corroboration requirement and special cautionary instructions to the jury came under concerted
attack, and in the course of the 1970s virtually every state repealed these discriminatory rules." Id. at 30.

12. SCHULHOFER, supra note 11, at 1 (stating that "[despite three decades of intensive
public discussion and numerous statutory reforms, the problem of rape has not been 'solved.'"). Schulhofer's point is consistent with feminist scholarship. See, e.g., LINDA R. HIRSHMAN &
JANE E. LARSON, HARD BARGAINS: THE POLITICS OF SEX 270 (1998) ("To the degree that
past rape reforms have begun from or continued the common law understanding of rape as
forcible sexual imposition, they do not correspond to modern understandings of what is right
and wrong about heterosexual conduct."); Michelle J. Anderson, Reviving Resistance in Rape
Law, 1998 U. ILL. L. REV. 953, 960 ("Rape law reformers sought and won only a partial
victory.").

13. See, e.g., People v. Barnes, 721 P.2d 110, 118 (Cal. 1986) (describing the California
legislature's repeal of the resistance requirement and explaining the various reasons why "the
entire concept of resistance to sexual assault has been called into question"); PAUL H.
ROBINSON, CRIMINAL LAW § 14.6, at 752 (1997) ("To require resistance, as some jurisdictions
once did, is to require victims to put themselves in danger of additional injuries . . ." (emphasis
added)).

14. SCHULHOFER, supra note 11, at 176 (emphasis added). "Many states continue to
require a 'reasonable' amount of physical resistance. And where the law on the books has
abolished formal resistance requirements, some resistance—physical and otherwise—remains
necessary in practice . . ." Id. at 127; see also Anderson, supra note 12, at 957 ("Reformers
changed courts' evaluation of resistance by degree, but not in kind."). Indeed, some states still
require "earnest resistance" by statute. Id. at 965 & n.69 ("States that maintain an earnest
resistance requirement in their statutes today include Alabama, Oregon, and West Virginia.").
to consent, they have not; many obviously wrongful threats still do not, in and of themselves, support a rape charge. For example, the school principal who obtains sex by threatening his pupil that she will not graduate does not commit rape, nor does the supervisor who obtains sex by threatening to fire his subordinate. Of course, we have known of this for some time. If it was not already clear from Catharine MacKinnon’s theoretical critique, it was crystal clear in Susan Estrich’s work, Real Rape, that resistance might reassert itself and that coercive threats might remain unpunished.

The question I want to ask is not whether this has happened but why it has happened. In my own view, resistance has resurfaced not because courts have failed, because feminism’s theories of rape are wrong, or because all would be better if we simply treated rape as a crime against autonomy. Schulhofer seems to be on to something when he emphasizes society’s continuing ambivalence about social norms of consent and coercion—the very basic concepts upon which rape law depends. For all of the work on rape reform legislation, the legal concepts of force and consent were left largely untouched in the 1970s and 1980s. Not surprisingly, perhaps, courts have found themselves reaching out to resistance to give some content to the conceptual ambiguities left behind. Resistance has resurfaced to resolve the normative ambivalence of force and consent—if the victim physically resists, courts and juries believe they can be fairly sure that she did not consent and that physical force was used to accomplish sex.

15. See State v. Thompson, 792 P.2d 1103, 1104 (Mont. 1990); SCHULHOFER, supra note 11, at 2-3.
16. See Nichols v. Frank, 42 F.3d 503, 507 (9th Cir. 1994); SCHULHOFER, supra note 11, at 132-34.
18. ESTRICH, supra note 11, at 18-19 (describing studies showing prosecutors’ reliance on the victim’s resistance), 67-71 (discussing the inadequacies of the “physical force” rule in simple rape cases).
19. SCHULHOFER, supra note 11, at 47-68.
20. See id. at 31-36.
21. Courts have long recognized that “[t]he importance of resistance lay in its relationship to the issues of force and consent . . . . By establishing resistance, the state was able to prove the key elements of the crime: the accused’s intent to use force in order to accomplish an act of sexual intercourse, and the woman’s nonconsent . . . .” People v. Barnes, 721 P.2d 110, 115 (Cal. 1986). It is for this reason that some writers have recently urged that we revive the resistance requirement and reverse its logic. Michelle Anderson argues that, rather than seeking to exclude claims by women who do not resist, the law should find that resistance, verbal or physical, includes those claims—that “resistance cannot be necessary to obtain conviction, but it should be sufficient.” Anderson, supra note 12, at 960. The argument addressed here focuses on resistance as an exclusionary, rather than an inclusionary, rule.
In this world, resistance becomes the law’s measure both of force and of nonconsent, long after it has been officially ousted from our doctrine. There is no doubt that resistance seems like a “bright line,” but it is only as “bright” as the norms upon which it depends. Put another way, the resurgence of resistance assumes and requires the “scripts” of female and male responsibility that Lynne Henderson warned us about so long ago.22 Being a date or a wife or even a colleague means that courts and lawyers and jurors presume that interactions between the two parties are voluntary, consensual, and “normal,” which means no coercion, no rape. In other words, the relationship, implied or real, spells consent to which resistance provides counterproof. This is not simply a theoretical point: ask a prosecutor about the key problem in a nonstranger rape case, and she will tell you, “It all comes down to the same nitty-gritty nuts-and-bolts issues: the relationship between the parties is going to be key in any rape prosecution.”23

From there, it is not hard to see why jurors or judges look for “her resistance”—it negates the implications of the relationship.24 If victims are assumed to have consented to have sex with those they are dating, then, by resisting, the victim tends to make us see that we should not be so ready to infer consent simply from the prior


23. Lisa R. Eskow, Note, The Ultimate Weapon?: Demythologizing Spousal Rape and Reconceptualizing Its Prosecution, 48 STAN. L. REV. 677, 699 (1996) (quoting Frank Passaglia, Director of the Sexual Assault Unit at the San Francisco District Attorney’s Office). Empirical work tends to confirm this judgment. Early studies of rape reform focused on “objective” measures like conviction rates and tended to show no “progress.” Horney & Spohn, supra note 10, at 535 (“[L]egal changes did not produce the dramatic results anticipated by reformers.”). Later studies have revised that estimate on one score: that rape reform has had some effect in producing “a climate more conducive to the full prosecution of simple rape” (what I would call cases of “relationship-rape”). Cassia C. Spohn & Julie Horney, The Impact of Rape Law Reform on the Processing of Simple and Aggravated Rape Cases, 86 J. CRIM. L. & CRIMINOLOGY 861, 884 (1996) (finding “some evidence,” id. at 882, that rape reforms have increased the number of relationship-rapes in the system through increased reporting and changes in police and prosecutor attitudes—even if conviction and dismissal rates remain unaffected by legal changes).

24. One may ask, if relationships have such a powerful force, why have courts required resistance even in so-called “stranger” cases? Schulhofer, for example, opens his book with an example of a woman accosted by a stranger and carried into the woods; she was overcome by fear and did not resist the stranger’s sexual attack. The jury convicted the defendant of sexual assault, but the appellate court reversed the verdict finding no force, presumably because the victim did not resist. Put another way, it was the victim’s responsibility to show by her actions that this was not a voluntary “romp in the woods.” SCHULHOFER, supra note 11, at 1-2 (discussing People v. Warren, 446 N.E.2d 591 (Ill. App. Ct. 1983)). Therein lies the painful possibility that the law presumes that women are in voluntary sexual relationships unless they prove to the contrary. The baseline here is the “romp in the woods” or voluntary sexual adventure; in short, the norm is that women are “in” a relationship unless they prove to the contrary.
relationship. The relationship provides the normative baseline from which consent and force are abstracted. Of course, as feminists have noted, it also places the burden on the victim to "prove" that she did not consent and that the rape was committed by force. Here, as elsewhere, the law places the onus on the victim to negate the implications of relationship; violent and otherwise, relationships are her responsibility from which she can only abstract her identity (even her physical autonomy) by showing physical force.

This analysis extends as well to the problems that have arisen in the context of defining force in the law of rape. Traditionally, only physical force has sufficed to meet rape law's idea of what constitutes illegal force. Of course, this leaves out a good deal of what most normal Americans would call "coercion"; indeed, it leaves out what the criminal law—in fraud, extortion, and robbery—calls "force." A high school girl believes she will lose her diploma if she does not have sex: no rape because no physical force. A child believes she will be returned to a detention home if she does not have sex: no rape because no physical force. An employee believes that she will lose her job: no rape because no physical force. All of these cases involve legitimate, socially-sanctioned relationships between victim and offender (student/teacher, employee/employer, foster-child/parent). Those relationships provide the baseline of "voluntary" interaction (implied consent) that the victim must rebut by showing something that is obviously inconsistent with consent—physical force. But think about that: does anyone really think that the

25. See, e.g., ESTRICH, supra note 11, at 69-71; MacKinnon, supra note 17, at 1303-04.
26. See, e.g., State v. Thompson, 792 P.2d 1103, 1106 (Mont. 1990) (defining "force" as physical compulsion because the Montana rape statute failed to define the term); Jane E. Larson, "Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction, 93 COLUM. L. REV. 374, 417-18 (1993) ("Today, however, courts rarely consider it unlawful to deceive someone into agreeing to sex . . . . It is both a tort and a crime to take money by false pretenses, but in most jurisdictions it is lawful to obtain consent to sex by intentionally deceiving one's partner.").
27. See Patricia J. Falk, Rape by Fraud and Rape by Coercion, 64 BROOK. L. REV. 374, 417-18 (1993) ("Today, however, courts rarely consider it unlawful to deceive someone into agreeing to sex . . . . It is both a tort and a crime to take money by false pretenses, but in most jurisdictions it is lawful to obtain consent to sex by intentionally deceiving one's partner.").
28. See State v. Thompson, 792 P.2d 1103 (Mont. 1990). The Montana statute was subsequently amended to include a definition of "force" in an attempt to solve this problem. MONT. CODE ANN. § 45-5-501 (1999).
30. See Nichols v. Frank, 42 F.3d 503 (9th Cir. 1994); SCHULHOFER, supra note 11, at 133-34.
If what was taken from her were money, of course, these would be crimes of fraud or extortion. And yet, rape law’s idea of force-as-physical-force leaves us with the unpalatable conclusion that the same conduct should fare differently when what is obtained is sex.32

Few believe that the resistance requirement should be a part of rape doctrine; even fewer believe that the girl taken off her bike at the local park has not been raped because she did not resist. If I am right that the general consensus condemns these rules and results, why is it that the law continues to embrace them—decades after declared feminist “success” in the revision of the criminal law?33 Indeed, the kinds of problems I am talking about are exceedingly conventional, even passé, from a feminist standpoint. Here arises the question of banal inequalities—inequalities that, if seen, would be condemned but yet somehow escape reform. We know that the law takes its cues from the social relationships involved; and we have long known, from law and society scholarship, just how powerful social norms are in defeating the best-laid plans at reform.34 The question here is not simply about the power of norms to shape law or how our notion of intimate relationships shapes the criminal law. Instead, it is how outdated norms may perpetuate themselves in a world that would, all other things being equal, reject them. The 4-H club case and the

31. Schulhofer discusses this case in which the defendant, Waites, who met his victim and others at a 4-H club, posed as a doctor who was testing the victim for learning disabilities and, based on that pretext, ordered the victim to disrobe, fondled her, and subjected her to fellatio and intercourse. Waites was convicted of rape, but the conviction was overturned by the appellate court because there was no “force.” See SCHULHOFER, supra note 11, at 45 (citing State v. Waites, No. 93-L-009, 1994 Ohio App. LEXIS 3651, at *15-21 (Ohio Ct. App. Aug. 19, 1994)).

32. See ESTRICH, supra note 11, at 70; Larson, supra note 26, at 417-18.

33. Although some state courts have openly struggled with the problem of “force,” and some legislatures have even attempted to deal with obvious loopholes, the most common type of reform addressing issues of coercion in rape focuses on defined categories of those most likely to abuse trust, such as psychiatrists, or ministers, or school teachers, or general provisions relating to specific classes of victims, such as children. See Falk, supra note 27, at 118-19 (“No doubt wary of casting their nets too wide, state legislatures have been quite conservative, tending to enact very specific provisions to cover a few factual scenarios rather than passing global fraud statutes.”). Indeed, the very fact that legislatures have sought to limit their reforms to particular kinds of relationships (for example, psychiatrist/patient), reflects and reaffirms the notion that the relationships between the parties provide the norms that govern our judgments about the propriety of sexual relationships. See id.

34. See Lawrence Friedman, Law Reform in Historical Perspective, 13 ST. LOUIS U. L.J. 351, 364-65 (1969) (arguing that reform is typically “half ratification” of an existing social order and half “real change.”); see id. at 365 (“A change that conforms to what most of the public already wishes to do or which calls for slight, familiar, acceptable change of behavior is far more palatable and far more likely to succeed.”).
detention-home case are not difficult cases for most people. But courts have not found these cases to be easy bellwethers of injustice; indeed, some have found no difficulty in rejecting resistance as doctrinal rule and then reinventing it for the most vulnerable—for young girls threatened with no diplomas or detention homes or violating “doctor’s” orders.

One possible answer to this development may simply be vision; the old, discarded norms (the rules about resistance) are in some way “hidden,” conventionally believed to be discarded or long-ago-reformed. After all, courts reinventing the resistance requirement do not say that they are reinventing the doctrinal rule; they say that they are applying the basic notions of force and consent. Similarly, courts applying the stranger-rape-as-paradigm rule do not say that rape only happens outside voluntary relationships; they say that they are defining force. Outdated norms resurface but remain undisclosed in newer, more ambiguous guises. Here, the discarded norms are “hidden” within places of ambiguity—the capacious and socially controversial notions of force and consent. The law that disavows sexism (by rejecting the doctrinal resistance requirement) ends up recapitulating it (by silently reinventing it within the space provided by law’s ambiguities).

If that is right, we may begin to see why reform carries the seeds of its own failures. Almost all controversial legislation—and that includes rape reform—is purchased at the cost of deliberate ambiguity. No piece of major legislation can obtain the collective consensus required by legislatures without compromise. In my view,

35. See, e.g., Commonwealth v. Berkowitz, 609 A.2d 1338 (Pa. Super. Ct. 1992) (Where “[t]he victim did not physically resist, but rather continued to verbally protest,” id. at 1340, the court found insufficient evidence of rape; the court characterized the issue as whether there was a sufficient “degree of physical force necessary to complete the act of rape in Pennsylvania.” Id. at 1339 (emphasis added)), aff’d in part and vacated in part by Commonwealth v. Berkowitz, 641 A.2d 1161, 1163-64 (Pa. 1994) (rejecting the notion that the victim must resist as a rule, but then immediately considering her lack of “physical action” against the defendant in upholding finding of no “force” and therefore no rape).

36. See, e.g., State v. Alston, 312 S.E.2d 470 (N.C. 1984) (The court specifically notes that prior consent to sex in a consensual relationship does not negate a charge of rape, id. at 475, but finds that defendant did not use “force” in accomplishing sexual intercourse, id. at 476.).

37. This is not only a product of collective action problems within legislatures, but also a more general problem with any legal reform in areas of intense social conflict. See ROBERT AXELROD, THE COMPLEXITY OF COOPERATION: AGENT-BASED MODELS OF COMPETITION AND COLLABORATION 61 (1997) (“In most cases, the law can only work as a supplement (and not a replacement) for informal enforcement of the norm...law is the formalization of what has already attained strength as a social or political norm.”); Stewart Macaulay, Law and Behavioral Sciences: Is There Any There There?, reprinted in part in LAW & SOCIETY, supra note 10, at 14, 15 (“Our society deals with conflict in many ways, but avoidance and evasion are important ones...We find social consensus at a high level of abstraction and so keep our
there is no shame in these compromises; they are inevitable and essential.\textsuperscript{38} The problem is that deliberate ambiguity, purchased now for a small sum, may exact much larger costs in the future. Indeed, it may become the nurturing grounds for the reform failures of the next generation. For within the heart of that ambiguity, old norms will live on, upwardly mobile and yet unseen.

That old, discarded norms might survive post-reform is not only predictable because legislatures trade in deliberate ambiguity, but also because ambiguity nurtures overtly rejected norms. Ambiguity works to hide discarded or unlikely norms by making it difficult to obtain the information about precisely what the norm is. As scholars of norm development tell us, lack of information and publicity may "be a determinative obstacle to societal norm formation."\textsuperscript{39} If, for example, everyone believes that the resistance requirement has been eliminated, then they are very unlikely to support the need for further reform, even if it is quite clear that they would support such reform if all the information were well-known. The law can exacerbate this situation by inhibiting information flow—by burying the old rules within new and deliberately ambiguous guises. If everyone believes that rape law has been "reformed" to eliminate the resistance requirement, and the law only reinvents the resistance requirement in difficult-to-see places like "force and consent," then norms challenging the consensus will be weak (even if we can predict that they would be strong in the presence of full information).\textsuperscript{40} Indeed, the great irony is that the very idea of "reform"—to the extent that it suggests that we have "solved" a problem of major societal controversy—nurtures its own contradictions by tending to inhibit the doctrines ambiguous or contradictory.").

38. To the extent that legal authorities seek to minimize conflict with "citizens' hostility" they may actually maximize compliance with a partial shift in norms that would not otherwise be possible. See, e.g., Tom Tyler, Why People Obey the Law (1990), reprinted in part in Law & Society, supra note 10, at 474, 476 ("If the effectiveness of legal authorities ultimately depends on voluntary acceptance of their actions, then authorities are placed in the position of balancing public support against the effective regulation of public behavior.").

39. Richard H. McAdams, The Origin, Development, and Regulation of Norms, 96 Mich. L. Rev. 338, 402 (1997); see also Robert C. Ellickson, Order Without Law: How Neighbors Settle Disputes 180 (1991) ("Players need information as well as effective power. In the absence of adequate information, a continuing relationship among empowered people may not be cooperative."); id. at 181 ("The hypothesis predicts that departures from conditions of reciprocal power, ready sanctioning opportunities, and adequate information are likely to impair the emergence of welfare-maximizing norms.").

40. See Axelrod, supra note 37, at 58-59 (arguing that "social proof," the proof of correctness of social behavior gleaned from observing others, "is a major mechanism in the support of norms," because it provides information to the actor seeking to comply with prevailing social norms).
flow of information about its own inevitable "compromises."

In short, what amounts to a necessary feature of the legislative process is likely to breed and nurture a condition of reform's simultaneous victories and defeats. In this sense, it seems almost predictable that rape reform would cycle between success and failure. Predictable perhaps, but unfortunate nevertheless: unfortunate because it sustains law's hypocrisy; more than unfortunate because it renders banal a set of inequalities whose casualties may be the most vulnerable among us.

B. Marital Rape: Complexity

If the resurgence of the resistance requirement tells us something about the power of ambiguity to nurture older, discarded norms, then the fate of marital rape rules tells a similar story under a different title. One of the very earliest crusades in the area of rape law focused on the obvious inequalities of a law that failed to protect married women from rape. Eliminating marital rape exemptions was a noteworthy part of many rape reform efforts in the 1970s and 1980s. These efforts quickly appeared to be quite successful, with courts doing the heavy-lifting of reform. In the leading case of People v. Liberta, the New York Court of Appeals held that marital rape exemptions violate the Equal Protection Clause of the Constitution. The Liberta case has since been followed by a number of courts, and

41. See SCHULHOFER, supra note 11, at 30 (stating that the marital exemption was one of the two principal problems focused on by rape reformers in the 1970s).
42. 474 N.E.2d 567 (N.Y. 1984).
43. Id. at 573 (holding that no rational basis exists to distinguish marital rape and nonmarital rape, thus marital exemption in New York statute violates the Equal Protection Clause); see also People v. DeStefano, 467 N.Y.S.2d 506, 515-16 (Suffolk County Ct. 1983) (holding that a wife has a right to the protection that law provides against rape for non-spouses and is denied equal protection of the law by the existence of a husband's statutory immunity in the case of marital rape).
A number of courts have relied upon arguments similar to those asserted in Liberta to construe statutes or common law crimes to avoid inequalities of treatment between marital and
its rationale has been applied not only to full marital exemptions, but also to marital immunities for lower-level rape crimes. Where statutes create marital exemptions for crimes other than first-degree rape, courts have found that these exemptions also violate equal protection.45

The only problem with this story is that it is incomplete, although it is repeated so often that it has become as good as the truth. Proponents and detractors alike extol the demise of the marital rape exemption46 as reason to celebrate feminist victory or to declare an end to the need for statutory reform. However, the ideas that shape the marital exemption have not died and, if the equal protection cases are any measure, obvious inequalities remain on the nation's statute books.47 In Virginia, the judge, if he or she thinks it in the best nonmarital rape. See, e.g., State v. Rider, 449 So. 2d 903, 907 (Fla. Dist. Ct. App. 1984) (rejecting common law "marital unity" and privacy arguments for marital rape exemption); State v. Smith, 401 So. 2d 1126, 1128-29 (Fla. Dist. Ct. App. 1981) (rejecting common law arguments for interspousal exemption to Florida sexual battery statute); Warren v. State, 336 S.E.2d 221, 223, 226 (Ga. 1985) (holding that no implicit marital exclusion exists in either rape or aggravated sodomy statutes while citing with approval cases striking down such exclusions on equal protection grounds); State v. Willis, 394 N.W.2d 648, 650 (Neb. 1986) (refusing to recognize a spousal exemption from a statute and stating that "none of the justifications for the exclusion have any merit in modern society"); Weishaupt v. Commonwealth, 315 S.E.2d 847, 852-55 (Va. 1984) (rejecting common law justifications for marital rape exception as inconsistent with autonomy and equal rights of women); see also Commonwealth v. Shoemaker, 518 A.2d 591, 594-95 (Pa. Super. Ct. 1986) (rejecting defendant's argument that criminalizing marital rape violated his rights of privacy and equal protection).

45. See, e.g., M. D., 595 N.E.2d at 713 (holding that Illinois violates equal protection when it applies the marital exemption to less serious sexual abuse offenses); People v. Naylor, 609 N.Y.S.2d 954, 956 (N.Y. App. Div. 1994) (holding marital exemption does not apply to third-degree sexual abuse; such exception would violate the Equal Protection Clause); Horvath, 584 N.Y.S.2d at 149 (extending Liberta's equal protection holding to deny a "marital immunity" defense to a prosecution for "sexual abuse in the first degree"); People v. Bruce, 556 N.Y.S.2d 782, 783 (N.Y. App. Div. 1990) (rejecting lower court's reversal of jury finding on attempted rape in the first degree because of its concern about the "marital context" and relying upon Liberta's equal protection rationale albeit implicitly extending it to the "attempted rape" context); People v. Prudent, 539 N.Y.S.2d 651, 651 (N.Y. Crim. Ct. 1989) (rejecting defendant's argument that Liberta's equal protection rationale does not apply to lesser sexual offenses).

46. It is conventional wisdom among criminal law scholars that the marital rape exemption is dead or at least dying. See, e.g., Donald A. Dripps, Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent, 92 COLUM. L. REV. 1780, 1783 (1992) ("The reformed statutes did make some substantive changes by abolishing the marital rape exemption . . . .").

47. See SCHULHOFFER, supra note 11, at 43 ("[T]he great majority of the states still retain an exemption for marital rape under some circumstances."); Jill Elaine Hasday, Contest and Consent: A Legal History of Marital Rape, 88 CAL. L. REV. (forthcoming Oct. 2000) (manuscript at 1, on file with author) ("A majority of states still retain some form of the common law regime: they criminalize a narrower range of offenses if committed within marriage, subject the marital rape they do recognize to less serious sanctions, and/or create special procedural hurdles for marital rape prosecutions."). Robin West's influential article on equal protection and marital rape first set forth the problem. See Robin L. West, Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment, 42 FLA. L. REV. 45
interest of the parties’ marriage, may dismiss some marital charges altogether even in cases where the court has made a finding of guilt.\(^48\) Similarly, in Arizona, spousal rape with force may be a misdemeanor while nonspousal rape without force is a serious felony.\(^49\)

The differentials in penalties are not the only ways in which marital rape offenses are treated separately. Some offenses that are treated as rape or wrongful sexual contact for strangers are treated differently if the parties are married or, in some cases, living together. Occasionally, an immunity will still arise on the surface of the statute. For example, Louisiana still exempts a husband from guilt for a “simple rape” and other sexual offenses by excepting married persons from the coverage of the simple rape statute.\(^50\) However, the more common statutory disparity is found when statutes limit the repeal of an exemption, creating one set of rules for married women and another for single women. For example, Mississippi has retained its defense of marriage statute exempting “legal spouse[s]” from any sexual battery offense.\(^51\) That statute is then qualified as if in repeal of itself by providing an exception for “forcible sexual penetration” (1990).

48. In a marital rape case tried to a Virginia court, despite a finding of guilt, the court may defer proceedings and place the defendant on probation if the victim and the State consent. Upon completion of probation and therapy, the court may, without the consent of the victim, dismiss the charges if it will “promote maintenance of the family unit” and serve the best interests of the “complaining witness.” VA. CODE ANN. § 18.2-67.2:1(C) (Michie 1996). This applies to cases in which prosecutors proceed under the special spousal statute or under the more traditional statutes, including aggravated cases. See id. §§ 18.2-61(D); 18.2-67.1(D); 18.2-67.2(D). This scheme clearly allows the judge the discretion to permit his views of the parties’ relationship to overcome a finding of guilt of marital rape.

49. The Arizona statute defining a spousal sexual assault (intercourse or oral sexual contact) accomplished by force or threatened force is a class six felony which may be reduced, at the discretion of the judge, to a misdemeanor with mandatory counseling. ARIZ. REV. STAT. ANN. § 13-1406.01(B) (West 1989). (LEXIS indicates that this statute is current through 1999). The standard nonspousal sexual assault statute, which does not require force but simply sex without consent, is a class two felony. Id. § 13-1406(B).

50. Louisiana defines a “simple rape” as “a rape committed when the anal or vaginal sexual intercourse is deemed to be without the lawful consent of a victim who is not the spouse of the offender.” LA. REV. STAT. ANN. § 14:43(A) (West 1997 & Supp. 2000) (emphasis added). A similar marital exemption exists for sexual battery and oral sexual battery, which are typically nonpenetration touching offenses but may also include cases that fall out of the definition of vaginal or anal intercourse. Id. § 14:43.1(A) (“Sexual battery is the intentional engaging in any of the following acts with another person, who is not the spouse of the offender, where the offender acts without the consent of the victim.” (emphasis added)); id. § 14:43.3(A) (“Oral sexual battery is the intentional engaging in any of the following acts with another person, who is not the spouse of the offender, . . .”). Such exclusions do not apply, however, in cases of aggravated rape, forcible rape, and aggravated sexual battery or aggravated oral sexual battery, id. §§ 14:42, 14:42.1; 14:43.2; 14:43.4, setting up a general rule that requires “aggravation” for the spousal offender but not for the comparable nonspousal offender.

without the consent of the alleged victim.” 52  But this amendment is only a partial repeal. The general nonspousal “sexual battery” statute provides only that the conduct be accomplished without consent, 53 although the statute on sexual battery by a spouse requires a showing of “force.” 54

Marital rape immunities thus live on between the “general” rape statutes and special “spousal” statutes. Understanding precisely how this works can often be a rather complex process, rivaling the unraveling of tax code regulations. Consider the difficulty of Maryland’s statutory scheme. Maryland provides that “a person may not be prosecuted under [a certain set of statutes] . . . if the victim is the person’s legal spouse,” except as provided in that statute. 55 The statute then goes on to permit prosecution under some sections, but only some sections, of the nonspousal statutes. These sections vary depending upon whether the parties are separated pursuant to a written agreement, separated pursuant to a limited divorce, or if the offense is accomplished by using force “against the will and without the consent of the person’s legal spouse.” 56 Leaving aside the complications of separation agreements and limited divorce, 57 the still-married spouse has significant hurdles to overcome that are not applicable to nonspouses. For example, the spouse-victim must show “force,” not simply a “threat of force.” 58 Thus, a spouse may be prosecuted for a forceful rape under the first-degree rape statute 59 but not for a rape accomplished by “threat of force,” 60 as for example, a

52. Id. (emphasis added).
53. Id. § 97-3-95(1) (“A person is guilty of sexual battery if he or she engages in sexual penetration with: (a) Another person without his or her consent; (b) A mentally defective, mentally incapacitated or physically helpless person . . . . ”).
54. Id. § 97-3-99.
55. MD. ANN. CODE art. 27, § 464D(a) (1996).
56. Id. § 464D(c)(1).
57. For an attempt to explain some of these distinctions, without any focus on the more detailed analysis above, see Lane v. Maryland, 703 A.2d 180 (Md. 1997).
58. MD. ANN. CODE art. 27, § 464D(c).
59. Id. § 462(a) (Supp. 1999).
60. Id. § 464D(c). Maryland’s first-degree rape statute covers rapes “by force or threat of force,” where the defendant “[t]hreatens or places the victim in fear that the victim or any person known to the victim will be imminently subjected to death,” id. § 462(a)(3), or where the defendant commits the offense “aided and abetted” by others. Id. § 462(a)(4). The spousal exemption does not bar prosecution under this statute per se, see id. § 464D(c)(2)(i), but requires an additional burden—force—thus implicitly excluding anything less, such as a threat of force. Therefore, if a husband accomplishes the rape by a threat to kill rather than force itself, he may not be prosecuted for the first-degree rape offense; similarly, if he issues a threat of force but does not use force and is aided by others, he may not be prosecuted for first-degree rape, even if he would be so prosecuted if the victim were a stranger.
husband who threatens to kill his wife and proceeds to have vaginal intercourse without her consent. Moreover, this scheme also exempts spousal sexual offenses under some parts of the second-degree rape statute, some parts of the third-degree sexual offense statute, and the full fourth-degree sexual offense statute. The bottom line is that, in Maryland, if you accomplish sexual intercourse by threatening to kill your wife, you have not committed first-degree rape, but you have if you similarly threaten a stranger. Indeed, because of the way rape is defined, you can threaten to kidnap your wife or bring along a few others to “aid and abet” sexual intercourse, and this conduct could not be prosecuted as first-degree rape, although it would be if the victim were a stranger. Maryland, unfortunately, is not the only state in which this kind of complex “partial repeal” governs marital rape.

That these inequalities remain on the statute books should be surprising, not only because many believe that the marital rape exemption has been banished, but also because marital rape differentials have been widely held to be unconstitutional. All of the prominent reasons used to justify marital rape rules, such as privacy and family harmony, fear of vindictive complaints, and problems of proof, have fared poorly in the face of equal protection and statutory

61. One might argue that the spousal rapist could be prosecuted under Maryland’s “sexual offense” statutes, id. § 464 (first-degree sexual offense); id. § 464A (second-degree sexual offense), since these sections are never mentioned in the marital defense statute, id. § 464D, and they lead to penalties comparable to the rape offenses. The only problem with this construction is that Maryland’s first- and second-degree sexual offense statutes only cover particular kinds of “sexual act[s]”; they do not cover vaginal intercourse. See id. § 461(e) (defining “[s]exual act” as “cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse”). Treating these “sexual acts” as capable of prosecution against a spouse, although vaginal intercourse is not, yields a rather odd result. In any event, it remains the case that the “rape” offenses are not available to charge the spousal defendant unless there is a showing of force, id. § 464D(c), and that neither the sexual offenses statutes, id. §§ 464, 464A, nor the sexual contact offenses, id. §§ 464B, 464C, are available for an act of vaginal intercourse. See id. § 461(f) (exempting from “sexual contact” penetration by “the penis, mouth, or tongue” into the “genital or anal opening of another person’s body”).

62. The spousal statute, id. § 464D(c), allows prosecution where the act is committed with force under three specified offenses: section 462(a) (all subsections of first-degree rape statute); section 463(a)(1) (first of three subsections of second-degree rape statute); and section 464B(a)(1)(i)-(ii) (two subsections of the third-degree sexual offense statute) as long as the prosecution can show “force.” The statute specifically bars prosecutions under non-enumerated subsections of 463 (second-degree rape), 464B (third-degree sexual offenses), and 464C (fourth-degree sexual offenses) through the “marital defense,” provided in section 464D(a).

63. See supra note 60.

64. There are a number of varying “lists” of the states that have marital rape differentials/immunities, see, e.g., Hasday, supra note 47, at 1 nn.1-3 (citing statutes); West, supra note 47, at 46-49 (citing statutes); but, without really examining the statutes in detail, it is often difficult to see how this is accomplished.

65. See supra notes 43-45 (discussing equal protection cases).
challenges. Courts from Alabama to Illinois to New York have rejected the notion that the marital relationship of the parties somehow makes the offense less worthy of prosecution.\textsuperscript{66} They have called the reconciliation argument “absurd,”\textsuperscript{67} warning that “it is the violent act of rape and not the subsequent attempt of the wife to seek protection through the criminal justice system which ‘disrupts’ a marriage.”\textsuperscript{68} They have openly rejected the notion that marital rape should not be a crime because it is likely to lead to false charges, stating that “[t]here is no other crime we can think of in which \textit{all of the victims are denied protection} simply because someone might fabricate a charge.”\textsuperscript{69} They have denied that proof problems justify lack of equal treatment, finding that “the problem of proving lack of consent is likely to be present in most cases in which the alleged victim and perpetrator have had a prior consensual sexual relationship regardless of whether they were married or unmarried.”\textsuperscript{70}

Finally, courts have been openly hostile to the notion of “privacy” as justifying marital differentials, asserting that “[w]hile protecting marital privacy and encouraging reconciliation are legitimate State interests, there is no rational relation between allowing a husband to forcibly rape his wife and these interests.”\textsuperscript{71}

Given this set of precedents and a constitutional basis for challenge,\textsuperscript{72} why do these statutes remain on the books? There are

\textsuperscript{66} See supra notes 44-45.

\textsuperscript{67} Weishaupt v. Commonwealth, 315 S.E.2d 847, 855 (Va. 1984) (“Weishaupt’s third argument is that to allow a husband to be convicted of raping his wife will be disruptive to marriages. \textit{He contends that the possibility of reconciliation will be foreclosed. This argument is absurd.”} (emphasis added)); see also People v. Liberta, 474 N.E.2d 567, 574 (N.Y. 1984) (“\textit{It is not tenable to argue that elimination of the marital exemption would disrupt marriages because it would discourage reconciliation.”}).

\textsuperscript{68} Liberta, 474 N.E.2d at 574 (citing Weishaupt, 315 S.E.2d at 855); see also Merton v. State, 500 So. 2d 1301, 1304 (Ala. Crim. App. 1986) (adopting \textit{Liberta’s rationale}); People v. M. D., 595 N.E.2d 702, 711-12 (Ill. App. Ct. 1992) (“\textit{If a marriage has deteriorated to the point where one spouse commits a forcible sexual assault upon the other and the victim desires to see the perpetrator imprisoned, reconciliation is hardly a likely prospect.”}).

\textsuperscript{69} Warren v. State, 336 S.E.2d 221, 225 (Ga. 1985). The court also noted that “there is no evidence that wives have flooded the district attorneys with revenge filled trumped-up charges.” \textit{Id.}; see also Merton, 500 So. 2d at 1304 (“\textit{If the possibility of fabricated complaints were a basis for not criminalizing behavior which would otherwise be sanctioned, virtually all crimes other than homicides would go unpunished.”}).

\textsuperscript{70} M. D., 595 N.E.2d at 712.

\textsuperscript{71} Liberta, 474 N.E.2d at 574; see also State v. Rider, 449 So. 2d 903, 906 n.6 (Fla. Dist. Ct. App. 1984) (“The marital privacy right recognized by the United States Supreme Court . . . may not be used as a justification for immunity from prosecution for sexual battery.”); Commonwealth v. Shoemaker, 518 A.2d 591, 594 (Pa. Super. Ct. 1986) (“The right to privacy within the marital relationship is not absolute and, in this case, must be balanced against the state’s interest in protecting an individual’s right to the integrity of his or her own body.”}).

\textsuperscript{72} Typically, a rational basis argument is very easy to rebut, simply requiring some
some practical reasons. First, potential victims have no standing to sue for equal protection violations, and defendants (who benefit from downgraded penalties and partial immunities) typically have no incentive to make such a claim. Male defendants brought the early claims; and once courts consistently refused to benefit them, defendants stopped making the claims. Thus, the constitutional norms that purportedly govern, norms of equality, have little clout. Second, as we have seen above, the discarded norms of relationship are powerfully resistant to change. Legislatures have been prodded in many jurisdictions to tinker with these rules, but the effort quickly encounters the very reasons rejected by courts as "illegitimate" or "illogical" or "absurd." Indeed, one reads of legislators giving voice explicitly to the notion that the relationship should control, echoing seemingly ancient sentiments that "[i]f you can’t rape your wife, who can you rape?"  

Third, and as important, there are places for these norms to hide. How could the average citizen/advocate/reformer possibly untangle the Maryland statute? Indeed, even for scholars of rape law, the time and effort to try to discover the precise interconnections between the exemptions and their relationship to general nonspousal statutes is relatively exhausting and largely unknown. It is within this complexity that the norms of relationship live on and hold court, albeit silently. Once within these statutes, moreover, this becomes a reason in and of itself to sustain the current system. The stratified rape law, which serves as the template for the marital rape immunities, is often favored by prosecutors as providing them with

legitimate reason for the statute’s distinctions. Interestingly enough here, the vast majority of courts addressing these statutes have been willing to find no "rational" basis. See supra notes 43-44 (citing several cases where courts have found no rational basis to sustain marital exemption statutes). Some have found this less than comforting, finding that marital rape exemptions endure "despite their apparent unconstitutionality," because of the "inadequacy of the dominant or mainstream political theory of equality." See West, supra note 47, at 49-50. I do not disagree with that as an abstract matter; indeed, I believe that existing equal protection doctrine has failed to understand the way in which norms of intimate relationships must enter the equality analysis. My point here is simply that courts have not been timid in rejecting the most prevalent justifications for marital rape exemptions. That, in turn, sets up an interesting juxtaposition between a law that simultaneously rejects marital rape exemptions as "absurd" and, at the same time, lets them live on in statutes throughout the country.

73. Eskow, supra note 23, at 689 (quoting 1979 statement of California State Senator Bob Wilson); see also id. at 696-97 (reporting statements in 1992 debate on California’s marital rape statute suggesting legislators do not see the public treating a marital rape as seriously as a traditional rape).

74. Rape law reform courted complexity in the 1970s and 1980s on the theory that many offenses of different grades would increase prosecutorial discretion and thus increase the chances of convictions. See Horney & Spohn, supra note 10, at 523 (“Many states replaced the single crime of rape with a series of offenses graded by seriousness and with commensurate
the most flexibility in deciding the appropriate charge and by defense counsel as providing the most lenient penalties. The parties who work "in the system" thus have little incentive to change and, indeed, have been found embracing separate marital rape treatment (even when it creates inequalities). Metanorms of flexibility and leniency become a friendly shield that allows legislators to avoid openly avowing what they really believe—that marital rape is a lesser crime. The discarded norms in which the relationship is more important than the violence still hold true; they simply remain hidden within complexity's claims for legitimacy.

Professor Nancy Lemon's 1992 experience attempting to reform the California marital rape exemption is illustrative here. Among other things, Lemon sought three major reforms: (1) to bring parity to penalties for stranger and marital rape by eliminating the misdemeanor treatment for marital rape; (2) to eliminate the "prompt complaint" rule requiring notification of marital rapes within ninety days; and (3) to dissolve the "separate" marital rape statute. Presumably, this should have been an easy reform, if the equal protection cases are any measure. And yet, it was a difficult process in which Lemon was never able to rid the law of the "separate" statute or to eliminate completely the prompt complaint rule. Instead, reformers obtained felony treatment for forcible marital rapes by agreeing not to eliminate the separate spousal statute. As Lemon warned, separate rules for married women have required continued legislative attention and revision to avoid exacerbating or creating inequalities between the general and spousal statutes.

Who stood up for the "separate" treatment in California? The lawyers—the group that one might have thought would stand for constitutional norms of equality. Some of the arguments legislators penalties.

75. See Krysten Crawford, Boalt Lecturer Rewrites the Rules on a Wife's Right to Say 'No', RECORDER, Nov. 22, 1993, at 3; Eskow, supra note 23, at 696-98 (describing Lemon's efforts).

76. See Crawford, supra note 75, at 3.

77. See id.

78. See id. ("The new statute abolishes the misdemeanor penalty, making all marital rapes felonies punishable by up to eight years in prison .... The amended law didn't come without some important concessions, the most significant of which keeps California's marital and nonmarital rape laws as separate Penal Code sections.").

79. See id. ("My discomfort," Lemon says, "is that as long as we have two separate code sections, non-marital rape [Penal Code §261] will be strengthened ... We will have to watch all rape bills like a hawk." (citing CAL. PENAL CODE § 261 (West 1999)); Eskow, supra note 23, at 697.
raised in support of separate treatment were the ones already rejected by courts (difficulties of proof, false claims, and the need to maintain marital relationships), but, in the end, the day was carried against reform not by these arguments but by their more veiled counterparts. The district attorneys' association, the criminal defense bar, and the American Civil Liberties Union all opposed various reforms of the marital rape statute and wanted to sustain its "separateness." They did not openly adhere to the discarded norms of yesteryear; instead, they claimed that the inequalities were really "better" for seemingly neutral reasons—better for defendants, better for an already overburdened criminal justice system, and, most interestingly, better for women. The complex, separate, and largely redundant statute—however it symbolized the "difference" of marital rape—made it easier for prosecutors to prosecute, they said. As one prosecutor put it, "the relationship acts as mitigation," making jurors perceive spousal rape as a crime less serious than nonspousal rape. That, of course, does not answer the question why the law should continue to perpetuate and express that view; it simply trades on the supposedly-discarded position that the relationship discounts the violence and that the law can and should do nothing about it.

In short, marital rape tells a story of discarded norms and how they continue to live. Here, they live on "between statutes" and because the resulting complexity is defended in apparently neutral, procedural terms. Competing metanorms of flexibility and ease of administration occlude the ways in which the norms of "relationship" continue to blind us to the nature of the violence, signify consent, and raise fears of false claims—the very arguments that courts rejected fifteen years ago in Liberta as untenable, absurd, and unfair. Clothed within purportedly friendly arguments about the ease of prosecution and often blocked from constitutional challenge, the relationship remains normatively resilient. The result is a banal sexism in a world that believes sexism in the criminal law is dead, a world in which you can threaten to kill your wife, proceed to have sex against her will, and still commit something less than real rape.

80. See Eskow, supra note 23, at 696-97.
81. E-mail interview with Nancy Lemon, Jan. 10, 2000.
82. Eskow, supra note 23, at 701 (quoting Linda Eufusia, Deputy District Attorney in San Mateo County's Sexual Assault Unit).
83. See id.
84. See supra text accompanying notes 65-71.
C. Battered Women and Self-Defense

One of the very odd things about some feminist reforms in the criminal law is their ability to continue to generate controversy even after the reforms themselves have become ingrained in the law. For every "noncontroversial" feminist reform that stands unimplemented, there remain widely implemented reforms that continue to be "controversial." Battered woman syndrome evidence is the classic example. Almost every state in the nation now accepts battered woman syndrome testimony. Indeed, courts in many jurisdictions have used battered woman syndrome evidence as a template for nonfeminist claims—claims of siblings, children, and even parents. Whether or not those rulings are correct, they exist and are not particularly controversial for courts (even if they should be).

The question this raises is why courts have so willingly embraced battered woman syndrome evidence while controversy about the syndrome increases in intensity. There is more writing deeply skeptical of the syndrome than ever before. Scholars, writing both for academic and popular audiences, have reviled the syndrome, urging that it lacks scientific validity, wreaks havoc with the law of self-defense, and may help to excuse executioners. Feminist reform remains oddly questionable, somehow illegitimate, and apparently political even though courts and legislatures have accepted syndrome evidence quite easily. The gist of the argument centers on the implication that the syndrome effectively changes the law "for battered women" and provides them a "special defense." As a legal

85. As of 1995, one study found that "[e]xpert testimony on battering and its effects" had been held admissible, at least in part, in "each of the 50 states and the District of Columbia" and that "[t]welve states have enacted statutes providing for the admissibility of expert testimony." Janet Parrish, Trend Analysis: Expert Testimony on Battering and Its Effects in Criminal Cases, 11 WIS. WOMEN'S L.J. 75, 81-83 (1996). The report noted, however, that "18 states have also excluded expert testimony in some cases." Id. at 83.


87. See, e.g., WILSON, supra note 5, at 56 ("The position that so many judges and legislators have taken is scientifically suspect, philosophically debatable, and legally unnecessary."); id. at 62-66 (discussing battered women's nonconfrontational killings and suggesting that changes in the law authorize "private, paid executions" in such cases); Faigman & Wright, supra note 5, at 76-79 (questioning the validity of studies supporting battered woman syndrome and concluding, id. at 79, that "the integrity of legal doctrine has suffered immensely from the syndrome's spread across the landscape.").
matter, this is not correct; there is no separate "battered women's" defense and courts routinely insist that they are not changing the law. And yet, doubts about this conclusion persist in the academic literature.

The problem with all of this lies in the overarching assumption that the syndrome implicitly aims to "change" the law of self-defense in ways that are, at best, political or favoritist. I believe that there is reason to doubt that normative claim. Indeed, for the student of self-defense law, the legal norms embodied in the syndrome are so conventional that if one were to encapsulate the syndrome in a set of jury instructions (rather than in expert psychological testimony), what you would end up with could all be supported by nineteenth-century law citations. The syndrome does many things: among them, it emphasizes the importance of past threats and the severity of the anticipated harm. Perhaps more importantly, it attempts to rebut the claim that the defendant should have left and focuses the jury on the defendant's perception of the events and her situation. There is nothing inconsistent between any of these notions, however, and established self-defense law. Since the nineteenth century, past threats and violence, including the victim's character for violence, have been considered highly relevant to a claim of self-defense, on questions of imminence, aggression, and threat. In 1888, courts would charge juries that the reasonable person is not to be judged by some "ideal" standard but that the jury was "to put themselves in the position of the assailed person, with his physical and mental equipment, surrounded with the circumstances and exposed to the influences with which he was surrounded, and to which he was exposed at the time." Similarly, it was well established then that the

88. See, e.g., State v. Koss, 551 N.E.2d 970, 974 (Ohio 1990) ("Thus, admission of expert testimony regarding the battered woman syndrome does not establish a new defense or justification. Rather, it is to assist the trier of fact [to] determin[e] whether the defendant acted out of an honest belief that she was in imminent danger . . . .").

89. See supra note 87.


91. See, e.g., People v. Thomson, 28 P. 589, 590 (Cal. 1891). The court stated that [u]nder these circumstances, all the acts and conduct of the deceased, either in the nature of overt acts of hostility or threats communicated or uncommunicated, were proper evidence to be considered by the jury as shedding light—to some extent at least—upon the issue as to whether the deceased or the defendant was the aggressor in this fatal affray. These principles are elementary in criminal law, and a citation of authorities not demanded . . . .

Id.

92. United States v. King, 34 F. 302, 309 (C.C.E.D.N.Y. 1888). The jury was charged as
defendant's perception of the victim's threat, rather than an actual threat, was sufficient to establish self-defense if the perception was reasonable (indeed, this was and still is known as the "appearances" rule).

Finally, it was well established that one does not automatically provoke an incident or become an aggressor by walking into a dangerous situation or staying in a dangerous place—whether that dangerous situation is a barroom brawl or a shootout at the O.K. Corral. There is no pre-retreat rule for dangerous situations, marriages included.

If this is true, and the syndrome's legal propositions are not terribly controversial, this may help explain why so many courts have been so willing to accept the substance of the expert testimony even if there remain commentators that express recurring doubts about its form as a "syndrome" or its necessity as "expert" testimony. But, more importantly, courts may have gravitated toward this testimony because judges have a vague, unarticulated intuition that the rules work well for strangers but not for those involved in intimate relationships. I recently conducted a study of self-defense cases that attempts to show that the reason the rules do not work well is because the relationship between the parties provides

follows:

> [I]n determining whether it is founded on reasonable grounds, the jury are not to conceive of some ideally reasonable person, but they are to put themselves in the position of the assailed person, with his physical and mental equipment, surrounded with the circumstances and exposed to the influences with which he was surrounded, and to which he was exposed at the time. If, with these tests applied... the jury are satisfied that there was then an apparently imminent danger of death or grievous bodily harm to the person assailed, he is entitled to act upon the appearances.

Id. 93. See id.

94. See, e.g., Ball v. State, 29 Tex. App. 107, 125-26 (Tex. Ct. App. 1890) ("Defendant's presence at the place where the killing occurred could not, under the circumstances, constitute provocation to the deceased."); State v. Bristol, 53 Wyo. 304 (1938) (Defendant had no duty to avoid entering a bar where he knew his adversary—who had threatened to attack him—to be drinking,); ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 147 (3d ed. 1999) (noting that English self-defense law protects the freedom to move, excepting from the duty to avoid violence, claims "in those cases where [the defendant] is acting lawfully in remaining at, or going to, a place" and that American law "takes the point further").

95. The emphasis here is on the "legal propositions" for which the syndrome stands. As can readily be noted by my summary, I make absolutely no claim about the psychological validity of the syndrome, a topic on which I have no opinion nor the expertise to entertain one.

96. Curiously, those who do know something about self-defense law have noted the seeming parallels between the syndrome and self-defense law, and cite those parallels as a reason to condemn the syndrome. See Faigman & Wright, supra note 5, at 88-89 ("[T]he syndrome so closely parallels the law of self-defense that its basic parameters appear to be controlled more by legal convenience than by psychological observation or theory.").

97. See supra note 87 and accompanying text.
the norms, and those norms overwhelm the law. Let's face it, battered women's cases are about the legal relevance of leaving. Judges and juries want battered women to leave before they kill (as we all do). The important question for most battered women's cases, however, is the legal relevance of departure to the standard case of confrontational self-defense. The man who walks into the dangerous bar for the fiftieth time or walks into a dangerous neighborhood for the eightieth does not lose his self-defense claim because he should have "left" before the knife was above his head. If the law is imposing such a rule on battered women in confrontational situations, then it is imposing a special disadvantage on those women, not a special advantage. Under this view, the syndrome becomes a kind of "normal" corrective to a law whose normative references risk unbalance: in confrontational cases, something like the syndrome, perhaps simply in the form of jury instructions, is necessary to remind the law of self-defense of its own commitments. Put another way, such testimony is necessary to rebut the implicit norm that there is a "pre-retreat" rule, a rule requiring defendants to "leave" dangerous places or relationships simply because they are dangerous.

To see the power of the norms demanding "departure"—in what should be a classic self-defense situation—consider the case of Barbara Watson. Watson was on the ground, and her husband's hands "around [her] neck," but the trial court found that she did not kill in self-defense because the threat against her was not "imminent." (Self-defense generally requires a finding that the defendant used deadly force only when faced with an imminent threat of death or great bodily harm.) As the appellate court reported it, the trial judge believed the threat was not imminent because of "[his] view of the parties' relationship involving 'a long course of physical

98. Victoria F. Nourse, Killing Time (draft manuscript, on file with author) (analyzing self-defense cases raising the issue of "imminence").
99. See supra note 94.
100. If I am correct, it would contravene basic self-defense law not to give an instruction that explained to the jury the difference between a retreat rule (which some states require in the event of confrontation) and a pre-retreat rule, which would require the defendant to avoid dangerous situations altogether.
102. Id. at 951. As the Watson court emphasized, "[t]he central issue in this case stems from the trial court's finding that appellant's belief—that she was in imminent danger... was unreasonable." Id. (emphasis added).
103. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., SUBSTANTIVE CRIMINAL LAW § 5.7 (1986).
abuse.” Put bluntly, the trial judge thought Watson should have left before her husband’s hands were around her neck. Of course, he did not express it that way. He used the apparently neutral, but quite difficult, imminence category and filled it up with social norms about Watson’s “proper” relationship to her husband and her responsibility for that relationship. Indeed, in reversing, this is precisely what the appellate court found, rejecting as questionable the notion that the violence could not be “imminent” because of the “parties’ relationship.”

To be sure, Watson’s case may be unusual. But that it could happen at all suggests the ability of the norms of relationship to overpower the law’s own commitments as well as the ease with which such norms are hidden—here, within the concept of “imminence.” The Watson trial court could not possibly have held as it did without believing that “imminence” amounted to a kind of “leave-him-first” rule, a rule imposing responsibility for the relationship, including its violence, on the defendant. But there were many ways in which the doctrine might have lent some apparent (although ultimately unavailing) support to that conclusion. The law of self-defense does often require that the defendant avoid the violence once it starts (sometimes known as the retreat rule). Similarly, the law does reject the self-defense claims of those who “provoke” the violence or

104. Watson, 431 A.2d at 951. I have left out here, but do not mean to slight, the end of this sentence which indicates that the trial court also believed that the defendant’s response was disproportionate since the victim did not have a weapon. Id. It is well-established self-defense law, however, without regard to battered women, that a physical struggle, particularly where the parties are of unequal size or physical capacity, may be met with deadly force. See State v. Wanrow, 559 P.2d 548, 556, 558-59 (Wash. 1977) (en banc).

105. Watson, 431 A.2d at 951-52 (“A woman whose husband has repeatedly subjected her to physical abuse does not, by choosing to maintain her family relationship with that husband and their children, consent to or assume the risk of further abuse.”).

106. Id. at 951.

107. Watson is not unusual in one sense: the tendency to use “imminence” as a catch-all to incorporate a number of the other requirements of self-defense law (including retreat rules in nonretreat jurisdictions) is not limited to the battered women’s cases; if my research is right, it is a common feature of self-defense cases. Indeed, contrary to the general assumption, the vast majority of appellate cases raising imminence as a relevant legal issue are not cases of nonconfrontational homicide—cases in which battered women or others kill long after the last threat. Indeed, this goes a long way to showing that imminence does not, as conventionally assumed, simply amount to “clock time.” It is precisely because the clock is not at issue—because the hands are around the defendants’ necks—that imminence takes on other meanings, as it has since its origins in the early common law notion of “sudden affray.” See Nourse, supra note 98.

108. This rule applies in a minority of jurisdictions; it has proven to be of continuing controversy throughout the history of the law of self-defense. See Dan M. Kahan, The Secret Ambition of Deterrence, 113 Harv. L. Rev. 413, 429-35 (1999).
create the conditions of their own defense.¹⁰⁹ The only problem with these "legitimate" reasons is that, when applied to the relationship (and not the violence), they create a rule that the law has never announced—that a woman loses her right of self-defense merely because she is married.

Unfortunately, lawyerly conventions themselves may be responsible for this state of affairs. Addressing the problems of self-defense in general, academics and lawyers, feminists and nonfeminists alike, have focused on the question whether the law should soften its standards for the odd and difficult cases involving battered women who kill their sleeping husbands long after the threat has long subsided.¹¹⁰ Talk of self-defense thus becomes a question of whether the legal standard is appropriately subjective or objective. This discourse does a fine job of providing a conclusion (subjectivity equals bad; objectivity equals good), but it tells us very little about what the content of the rules should be and, crucially, what we really mean by "necessary" self-defense (in battered women's cases or anyone else's). Must a defendant really exhaust all "legal alternatives" before exercising the right of self-defense? The law has never uniformly required this. If we believed such an "avoid-violence-at-all-costs" rule were appropriate, then why is it noncontroversial that we have no shoot-'em-in-the-foot rule; or why have a majority of jurisdictions rejected a retreat rule? When we say of self-defense that it is necessary, why do almost all jurisdictions allow people to kill in the face of a threat that they know is serious but not life-threatening?

These questions recede in importance, however, once objectivity and subjectivity become the central focus. Perspective, rather than meaning, becomes the controlling issue. And, once that is the question, it follows fairly clearly that urging justice for battered women means seeking a political, self-interested, and weaker

¹⁰⁹. See LAFAVE & SCOTT, supra note 103.

¹¹⁰. One of the premises of the debate, albeit one for which there is little empirical support, is that battered women's cases are, like Judy Norman's, primarily ones of long-delayed homicidal attacks. See, e.g., David L. Faigman, Note, The Battered Woman Syndrome and Self-Defense: A Legal and Empirical Dissent, 72 VA. L. REV. 619, 621 (1986) ("Frequently, however, a battered woman kills her mate after an attack has ended or at some time when, seemingly, no immediate threat is present."); Cathryn Rosen, The Excuse of Self-Defense: Correcting a Historical Accident on Behalf of Battered Women Who Kill, 36 AM. U. L. REV. 11, 43 (1986) ("Most battered woman's defense cases involve situations in which the defendant was not, in fact, in imminent danger of death or serious bodily harm at her victim's hands."). But see Maguigan, supra note 90 (arguing that most appellate cases involve confrontational, rather than nonconfrontational claims).
standard for the “weaker” sex. When this issue is framed as one of subjectivity and objectivity, the only thing about which we can argue is whether the rules are really rules or exceptions, rather than the content of those rules. In this sense, subjectivity/objectivity talk keeps the syndrome controversial. Because the only legal basis on which the syndrome appears to rest is “subjectivity,” it always appears as politics in legal guise.

The story of battered woman syndrome is a story like the ones I have recounted: we have vague legal concepts harboring unresolved social norms, sometimes disavowing and even contradicting the law’s overt commitments. The law of self-defense does not generally require that the defendant “leave” before the attack has started; it clearly disavows the notion that married women lose their right of self-defense; and, by embracing syndrome evidence, it even attempts to rebut juries’ implicit judgments that a battered woman must leave the relationship before the deadly attack. And, yet, these overt commitments may be shattered by social norms that demand, like they did of Barbara Watson, precisely the contrary—norms that are not openly stated but instead are disguised in the apparently objective judgments of imminence and necessity.

In summary, all of these problems are exacerbated here, not by the processes of legislative reform, but by the habits of the legal academy and courts. Debate about the syndrome has tended to revolve around whether it creates a “special” rule for women in significant part because of the prevalence of objectivity/subjectivity discourse. There is good reason to suspect, however, that this discourse leads to diversion. Battered women’s cases—whether confrontational or nonconfrontational—raise difficult questions because the law of self-defense is neither as transparent nor as settled as many hope or believe, and because the resulting ambiguities are vulnerable to powerful social norms. The great unanswered questions of self-defense law—questions about the meaning of imminence and retreat and necessity—are not likely to be resolved by a debate about subjectivity and objectivity. And, as long as they are not resolved, these meanings may well be provided not by the law’s best judgments, but by society’s worst judgments—by societal norms about relationships that contradict the law’s own aspirations.

**CONCLUSION**

It simply defies reality to conclude that there has not been
significant feminist reform in the criminal law—there has. The interesting and challenging part is to understand how and when success lives with failure. This is worth investigating in its own right so that we may better understand the odd, discontinuities of reform rather than simply assuming the impossibility of change or the ease of effectuating it.

I have argued that feminism contests powerful social norms about intimate relationships, which makes reform intensely controversial in very personal ways. People resist feminism because it seems to place them in positions in which they may have to question their most intimate relationships, their identity, and their daily lives. At the same time, this resistance, when overcome by legal reform, is likely to remain embedded in reform efforts, albeit in ways that are difficult to see, helping to perpetuate that which the law openly disavows.

Perhaps it is no wonder, then, that we live in a world of feminist success and failure in the criminal law. The resulting inequalities, however, should be cause for great concern not only among feminists, but also among criminal law scholars generally. Social norms of inequality have tended to perpetuate themselves in the criminal law, despite the law's disavowals for reasons beyond feminism itself. First, constitutional litigation, a typical source of normative challenge, provides little relief for crime victims; not only is it very difficult for potential victims to get into court to assert an equal protection claim, but the federal courts remain wedded to the principle that they do not want to "involve" themselves in the substantive criminal law (particularly criminal laws affecting women) lest they become courts of domestic jurisdiction. Second, the norm-entrepreneurs of the criminal law academy have remained largely silent. At least until quite recently, the entire idea that norms could or did affect the criminal law was seen as "off limits," as a kind of terrible acknowledgment of the power of the community to destroy the individual. Criminal law theory is deeply positivistic; it proceeds upon the assumption that social norms are not the business of the law itself but in fact must be relegated to the institutional world of the

111. See, e.g., Rehnquist: Is Federalism Dead?, LEGAL TIMES, May 18, 1998, at 12. The Legal Times reported Chief Justice Rehnquist's remarks before the American Law Institute, which were critical of efforts in Congress to increase the criminal law jurisdiction of the federal courts on the grounds that these matters should be left to the state. Chief Justice Rehnquist included the Violence Against Women Act, a civil rights remedy, within his catalog of "criminal law" statutes. See id.
jury. When theory blinds itself to the power of norms to change and affect law, it pushes legal reform into theoretically unstable positions. Even reforms that are widely accepted by courts are somehow seen as "political" (in the pejorative sense of that term) rather than principled.\textsuperscript{112}

Feminist reform has been generating, and no doubt will continue to generate, discontinuous results in the criminal law and elsewhere. By this, I mean that the old discarded norms will live on beside the new ones, beckoning as if in perpetual challenge. If this is right, judgments of any statutory reform's futility or success must be issued with caution. At the same time, there is no reason for a sense of defeatism or of failed feminism. In urging that reform's failures may be "normal," I am simply suggesting that legal reform is a work in progress. Statutory reform rarely ends anything. It may transform the debate, yet it would be naïve to believe that it could "end" a matter as ancient as sexism. This does not mean that reform is futile, but it may simply mean that reform demands perpetual vigilance. To paraphrase Reva Siegel (in another context): "[s]o long as we view [reform] in static and homogenous terms... it is plausible to imagine ourselves at the end of history, finally and conclusively repudiating centuries of racial and gender inequality."\textsuperscript{113} For reformers, there is no time to pause as if we are at "the end of history." There simply is too much "unfinished business" in the criminal law.

\textsuperscript{112} See, e.g., \textit{Wilson, supra} note 5, at 68, 112 (criticizing battered women's claims as seeking to "invent a new standard of personal accountability," \textit{id.} at 68, and suggesting the acceptance of these claims is "[m]otivated by empathy for some group of disadvantaged defendants," \textit{id.} at 112).