

November 2007

In Defence of Gender Neutrality Within Rape

Philip N.S. Rumney

Follow this and additional works at: <https://digitalcommons.law.seattleu.edu/sjsj>

Recommended Citation

Rumney, Philip N.S. (2007) "In Defence of Gender Neutrality Within Rape," *Seattle Journal for Social Justice*: Vol. 6: Iss. 1, Article 40.

Available at: <https://digitalcommons.law.seattleu.edu/sjsj/vol6/iss1/40>

This Article is brought to you for free and open access by the Student Publications and Programs at Seattle University School of Law Digital Commons. It has been accepted for inclusion in Seattle Journal for Social Justice by an authorized editor of Seattle University School of Law Digital Commons.

In Defence of Gender Neutrality Within Rape

Philip N.S. Rumney¹

INTRODUCTION

In a previous issue of the *Seattle Journal for Social Justice*, Patricia Novotny discussed the issue of gender neutrality within rape statutes and its implications for women, men, and the relations between the two sexes.² Gender neutrality within rape statutes is the concept that the criminal law should recognize that both men and women can be rape victims as well as perpetrators. Gender neutrality within rape reflects modern understandings of the nature, effects, and dynamics of nonconsensual penetrative sex acts, and is an evidence-led means of appropriately labeling criminal conduct. By contrast, Novotny argues that gender-neutral reforms raise a number of concerns and may have a number of negative consequences for female victims of rape. Novotny takes issue with the growing recognition of male victimization³ and suggests that gender neutrality within rape might form part of a backlash against feminism;⁴ that it is a form of “gender disguise”;⁵ that gender neutrality suggests men and women are equally victimized;⁶ that gender-neutral rape statutes may have undermined rape law reform;⁷ and that men and women “experience sexual assault differently.”⁸ Novotny’s article is underpinned by what appear to be theoretical objections to gender-neutral rape statutes that are not grounded in the wider legal and social science literature. This carries with it the attendant danger that theoretical objections to gender neutrality in rape will override the reality of male sexual victimization and its appropriate labeling by the criminal law.

While I consider Novotny’s concerns over the “growing insistence that men can be victims [of rape and sexual assault]”⁹ as a starting point, I also address the arguments and criticisms used by other critics of the so-called “sexual democratisation of rape.”¹⁰ I draw upon the growing research

literature on male sexual victimization,¹¹ as well as the experience of jurisdictions that have adopted gender-neutral definitions of rape as part of an analysis of the claims and concerns raised by the critics.

In Section I, I define gender neutrality within the context of rape and examine the nature of gender-neutral rape statutes, including the reasons for their enactment. In Section II, I analyze the wide range of concerns articulated by critics of gender neutrality. In Section III, I present the argument that the criticisms directed toward general-neutral rape statutes are largely unwarranted and lack evidential support. In addition, I highlight one of the weaknesses of theory-driven analysis in this area—that it does not take account of our growing understanding of male sexual victimization. Finally, I conclude by pointing out that the critics of gender-neutral rape statutes have misunderstood these reforms. The critics argue that gender neutrality consists of ignoring issues of gender in rape when, in reality, this reform has been concerned with the appropriate labeling of criminal conduct and does not prevent the gendered analysis of rape.

I. THE CONTOURS OF GENDER NEUTRALITY WITHIN RAPE

The concept of gender neutrality within rape has been influential over the last four decades in those jurisdictions that have engaged in significant reform of their rape and sexual assault laws. The fundamental characteristic of gender-neutral reforms is that they expand the definition of rape to recognize male victims and female perpetrators. Hence, they are “neutral,” but only in the sense of including both males and females as potential rapists and victims. Gender-neutral reforms vary across the many different jurisdictions in which they have been introduced; in this section, I explain some of the various ways in which gender-neutral reforms define rape and sexual assault. I will also consider the reasons that law reform bodies, legislators, and scholars have used to justify the introduction of gender-neutral rape statutes.

Across dozens of jurisdictions, gender-neutral reforms have been adopted as part of a wider law reform agenda in an attempt to reflect a more modern understanding of the purpose of rape law—the protection of sexual autonomy from the harm of non-consensual penetrative sex acts.¹² Scholars have criticized traditional rape laws that only proscribe penile-vaginal intercourse, arguing that these laws exclude “a great deal of behaviour which is remarkably similar to the act legally designated as rape and...such exclusion appears to rest on no logical or justifiable grounds.”¹³ This critique emphasizes the similarity in the physical or psychological trauma caused by non-consensual penetration of the vagina, anus, and mouth by the penis or other objects.¹⁴ Such criticism has been bolstered by the fact that traditional justifications for a narrowly defined *actus reus* in rape appear to have lost their persuasiveness.

In 1984, the Criminal Law Revision Committee (CLRC) argued that the English definition of rape, proscribing only non-consensual penile-vaginal intercourse, should be retained on the grounds that vaginal rape was “unique and grave.”¹⁵ In its previous working paper, the CLRC sought to distinguish penile-vaginal intercourse from other forms of penetration on the ground, *inter alia*, that penile-vaginal rape risks pregnancy.¹⁶ In response to such arguments, Jennifer Temkin has noted “[t]he fact that pre-pubertal, menopausal, sterilized, and infertile women as well as those who practice contraception are all covered by the law of rape suggests that [the risk of pregnancy] is not of overriding significance [in the definition of rape].”¹⁷ Therefore, the move away from a narrow definition of rape reflects a realization that the historical justifications for its existence do not survive critical analysis.

Male rape was first recognized under English law in 1994 when the definition of rape was revised so as to include non-consensual, penile-anal intercourse of a woman or a man. A further extension to the definition resulted from a report of the Home Office Review of Sex Offences (hereinafter “the Review”). In its report, the Review proposed that the

definition of rape be extended to include penile penetration of the mouth, a recommendation implemented into law by the Sexual Offences Act 2003.¹⁸ The Review recommended this change based on the trauma that can be caused by such assaults.¹⁹ Additionally, the Review adopted an expanded definition of penetration that emphasized similarities among different forms of penile penetration of the body;²⁰ notably, such emphasis has been a long-standing justification for legal reform in this area. In 1976, Jocelynn Scutt, writing about rape law reform in Michigan, argued that:

A principle of criminal law is, surely, that all persons should be protected equally from harm of like degree. . . . The case for treating crimes of like heinousness similarly appears to be stronger than that calling for a distinction to be made between penetration of the female body and penetration of the male body, whatever the sex of the actor.²¹

Thus, gender-neutral reforms have been viewed as a means of appropriately labeling conduct that is similar in nature and effect.

The importance of appropriate labeling should not be underestimated. Feminist scholars have long recognized that it is important that female rape survivors be able to put an appropriate name or label to their experiences of abuse so as to undermine “the isolation of feeling that you are the only one.”²² In her analysis of findings from interviews with female victims of rape and sexual assault, Liz Kelly has stressed the significance of such naming in challenging the invisibility of male violence: “Lack of care in the terms we use to name forms of male violence can result in limited definitions which reinforce the public invisibility of much [of] the range of abusive behaviour men engage in”²³ Recently, Stephanie Allen applied the concept of naming to male victims and noted that the lack of public acknowledgement of male rape has impacted the ability of victims to recognize their own victimization. Allen quotes one male victim who was raped in the 1960s: “I knew it wasn’t right, because I felt so awful afterwards, but I didn’t know what it was because nobody had heard of

male rape in those days.”²⁴ In recommending the adoption of an expanded gender-neutral definition of rape, the Republic of Ireland Law Reform Commission acknowledged a “consensus” that favored an expanded definition amongst groups working with victims:

We attach considerable significance to the fact that these views are held by persons who are in daily contact with the victims of assaults and who are in a position to observe their use of language. We were also told by them that appropriate labeling of offences contributes to the victim’s sense of being vindicated and protected by the State and that any description which seems to understate the gravity of an offence or put it in a lesser category will be resented by the victim.²⁵

The idea of labeling or naming abusive acts as rape leads to another issue—the relationship between the lack of societal recognition of male rape and institutional neglect of the problem. The historic failure of the legal process in most jurisdictions to recognize rape outside the male-on-female paradigm may have also contributed to the failure of society to acknowledge male sexual victimization. In the context of male rape, it has been argued that “[t]he general belief persists that either men cannot be raped, or if they are, so few men are raped that it becomes a freak occurrence.”²⁶ This lack of acknowledgement can also lead to isolation amongst victims and contribute to a view that little needs to be realized in order to address the problem of rape outside the male-on-female paradigm. Similar problems exist in cases of sexual violence and abuse within the gay community; for example, Lori Girshick notes that:

The lesbian, bisexual, and gay communities have generally denied abuse, silenced victims, and protected abusers. This loyalty to the community has made it difficult to expose the negative aspects of abusive same-sex relationships. In fact, lesbians or bisexual women may blame survivors for their abuse rather than hold an abuser accountable, since this would require community acknowledgment of the abuse.²⁷

Legal acknowledgement of such abuse may help to break down societal notions of denial and assist male and female victims in seeking support and legal redress.²⁸

Jurisdictions that have adopted gender-neutral laws include: Canada, all Australian states,²⁹ the Republic of Ireland,³⁰ Finland,³¹ England and Wales,³² and the vast majority of states within the United States.³³ Gender-neutral reforms, however, are not uniform in nature. Some jurisdictions have adopted laws that are fully gender-neutral—these laws recognize male victims of rape and acknowledge that women can physically commit the act of rape.³⁴ In order to achieve gender neutrality, jurisdictions have adopted an expansive definition of sexual intercourse that includes penetration of the vagina, anus, or mouth with a penis, hand, tongue, or inanimate object.³⁵ These definitions also cover assaults where a woman coerces a man, woman, or child to penetrate her in one or more of the ways stipulated.³⁶ Other jurisdictions, such as England and Wales, have extended the definition of rape to include male victims,³⁷ but do not recognize females as principal offenders (although women can be convicted as accessories).³⁸ While most reform jurisdictions do recognize same-sex rape, Indiana is unusual in that it has a gender-neutral law that only recognizes rape between heterosexuals.³⁹

Given the significant level of rape law reform that has taken place across many jurisdictions, it is interesting to note Novotny's claim that gender-specific definitions of rape (involving a male perpetrator and female victim) represent, in the United States, the "classic definition."⁴⁰ This definition has undergone significant revision over the last four decades. In addition, documented awareness of male sexual victimization in the United States can be traced back to the early nineteenth century.⁴¹ Outside of the United States, gender neutrality within rape appears to have a longer history. For example, in China, there was explicit regulation of male rape dating back to 1740.⁴² Novotny also appears to suggest that the recognition of male victimization was not a goal of rape law reform,⁴³ however, she cites no

authority for this claim and, while it might be true in some jurisdictions, this description most certainly does not describe the motives behind reform in others.⁴⁴

The issue of male victimization has also been the subject of discussion in the context of the U.S. Model Penal Code (hereinafter “the Code”). The Code’s focus on a gender-specific definition of rape has been justified on the following grounds:

[Although] the male who is forced to engage in intercourse is denied freedom of choice in much the same way as the female victim of rape . . . [the] . . . potential consequences of coercive intimacy [for males] does not seem so grave. For one thing there is no prospect of unwanted pregnancy. And however devalued virginity has become for the modern woman, it would be difficult to believe that its loss constitutes comparable injury to the male.⁴⁵

The Code’s commentators, according to Susan Estrich, regarded the issue of gender neutrality as a “close question.”⁴⁶ Further, Estrich notes that if the Code was being rewritten today it might well be drafted in gender-neutral language.⁴⁷ In a recent article, Deborah Denno argues that the Code should be updated, stating that: “The male-perpetrator, female-victim requirement dates the Code in light of modern attitudes and knowledge about the comparable severity of rape involving other gender combinations. Given the Commentaries’ own recognition of this inequity, a change to gender neutrality is long overdue.”⁴⁸ Indeed, the Code has been overtaken by societal events as well—particularly court decisions that have recognized the incidence of rape outside the male-on-female paradigm.⁴⁹

II. ANALYZING THE CASE AGAINST GENDER NEUTRALITY IN RAPE

What is readily apparent when reading the critical literature on gender neutrality within rape is the wide range of concerns and negative effects reportedly identified by its critics. In this section, I critically examine six specific concerns and negative effects that are to be found in Novotny’s

article and the work of other critics. I compare the arguments put forward by the critics with the current scholarly literature on male sexual victimization in order to judge their persuasiveness. Given that these arguments are at the core of the case against gender-neutral rape statutes, this analysis will allow us to judge whether the critics have made a convincing case.

A. The Growing Recognition of Male Victimization

A fundamental issue to any discussion of male sexual victimization is the seeming unease exhibited by some critics of gender-neutral rape statutes at the increasing societal recognition of, and response to, male sexual victimization. Novotny's discussion of male rape and sexual assault illustrates this unease. At the core of her article is what she sees as the "potential consequences—good or ill" of "unsettled" cultural expectations regarding sexual violence, including the idea of gender neutrality.⁵⁰ Novotny states that "[a] number of recent events, suggesting male co-optation of the victim category, prompt this inquiry."⁵¹ Included in Novotny's list of events is the increased willingness of males to complain of sexual abuse by members of the Catholic Church;⁵² the "mini-industry" of therapists who work with male survivors;⁵³ the increasing number of men complaining of sexual harassment;⁵⁴ and a recent study that found nearly as many men reporting unwanted sexual activity as women.⁵⁵

Novotny seems to have difficulty with the notion that male victimization is something worthy of attention and she appears to take exception to the coverage that sexual abuse of boys by Catholic priests has received in the media. While describing the scandal as "interesting," she states: "[e]xploitation of the vulnerable by authority figures is hardly newsworthy. Exploitation by Catholic priests, in particular, is an old story to many former Catholic schoolgirls."⁵⁶ It is regrettable that, given her concern about rape and sexual assault, Novotny would argue the sexual abuse of boys⁵⁷ at the hands of Catholic priests, the ongoing slowness of the Church

to take effective action, and the subsequent payment of millions of dollars in compensation are issues that are “hardly newsworthy.”⁵⁸ Novotny’s stance appears to be that when males are victims, their victimization is not worthy of attention, a view occasionally shared by some other legal scholars.⁵⁹

One might wonder what the reaction would be if Novotny’s analysis were to be applied specifically to female victims. In a recent news story concerning the Catholic Church in Northern Ireland, a woman claimed that her marriage had fallen apart due to trauma caused by abuse she had suffered as a child at the hands of a priest. Referring to this sexual abuse, the priest who refused the woman’s marriage annulment application told her “[t]here is undoubtedly a tendency to exaggerate its effects on individuals.”⁶⁰ The comment was defended by the Church that stated: “[The priest is] playing devil’s advocate. He’s not representing the church’s attitude. He’s not going to please everybody.”⁶¹ Applying Novotny’s apparent view on male victims to a similar circumstance as the instant case, one could imagine the justifiable outrage if it were to be suggested that such a story was “hardly newsworthy.” These stories, whether they feature male or female victims, signify ongoing institutional failures and are a sign that the press is performing a crucial societal function by highlighting the abuse of power. This particular story also indicates a further problem—the institutional failure to understand the harm and impact of rape and sexual abuse.⁶²

The recognition of male sexual victimization in the contexts identified by Novotny surely suggests, to use her word, a “gain”⁶³ in the struggle against sexual assault and harassment.⁶⁴ As will become apparent, however, the tone and content of her article conveys unease at the trend towards gender neutrality within rape. Novotny, like other critics, appears to pit one group of victims against another while placing them in a hierarchy of importance. Such an approach is particularly unfortunate because it is quite possible to

share Novotny's concern about the plight of female rape victims without questioning the recognition of male rape and sexual assault.

B. Gender Neutrality as a "Backlash" Against Feminism

Novotny asks whether gender neutrality is "just another 'backlash' story?"⁶⁵ In other words, is the "insistence" that men can be victims too, a means of attacking feminist perspectives on rape and sexual assault? Novotny is not the first commentator to raise this concern. Florence Rush, writing about the backlash against feminism, recounts being informed about a committee created to raise awareness of male rape and campaign for a gender-neutral rape law in New York;⁶⁶ she asks: "Was this group simply looking for equal protection under the law or was it telling us that male rape is not an issue of sexism because women also rape men?"⁶⁷ She does not explain whether she actually put these questions to the committee or its response.

The backlash argument appears to suggest that gender neutrality in rape is inconsistent with feminist principles and, indeed, is an attack on feminist analysis of rape. However, the backlash argument is, in reality, an attempt at historic revisionism that shows an ignorance of the history of the feminist movement. Since the 1970s, many feminists have favored the legal recognition of male rape, while at the same time being unambiguously committed to the needs of female rape victims.⁶⁸ Further, some prominent male commentators who are concerned with male sexual violence and victimization have located themselves within a feminist perspective.⁶⁹ Another aspect of the backlash argument is the suggestion that gender neutrality undermines feminist conceptions of patriarchy. Novotny asks the following questions: "If men are victims of rape, then rape is not a tool of patriarchy? Indeed, is patriarchy itself a figment of feminist imagination?"⁷⁰ I will endeavor to provide an answer to these questions.

If male power were to be viewed as monolithic, then the recognition of male victims might have the implications for feminist analysis that Novotny

suggests. Yet, few commentators see male power (or female victimization) in such absolute terms. The answer to Novotny's questions is that the recognition of male rape and sexual assault does not undermine feminist explanations or analysis of sexual violence. The recognition of male victimization, in fact, supports feminist arguments concerning male power. Jeanne Gregory and Sue Lees have noted that male and female rape "can both be seen as forms of promoting dominant hegemonic heterosexuality."⁷¹ In earlier work, Lees argued that "to embrace non-consensual buggery of men under the same legislation [as women] is not, in my view, to deny the relation between rape whether of men or women and male domination, and in particular, domination of the particular hegemonic form of macho masculinity characteristic of western cultures."⁷²

In reality, feminists have long recognized male victimization; however, this simple reflection of reality has not prevented them from engaging in an analysis of power relations between men and women that highlight issues of inequality, victim-blaming, or the extent of female victimization, and nor should it. For example, in her groundbreaking study of female rape, *Against Our Will: Men, Women and Rape*,⁷³ Susan Brownmiller was also able to recognize the reality of male victimization:

While the penis may remain the rapist's favorite weapon, his prime instrument of vengeance, his triumphant display of power, it is not in fact his only tool. Sticks, bottles and even fingers are often substituted for the "natural" thing. And as men may invade women through their orifices, so, too, do they invade other men. Who is to say that the sexual humiliation suffered through forced oral sex or rectal penetration is a lesser violation of the personal, private inner space, a lesser injury to mind, spirit and sense of self? . . . All the acts of sex forced on unwilling victims deserve to be treated in concept as equally grave offenses in the eyes of the law, for the avenue of penetration is less significant than the intent to degrade. Similarly, the gravity of the offence ought not to be bound by the victim's gender. That the law must move in this direction seems clear.⁷⁴

Novotny's reference to patriarchy represents an unsophisticated view of male dominance and men's relative power to that of women. In raising her concerns, Novotny does not acknowledge, as others have, that men can exercise power over other males as well as they can over women. It might also be asked why it is not possible to recognize the reality of male power, yet at the same time recognize that it is not a singular all-embracing force that shapes the lives of all men and women in identical ways, in all circumstances. Indeed, Ngaire Naffine, in a different context, notes that: "There are always gaps and dissonances between the dominant view of heterosexuality (as pleasurable coercion) and women's encounters with it (which of course are multiplicitous, not singular)."⁷⁵ If that were not the case, it would beg the question as to how it is possible for the work of Novotny to even exist?⁷⁶ The answer, of course, is that no system of domination, whether political, economic, or gendered, is absolute. Similarly, it becomes very difficult to accept that there is a single reality in rape; that is, men rape women and men can never be victimized, or if they are, this act has a meaning so different for men that it cannot be labeled as rape. As such, it is submitted that the recognition of male victimization does not undermine the notion of patriarchy; it merely acknowledges that sexual coercion can also, in a minority of cases, exist in other contexts. To deny this reality creates the danger of theoretical objections to gender neutrality in rape, overriding the reality of rape and sexual assault outside the male-on-female paradigm.

C. Gender Neutrality as "Gender Disguise"

At the center of Novotny's argument is a clear concern that gender neutrality challenges this "gendered paradigm" of rape.⁷⁷ In her article, she appears particularly concerned that gender neutrality will mean that the victimization of women will no longer be of central importance when considering the problem of rape. This is a commonly cited theoretical argument used by critics, and this section considers its merit. I will further

explore the extent to which the theoretical arguments against gender neutrality have support within the wider literature on rape law and male victimization.

Novotny claims: “[G]ender neutrality in rape reform, as is often the case, means gender disguise. Without altering the gendered reality of rape itself, gender neutrality permitted an understanding of rape different from the classic male versus female paradigm.”⁷⁸ Likewise, Naffine has argued that gender neutrality “mystifies” the crime of rape,⁷⁹ and Catharine MacKinnon claims that it is a “cover-up for the gendered reality that . . . [is] . . . really going on.”⁸⁰ In reflecting upon changes in views within the feminist movement since the 1970s, MacKinnon has also argued that “[w]hen the movement criticized rape, it meant rapists and the point of view that saw rape as sex.”⁸¹ She argues that gender neutrality shifts the focus away from female victimization: “[S]o-called gender neutrality—ignoring what is distinctively done to women and ignoring who is doing it—became termed the feminist position . . . Gender neutrality means that you cannot take gender into account, you cannot recognize, as we once knew we had to, that neutrality enforces a non-neutral status quo.”⁸²

Interestingly, MacKinnon does not apply her analysis of gender neutrality to the anti-pornography ordinance drafted by herself and Andrea Dworkin. This ordinance explicitly protects women and also states: “In this definition, the use of ‘men, children, or transsexuals in the place of women’ is also pornography.”⁸³ Indeed, it is a further irony that while MacKinnon criticizes post-modernism and its failure to acknowledge the harms caused to women as a result of sexual violence, she does exactly this in her discussions of gender neutrality as a means of acknowledging male victimization.⁸⁴

Further, some critics appear to view gender neutrality as a coercive mechanism, whereby scholars and others are prevented from focusing their attention on the specific needs of female victims of rape. For example, Christine Boyle states:

The change to a gender-neutral sexual assault law discourages analysis of the law in gender specific terms. The change was a legislative order . . . to stop thinking of sexual assault as something men do to women (or to other men, thus putting those other men into the degrading position of being treated like a woman).⁸⁵

Such objections to gender neutrality are primarily ideologically driven, rather than rooted in the experience of rape victims or the scholarly literature, which continues to focus overwhelmingly on female victimization. In her evaluation of various rape law reform measures, Rosemary Tong has questioned the negative characterization of gender neutrality by radical feminists. She has argued that, to radical feminists, the recognition of male rape “deflates the notion that rape is a crime perpetrated by men against women,” which could “lead people to believe either that rape is no more a problem for women than it is for men or that rape is ‘no big thing.’”⁸⁶ While Tong acknowledges the possibility of this, she argues “feminists outside the radical community observe that if rape is understood as a crime of the powerful against the less powerful or powerless, then the public need not adopt such mistaken beliefs.”⁸⁷

The gender disguise argument espoused by scholars such as MacKinnon, Novotny, Naffine, and others can be responded to on several grounds. One might ask what precisely is being disguised and from whom? How does gender neutrality do this? Where is the evidence of this? Furthermore, if such laws are so powerful as to be a form of “legislative order,” how are these scholars able to analyze rape in the way in which they do? Why, if these laws “mystify” reality to the extent suggested, do researchers continue to focus their efforts overwhelmingly on the rape of females?⁸⁸ Is there any evidence from anywhere that suggests that gender-neutral rape laws mask the fact that most rape victims are female and that most of the perpetrators are male? Similarly, is there any evidence that gender-neutral rape laws mask the dynamics of female sexual victimization? Such claims appear to give gender-neutral laws an inflated prominence and influence. Worse, the

gender disguise criticisms of gender neutrality appear, for the most part, to be largely speculative in nature. Even where specific claims are made, they are not based on any empirically sound basis. For example, Joan McGregor assumes that gender-neutral rape laws must mean that we ignore all the knowledge we have acquired of the ways in which men and women react to sexual victimization:

Because women do not necessarily react in the same way as men, if gender-neutral statutes mean retaining male norms and reactions to rape scenarios, then women will continue to be disadvantaged. So, for example, physical resistance might be a typical male reaction to attack, but not necessarily a typical female reaction. Men are socialized to fight, to respond physically, women are not and may respond by, for example, crying or “freezing.” Subjecting women to the resistance requirement therefore disadvantages them.⁸⁹

In response to this objection, it is worth noting that it is not a typical reaction of men to physically resist rape. As noted by Gillian Mezey and Michael King, “[a]lthough it is often assumed that men are able to defend themselves, our findings demonstrate that, like women, men react to extreme personal threat with frozen helplessness.”⁹⁰ However, the fundamental point here is that even if McGregor’s description were accurate, there is no reason why adopting gender-neutral rape definitions should require us to ignore gender differences in reactions to rape. As with other critics, McGregor simply misunderstands the nature of gender neutrality within rape. Ultimately, with one exception that will be discussed next, these critics are unable to identify any substantive evidence of rape being mystified or disguised in any way by gender neutrality.

There is limited evidence, only cited by two critics, that the gender disguise view of gender neutrality may have influenced a court decision that could be said to have obscured important issues of gender in judicial decision-making. In *R. v. Chase*,⁹¹ the Court of Appeal for New Brunswick held that a Canadian sexual assault law could not be defined to include the

touching of a fifteen-year-old girl's breasts by an intruder. The court so held, *inter alia*, on the basis that the term "sexual" should primarily be limited to the genitals, reasoning that "to include as sexual an assault to the parts of the body considered as having secondary sexual characteristics may lead to absurd results if one considers a man's beard."⁹² The Canadian Supreme Court rejected the reasoning of the New Brunswick court, finding that the assault in question was clearly sexual in nature when looking at its circumstances and context.⁹³

The interpretation of the sexual assault provision by the New Brunswick court clearly ignored the differing sexual meanings that attach to a man's beard and a woman's breasts. As such, it might be argued that this decision "disguised" issues of gender. But does this case actually add support to those who oppose gender neutrality in rape?⁹⁴ Arguably, it does not.

First, as already noted, the decision was overturned on appeal. When considering judicial decision-making in the context of sexual offences, one can identify many decisions that have been subsequently held in error. However, this, in itself, is generally not seen to form a solid basis upon which to abandon the entire law that is the subject of an overruled judicial interpretation.

Second, the law subject to interpretation in *Chase* was not a rape law, nor was it the most serious sexual assault provision under Canadian law.⁹⁵ Indeed, most sexual offence laws are defined in gender-neutral language. The logic of the critics' position, however, is that rather than just undermining gender neutrality in rape, the overturned reasoning in *Chase* should support a view that all sexual offences be gender specific. Undoubtedly, there are other sexual offences that are primarily committed by males against females, and one might speculate that the power relations that are linked to rape are also linked to these other offences; for example, those involving children. The critics have yet to explain why gender specificity is only desirable in cases of rape.⁹⁶

The critics also fail to acknowledge that gender-neutral reforms are not designed to make gender irrelevant in our understanding of sexual violence; in fact, gender is central to any understanding of how and why sexual violence occurs. What is clear, however, is that while females are the main victims of sexual violence and males the main perpetrators, one still has to consider how sexual assaults beyond the male-on-female paradigm are to be labeled by the criminal law.

Gender neutrality within rape is an evidence-led means of appropriately labeling criminal conduct. It is also the case that an acknowledgement that men can be victims of rape, and that women can physically commit the act of rape, is consistent with a tradition of analysis used by feminists that examines issues of context and victim experience. These are perspectives excluded from traditional legal method. Thus, Naffine argues that “traditional legal thinking about the nature of rape and how the law should best deal with it depends on outmoded and contested images of women and their relations with men.”⁹⁷ She also argues that legal perceptions of women and rape “are both clearly pronounced and poorly informed. They take little account of the considerable empirical and theoretical literature . . . on the meaning of the crime to women.”⁹⁸

One can equally argue that in the last two decades, our understanding of male rape and sexual assault has grown so “contested and outmoded” that images of male victims can no longer go unchallenged. Thus, drawing on wider perspectives not only assists our understanding of female rape, it is also essential in our understanding of how the legal process deals and should deal with male victims of rape and sexual assault.⁹⁹ It is somewhat ironic that feminist critics of gender neutrality (rightly) criticize the legal process for failing to properly address and understand the experiences of female victims, yet they make the same mistake in their analysis of legal responses to male victimization.

Another variation on the gender disguise argument is the suggestion that gender-neutral rape statutes ignore the differing power relations between

men and women. In the context of English law, Terri Gillespie argued that “to refer to ‘non-consensual buggery’ as the same as female rape (i.e., that the crime is gender neutral), is to render invisible the gendered power relations between men and women expressed through men’s sexual violence to women.”¹⁰⁰ As is customary amongst critics, Gillespie does not explain how gender neutrality renders gendered power relations “invisible,” nor does she give any examples of this happening in jurisdictions with gender-neutral rape laws. In any case, the issue of “gendered power relations,” where the victim is female, may be relevant when considering men as the perpetrators of sexual violence, and it may help to explain why and how rape occurs. However, in terms of labeling male *victimization*, it is a stretch to link “men’s sexual violence to women” and the exclusion of male *victims* from the remit of rape. It is evident that males, like females, experience a wide range of pressures and coercion that may operate to vitiate consent for the purposes of rape.¹⁰¹ Gillespie, however, does not explain why her notion of “gendered power relations” cannot be relevant to the analysis of male sexual violence against other males.

On the basis of what we know of men’s experiences of rape and sexual assault, along with the evidence that exists on how male sexual consent is constructed within the legal process, there appear to be similarities between male and female rape.¹⁰² In fact, there appears to be no current evidence to suggest that “gendered power relations” differ so greatly in male and female rape to justify the different legal labelling of those experiences by the criminal law. In the legal sphere, it would, of course, be naïve to assume that notions of consent, submission, acquiescence, or agreement will be constructed in identical ways in all cases of male and female rape. There are likely to be differences, for example, because facts and defence tactics vary between cases, just as there are likely to be differences between cases where the victims are of the same gender. In addition, there may also be societal attitudes that attribute blame or responsibility for sexual violence to victims because of their gender and sexual orientation. Such beliefs are

potentially important in the construction of notions of consent within the legal process.¹⁰³ However, while some societal perceptions of male and female rape differ, the current literature suggests that many people's beliefs around male and female rape tend to be poorly informed. In addition, people often blame victims, male or female, for their experiences of rape.¹⁰⁴ Consequently, given many of the similarities in male and female sexual victimization,¹⁰⁵ it appears that any differences in "gendered power relations" do not justify labelling the crimes differently under the law.

It would appear that those opposed to gender neutrality within rape incorrectly assume that the concept means ignoring gender in rape and that the incidence and context of female rape cannot be considered relevant under gender neutrality. Significantly, the critics can provide no sources to support their claim. Rather, their views appear linked to a debate that has occurred between feminists who believe in formal equality—that is, gender neutrality—and those feminists who are critical of formal equality because it fails, they argue, to effectively address issues of social and gender inequality¹⁰⁶ and, indeed, is positively harmful to women.¹⁰⁷

It is apparent that feminists opposed to formal equality do not distinguish its use in differing areas of law. There are legitimate concerns about the impact of formal equality in some areas of law because "facially sex-neutral rules often contribute significantly to the maintenance of the existing system of sex differentiation."¹⁰⁸ Clearly, it is possible that gender-neutral laws may fail to acknowledge and address inequalities that may impact, for example, some fields of law. However, in the context of rape, gender neutrality is neither undermining the substantive equality of women nor are women being harmed by it. Instead, it is a simple recognition of reality—men sometimes fall victim to the same or at least very similar acts to those suffered by women. Thus, it is dangerous to take a critical broad brush to formal equality in the form of gender neutrality and simply assume it has a negative impact in all contexts.

D. Gender Neutrality as Equal Victimization

A further argument against gender neutrality in rape rests upon the claim that it implies men and women are equally victimized, or are equally likely to commit rape. As with many of their other assertions, critics are unable to offer evidence to support this claim. This section considers how gender neutrality critics construct this particular argument and also draws on the experience of England in adopting a gender-neutral rape statute to find out whether the equal victimization claim is in evidence.

Novotny notes that in “Washington, as in many states, the crime of rape may be committed if the victim is rendered mentally incapable of consent, whether through the abuse of alcohol or drugs, or for some other reason.”¹⁰⁹ After setting out Washington’s law on incapacity of consent, Novotny refers to the response of some of her students during classroom discussions to the notion of gender neutrality, stating: “Some of my students argue that if both parties are intoxicated, either both are guilty or not guilty of the crime More remarkable . . . is that my students posit a gender blind ‘date-rape’ landscape, one inhabited by as many potential male as female victims.”¹¹⁰

The problem with this analysis, however, is that from what Novotny recounts of her students’ comments, they do not appear to be arguing that there may be as many male as female victims of rape. Her students’ scenario is limited to discussing one incident involving two people. Novotny’s students appear to say nothing about the wider incidence of rape and sexual assault. In any case, the problem inherent within her students’ hypothetical is not so much in the issue of gender neutrality, but in the fact, as Novotny points out, that there is no *mens rea* requirement for rape in Washington that makes the hypothetical more likely to occur.¹¹¹ Though, of course, it would still require both parties to claim non-consent and if that were ever the case, then presumably both parties would be criminally liable. Either way, exactly the same problem could arise in the context of non-sexual assaults or a multitude of other offences.

In a variation on the equal victimization argument put forward by Novotny, Rush has also claimed that gender neutrality is “a useful tool in an attempt to establish that women are as guilty as men for the offences attributed to them.”¹¹² Similarly, Regina Graycar and Jenny Morgan claim to have identified law commission reports and judicial opinions that “give the impression that rape is as likely to be committed by women as men”¹¹³ It has to be said that this is a strained interpretation of the sources to which they refer and it is perhaps unsurprising that they do not cite any passages from law commission reports and judicial opinions to support such an interpretation. Indeed, one could equally argue that these sources did not explicitly recognize the classic male-on-female paradigm because this paradigm is assumed. When one examines the reasons why gender-neutral reforms have been introduced, it is impossible to find any suggestion by a court, legal scholar, or reform body that men and women are equally victimized or that they are equally likely to victimize. Indeed, the reality that most victims are female has been explicitly recognized.¹¹⁴ In fact, the only place where the equal victimization/victimizer claims can be found is in the work of critics such as Novotny, Graycar, Morgan, and Rush.

Novotny goes on to refer to the “surprising results”¹¹⁵ of a study by Mary Larimer et al.¹¹⁶ in which men and women were asked about their experiences of non-consensual sex. The study found that 20.7 percent of men and 27.5 percent of women “reported being the recipients of one or more of . . . five types of unwanted sexual contact.”¹¹⁷ Some other studies have also found roughly equal reporting rates of unwanted sexual contact for men and women.¹¹⁸ These studies do suggest that non-consensual sexual contact is widespread and that clearly men, as well as women, can be victims. However, this does not mean that men and women’s experiences represent, in Novotny’s words, a “gender-symmetrical view of rape”;¹¹⁹ this is only possible if one is prepared to decontextualize research findings. In order to judge the prevalence of rape from such research, one would have to

examine the meaning of such experiences to the participants, the nature of the sexual contact, and the circumstances in which the unwanted contact took place. Given the seriousness of the crime of rape, such an analysis is crucial in terms of how “unwanted sexual contact” is labeled by the criminal law.

In the midst of the various claims made by the critics of gender neutrality, it is worth comparing these criticisms with the experiences of jurisdictions that have adopted gender-neutral reforms. In this respect, reforms to English rape law that led to the recognition of male victimization are instructive. Prior to 1994, cases of non-consensual, penile-anal sex between adult males were labeled as non-consensual buggery with a maximum penalty of ten years of imprisonment, in contrast to the offence of rape, which attracts a maximum sentence of life imprisonment.¹²⁰ Indeed, it was argued that English criminal law had traditionally been primarily concerned with the regulation of consensual male homosexual behavior rather than recognizing men as victims of serious sexual assaults.¹²¹

In 1994, the offence of rape was extended to cover cases involving non-consensual, penile-anal intercourse with either a male or female victim.¹²² Those who supported this change did so on several grounds. It was argued that the function of rape law was to protect people from serious violations of their sexual autonomy and that there were clear similarities in victim trauma between non-consensual vaginal and anal intercourse.¹²³ The proponents also argued that a change in the law would mean that anal rape would be treated with appropriate seriousness in terms of sentencing and labeling, as well as providing recognition of the problem.¹²⁴ Recently, similar arguments have been made in favor of the recognition of male rape under Scottish law.¹²⁵ Neither of the equal victimizer/victimization claims made by the critics of gender neutrality are supported by the experience of law reform in England.

Interestingly, this amendment to English law has recently attracted criticism from a novel perspective. Ruth Graham claims that “the discourse

that led up to the 1994 amendment suggests that the penetration of the male body is the important violation, rather than the violation of the anus (male or female) . . . how is it that the penetration of the male anus is privileged?”¹²⁶ She also objects to a characterization of this amendment made during the Parliamentary debates in the House of Lords by Lord Ponsonby of Shulbrede, who stated that the amendment was “related to male rape.”¹²⁷ Graham also makes reference to the “almost exclusive focus on anal rape of men, rather than on anal rape in general” in discussions prior to the 1994 amendment,¹²⁸ and explains this focus by using the work of Judith Butler, noting that “[p]enetration of the female body remains less ‘shocking’ than that of the male body . . . In this context, the focus on the anal rape of men becomes more understandable, though not excusable.”¹²⁹ This would appear to be another criticism driven by theory that attempts to portray gender-neutral reforms as problematic; however, the reality is quite different because Graham inaccurately characterizes the discourse that gave rise to the amendment. In the context of the Parliamentary debates, there are repeated references to the anal rape of women, particularly in the House of Lords, where most of the discussions on the amendment took place.¹³⁰ In addition, Graham’s criticism of Lord Ponsonby is inaccurate and taken out of context. He did, indeed, make brief reference to male rape because, as he explained, “[t]he idea of male rape may well be unthinkable to many of your Lordships, as it is to me.”¹³¹ In these debates, he also made reference to female victims of anal rape,¹³² as did other Lords.¹³³ There was even a suggestion that anal rape may be more traumatic for women than for men.¹³⁴ Graham does not acknowledge these points; by misconstruing key debates that gave rise to the 1994 amendment, Graham appears, like other critics, to be guided more by theory than by evidence.

E. Has Gender Neutrality Damaged the Legal Response to Rape?

Some scholars have argued that gender neutrality has undermined the impact of rape law reform. Novotny shares this concern and poses two

related questions: “[T]o the extent the feminist challenge rightly and necessarily intended its beneficiaries to be female, has it been undermined by a rising tide of male victims? By gender neutralizing the victim position, have we gained or lost ground in the struggle against sexual assault and harassment?”¹³⁵ Novotny does not explain how the societal and legal response to rape could be undermined by the “rising tide of male victims,” but it is worth examining some of the evidence that explains why the effects of rape law reform have been “disappointing.”¹³⁶

There is a growing literature that details the limited impact reforms have had on improving the conviction rate in cases of rape and the treatment of rape complainants by the criminal justice process. Unfortunately, Novotny does not engage in any detailed discussion of such findings, though she does briefly refer to two studies on the impact of reform. If she had examined these studies in detail, along with a vast range of other research, she would find that there are a multitude of reasons for the failure of rape law reform, none of which have anything to do with gender neutrality.¹³⁷ For example, many studies have found that the attitudes and practices of criminal justice professionals have undermined reform measures. In the context of the Michigan reforms, Marsh et al., in the book *Rape and the Limits of Law Reform*, noted that “there are junctures in the investigation at which the rape victim confronts a unique scepticism in the form of institutionalized policies and practices the law did not address. These reflect both enduring myths about the crime and unchallenged bureaucratic routines.”¹³⁸

In their detailed study of rape within the U.S. criminal justice system, David Bryden and Sonja Lengnick identify several factors that lead to rape case attrition and note that “although official bias has played an important role, most rape-case attrition appears to be due to a combination of the victim’s unwillingness to seek legal redress, the prosecution’s burden of proof in criminal cases, and jurors’ attitudes.”¹³⁹ In a study of the effects of reform in several U.S. states, Spohn and Horney found that “in most of the

jurisdictions we studied, the reforms had no impact. . . . We found, like many others who have studied reforms aimed at the court system, that the rape law reforms placed few constraints on the tremendous discretion exercised by the decision makers in the criminal justice system.”¹⁴⁰

Some scholars have engaged in misrepresentation of sources in an attempt to blame gender neutrality for the failure of rape law reform. For example, Kwong-Leung Tang, in her article on rape law reform in Canada, has claimed that Canadian gender-neutral laws are “superficial and that they work to the detriment of women by minimizing the harm of rape.”¹⁴¹ Tang cites to Leah Cohen and Connie Backhouse as authority for this assertion;¹⁴² however, upon consulting this source we find that the authors do make the point Tang claims, but *not* in the context of gender neutrality. For example, they do talk about the reforms minimizing harm, but in the context of proposed sentencing reductions that have nothing whatsoever to do with gender neutrality.¹⁴³

A variation on the claim that gender neutrality has damaged the legal response to rape is the suggestion that gender neutrality is an ineffective means of addressing the problem of rape. Annabelle Mooney recently argued that gender neutrality “will not, of itself, change attitudes and behaviour . . . [for change] to occur requires not only linguistic but institutional and social reform. The gender problem is not simply one of representation, but one of experience lived and corporeal.”¹⁴⁴ Such an assertion is not wholly inaccurate; it is, undoubtedly, the case that legal reform on its own cannot solve the problem of sexual violence, as clearly demonstrated by the evidence of the impact of legal reform discussed earlier.¹⁴⁵ Indeed, this point has been recognized in some reform jurisdictions. For example, the Law Reform Commission of Canada has stressed that “we must recognize that the criminal law can serve only a limited function and should not be regarded as a replacement for other social controls.”¹⁴⁶ Mooney’s criticism, however, has nothing to do with gender neutrality within rape. She fails to consider why gender-neutral rape

laws were introduced¹⁴⁷ and appears to criticize gender neutrality for not performing some miraculous improvement in the treatment of rape cases by the criminal justice system. Yet, that is not the aim of gender neutrality; hence, gender-neutral reforms have been accompanied by a wide range of definitional and procedural reforms, along with attempts to change the attitudes and practices of those working within the criminal justice system. Mooney appears to unintentionally acknowledge this point by proposing several changes to improve the law's response to rape, as well as suggesting the need for "the re-evaluation of our understanding of crime, justice, and the institutions that deal with it."¹⁴⁸ Further, her analysis becomes confused when she states, "I by no means want to suggest that men are not raped,"¹⁴⁹ and "[n]otwithstanding men are also raped"¹⁵⁰ Such an acknowledgement begs the question, how should these "rapes" be labeled by the criminal law? Unfortunately, other than suggesting that men are "gendered female in such a crime,"¹⁵¹ she provides no explanation as to how such crimes should be classified.

F. Do Men and Women "Experience Sexual Assault Differently"?

Some critics of gender-neutral definitions of rape claim that men and women experience sexual assault in significantly different ways and, therefore, gender neutrality detracts from the unique experiences of women who have been raped. Novotny shares this criticism of gender neutrality, but fails to address the scholarly research on male victimization that provides evidence to the contrary. This failure is illustrated by Novotny's discussion of the impact of rape and sexual assault on male victims. In what is, at the very least, an overstatement, Novotny claims: "As one consequence of the centrality of gender to sexual assault, men and women experience sexual assault differently, according to social psychologists."¹⁵² In this section, I will examine Novotny's claims in light of the current literature on the impact of rape on male victims.

Novotny bases her claim that “men and woman experience sexual assault differently” on the single assertion that men’s sense of masculinity is challenged by rape, whereas in the cases of female victims it “reinforce[s] a heterosexual normative feminine self-concept for women.”¹⁵³ While this particular description of victim reactions is accurate,¹⁵⁴ Novotny’s characterization of reactions to rape is extremely narrow. In reality, there are marked similarities in the responses of adult men and women to rape. Novotny neglects to examine the full range of victim responses, including physical, emotional, and psychological reactions, along with attempts by victims to normalize or minimize their experiences.¹⁵⁵ This is not to say that all victims experience rape in the same way, but, on the basis of the current literature, there are clear similarities.¹⁵⁶ In terms of differences, within the same gender group there are wide variations between the reactions of individual victims to rape.

In the context of male rape, distinctions can also be made between the effects of attacks by women and those by men. While some men who are sexually assaulted by women can and do suffer severe trauma,¹⁵⁷ male victims in such cases appear to report fewer negative reactions than women who are raped by men.¹⁵⁸ One also has to recognize that, as with female victims,¹⁵⁹ there may be particular issues faced by men who are raped by partners or acquaintances (for example, problems of trust and an inability to escape an abusive relationship), that are not faced by men raped by strangers.¹⁶⁰ This is a specific area that requires further inquiry as it has been noted that this issue is “perhaps the most understudied topic in same-sex domestic violence.”¹⁶¹ In contrast, there are much clearer and well-established parallels between male and female victims where the assailant is male.¹⁶² Thus, male *and* female rape can be seen as having serious, long-term psychological and emotional trauma for victims.¹⁶³ In order to judge Novotny’s claim that “men and women experience sexual assault differently,” one also has to take account of recent research that examined sexual assault within lesbian relationships.¹⁶⁴ In a series of interviews

conducted with lesbians who had been sexually assaulted by other women, Girshick found that they were victims of a range of penetrative and non-penetrative, non-consensual sex acts. In comparing these women's reactions to those of women sexually assaulted by male dates or acquaintances, Girshick found clear and pronounced similarities.¹⁶⁵

Within the U.S. courts, there has also been recognition of the similarities between male and female victimization. In *People v. Yates*,¹⁶⁶ Justice Shea acknowledged the existence of "Male Rape Trauma Syndrome," and concluded:

A review of literature describing the effect of sexual assault on men reveals that male victims, both heterosexual and homosexual, exhibit a well defined trauma syndrome parallel to that found in female victims of rape. . . . Nothing in the peculiar reactions of male victims of sexual assault places them outside the medical definition of post-traumatic stress disorder [as recognized in cases involving female victims] or diminishes the validity of the conclusion that a syndrome of male sexual victimization is accepted in the scientific community.¹⁶⁷

Where does this analysis lead us? First, it is worth noting that there are differences in the way rape is experienced by individuals as well as by groups taking into account such factors as gender, sexuality, and the identity of the assailant. However, there appears to be no support within the scholarly literature for Novotny's blanket assertion that "men and women experience sexual assault differently"; instead, there are marked similarities. Furthermore, the differences between the experiences of men and women (for example, the challenging of men's sense of masculinity in cases of male rape) do not provide any obvious basis for arguing that male rape should be labeled as distinct from female rape by the criminal law.

III. CONCLUSION

The work of those who criticize gender neutrality within rape lacks sufficient or informed analysis. Novotny and other critics do not offer a

solid, empirically based argument. The claim that gender neutrality does not allow for the examination of gender when discussing rape is not the purpose or the effect of gender neutrality within rape. In addition, some critics, relying either on misrepresentation of evidence or no evidence at all, seek to construct an “ideological projection” in which they claim gender neutrality harms women.¹⁶⁸ If the critics were correct, and gender neutrality harmed women or meant the exclusion of issues of gender from discussions about rape, they would have a justifiable concern. In reality, it is difficult to imagine a responsible discussion of rape that does not consider all issues relating to gender and the realities of sexual violence faced by both women and men.

Another aspect of the critics’ analytical failure is that they are largely unable to identify any benefits that gender neutrality might hold for victims of rape and sexual assault. Graycar and Morgan, for example, ask, “[c]an you see any advantages in having a gender-neutral sexual assault law?”¹⁶⁹ Yet, they make no attempt to answer this question. In addition, the critics appear to not critically think about their own arguments, nor raise any evidential concerns. This is a significant failure given that I have demonstrated that many of the criticisms of gender neutrality fail for want of evidence. Ultimately, and despite the unwillingness of the critics to acknowledge this fact, gender neutrality within rape is concerned with the appropriate labeling of criminal behavior. The “insistence,” as Novotny describes it, of those who favor gender neutrality is to challenge outdated legal codes that attach to sexual assault inappropriate labels and inadequate sanctions and to provide a more informed legal response to male victimization. Many of the critics, in their work, refer to the needs of female victims and discuss how the criminal law has traditionally excluded women’s experiences and perspectives. One might think, therefore, that the critics would have a greater understanding when similar attempts are made to assist male victims of rape and sexual assault.

Graham, in her recent contribution to the debate around gender neutrality, illustrates the trend of gender neutrality opponents' unwillingness to engage in self-criticism. In this work Graham states:

The current research evidence remains largely exploratory, and ill suited to support the claims to empirical reality they use in their argument for gender-neutrality in the law of rape. We need to better understand what 'male rape' means and the implications for sexual assault more broadly, rather than seeking to contribute to established theoretical debates on the basis of flimsy definitions of sexual harm.¹⁷⁰

On many levels this is an inversion of reality. As already made clear, it is those who favor gender-specific rape laws who lack credible evidence or arguments. Graham makes no effort to consider the arguments surrounding gender neutrality; thus, how she is able to summarily dismiss the case for gender neutrality is unclear. If examined more closely, Graham would have to concede that many of the arguments against gender neutrality do not withstand scrutiny.¹⁷¹ Indeed, some of these arguments require no discussion of male rape at all in order to be fully dismissed.¹⁷²

This article has focused primarily on male victimization, but many gender-neutral laws have recognized that women can also physically commit the act of rape. The traditional invisibility of these sexual assaults in law is reflected, in part, by a historic denial on the part of scholarship and court decisions that such assaults even occur.¹⁷³ Understanding of sexual offending by women is growing; as such, legal discussion and analysis should take into account these new understandings. If we are to be a society that takes sexual violence seriously, then it is important we recognize all victims and perpetrators of rape. It is also of central importance to this process of recognition that sexual violence is correctly labeled by the criminal law. This can and should be achieved—while recognizing the fact that most victims are female¹⁷⁴ and that there are important issues of gender to consider in understanding the causes of rape—in our responses to victims

and in the enforcement of the criminal law. It has yet to be convincingly argued, however, that these wider understandings should lead to the exclusion of male victims (or female perpetrators) from the definition of rape.

Finally, the mistaken characterization of gender neutrality by critics as something sinister or dangerous highlights the way in which theory-driven argument can become detached from reality. Janice Richardson, when recently commenting on the work of Foucault and Deleuze, and the relationship between theory and practice, stated:

Theory and practice can be viewed as relays such that sometimes theory is blocked by the need to be informed by practice. . . . I agree theory can be blocked by not listening to “minor” discourses (i.e. to what actually happens at the sharp end of oppression) or by blindly applying monocausal or ahistorical “grand theories” of oppression to all situations¹⁷⁵

Although Richardson is not discussing the plight of male rape victims here, her analysis is useful because it goes some way to describing the approach of feminist critics to gender neutrality within rape. The theoretical objections to gender neutrality that have been surveyed in this article are not informed by practice or empirical evidence. For example, the claim that gender neutrality has undermined rape law reform is not supported by evidence.¹⁷⁶ Critics have failed to listen to counter evidence and have been reluctant to engage in self-criticism. Whether male victims (or indeed, female victims assaulted by other women) might constitute a “minor discourse” is open to debate. They might be included as a minor discourse because men perpetrate most rapes and most victims are female. Further, their experiences might be viewed as a minor discourse because the evidence examining their victimization has been almost completely ignored by the critics. In addition, male rape victims can be seen as experiencing the “sharp end of oppression.” It can also be argued that the critics are guilty of blindly applying their theoretical objections to gender neutrality

without considering either the strength of their arguments or the accuracy of their characterisations. It is high time that the reality of sexual victimisation for *all* those who suffer its pain and degradation be our concern when defining criminal acts. The pursuit of theory has its place, but not at the cost of recognizing the reality of rape for all its victims.

¹ LLB(Hons), LL.M. Reader in Law, School of Law, University of the West of England, United Kingdom. Email: phil.rumney@uwe.ac.uk. I would like to thank the following people for reading earlier drafts of this article: Dr. Charnelle van der Bijl, Department of Mercantile Law, University of Stellenbosch, South Africa; Joanna Jamel, University of Leicester, United Kingdom; and my former colleague Kevin Williams. Special thanks go to Laurie Brown, to whom this article is dedicated. She is a constant reminder that there are many things in life more important than academic argument (Act II, ii, 1–2).

² Patricia Novotny, *Rape Victims in the (Gender) Neutral Zone: The Assimilation of Resistance?*, 1 SEATTLE J. FOR SOC. JUST. 743 (2003).

³ *Id.* at 743.

⁴ *Id.* at 750.

⁵ *Id.* at 748.

⁶ *Id.* at 744.

⁷ *Id.* at 745.

⁸ *Id.* at 744.

⁹ *Id.* at 747.

¹⁰ Ngaire Naffine, *Possession: Erotic Love in the Law of Rape*, 57 MOD. L. REV. 10, 25 (1994).

¹¹ This article primarily focuses on male sexual victimization as that is the focus of Novotny's article. However, reference will be made to female rape assailants where appropriate.

¹² In the context of the legal recognition of anal rape, Ruth Graham recently observed that "to argue that the harm caused is comparable is not the same as arguing that the male anus, the female anus and the vagina are similar." Ruth Graham, *Male Rape and the Careful Construction of the Male Victim*, 15 SOC. & LEGAL STUD. 187, 196 (2006). This is a rather curious point as Graham does not examine potential similarities, nor does she attempt to argue that there is something distinctly different about anal and vaginal penetration. See LAW REFORM COMM'N, RAPE AND ALLIED OFFENCES paras. 6–14 (LRC 24-1988, 1988) (Ir.), available at http://www.lawreform.ie/publications/data/volume6/lrc_46.pdf (discussing in detail this issue, which led to a recommendation by the Republic of Ireland's Law Reform Commission for an expanded gender-neutral definition of rape); see also Colleen Hall, *Rape: The Politics of Definition*, 105 S. AFR. L.J. 67 (1988); Jocelynn A. Scutt, *Reforming the Law of Rape: The Michigan Example*, 50 AUSTL. L.J. 615 (1976).

¹³ Hall, *supra* note 12, at 68. The similarities in terms of psychological trauma will be discussed *infra* notes 152-67 and accompanying text.

¹⁴ *Id.*

¹⁵ CRIMINAL LAW REVISION COMM., SEXUAL OFFENCES, 15TH REP., at para. 2.3 (1984) (U.K.).

¹⁶ CRIMINAL LAW REVISION COMM., Working Paper on Sexual Offences para. 45 (1980) (U.K.).

¹⁷ JENNIFER TEMKIN, RAPE AND THE LEGAL PROCESS 61 (2d ed. 2002).

¹⁸ For discussion, see *infra* note 37.

¹⁹ The Review noted that “[f]orced oral sex is as horrible, as demeaning and as traumatising as other forms of forced penile penetration.” HOME OFFICE, 1 SETTING THE BOUNDARIES: REFORMING THE LAW ON SEX OFFENCES, para 2.8.5, at 15 (2000) (U.K.). Indeed, prior to this reform judges were already drawing comparisons between penetration of the mouth and vagina in sentencing decisions. In *R. v. Wilson*, (1993) 14 Crim. App. 627, 631 (U.K.), Lord Taylor C.J. stated that “the truth of the matter is that that kind of invasion of a woman’s body via her mouth rather than her vagina can be regarded as every bit as serious, and in some instances perhaps more serious, than an offence of rape.” See also *R. v. Hiscock*, (1992) 13 Crim. App. 24, 26 (U.K.); *R. v. Sheen*, (1987) 9 Crim. App. 164, 166–67 (U.K.).

²⁰ The Review stated that “penetration comes in many forms. Men put their penis into the vagina, anus and mouth. Other parts of the body (notably fingers and tongues) are inserted into the genitalia and anus. Objects are inserted into the vagina and anus of victims. Both men and women may perform such penetration.” HOME OFFICE, *supra* note 19, at para. 2.8.2.

²¹ Scutt, *supra* note 12, at 616–17. She also argues that:

It is not convincing to argue that a woman would necessarily be more damaged—physically or mentally—by penetration of vagina over penetration of anus, beyond the fact of loss of virginity in some cases, or the possible occurrence of pregnancy. Nor is it seemingly relevant in terms of damage that penetration is effected by penis or by artificial means. Further, although probably less men than women are attacked in the way of sexual advances leading to penetration, this does not appear to be a valid reason for assuming that penetration of a male anus is necessarily of less consequence to the criminal law than the classic rape situation.

Id. at 616–17.

²² LIZ KELLY, SURVIVING SEXUAL VIOLENCE 141 (1988). The idea of “naming” is seen by feminist scholars as a crucial means of challenging male violence against women. By being able to name experiences as unwanted and abusive, it is the “first step in challenging existing ideas, policies and practices.” Jill Radford et al., *Introduction to WOMEN, VIOLENCE AND MALE POWER* 4 (Marianne Hester et al. eds., 1996). Naming abusive acts also allows women to identify with others who have suffered similar abuse.

²³ KELLY, *supra* note 22, at 143.

²⁴ Stephanie Allen, *Male Victims of Rape: Responses to a Perceived Threat to Masculinity*, in NEW VISIONS OF CRIME VICTIMS 23, 33 (Carolyn Hoyle & Richard Young eds., 2002).

²⁵ LAW REFORM COMM'N, *supra* note 12, at para. 11.

²⁶ MICHAEL SCARCE, MALE ON MALE RAPE: THE HIDDEN TOLL OF STIGMA AND SHAME 8–9 (1997).

²⁷ See LORI B. GIRSHICK, WOMAN-TO-WOMAN SEXUAL VIOLENCE 57 (2004) for discussion. Similar problems have been identified in the context of same-sex domestic violence. See NAMING THE VIOLENCE: SPEAKING OUT ABOUT LESBIAN BATTERING (Kerry Lobel ed., 1986); VIOLENCE IN GAY AND LESBIAN DOMESTIC PARTNERSHIPS 6–7 (Claire M. Renzetti & Charles Harvey Miley eds., 1996).

²⁸ While legal reform may have a role to play, it is clear that it is only one of many instruments for social change that are required to influence wider societal attitudes and practices.

²⁹ See TEMKIN, *supra* note 17, at ch. 3, for discussion of Canada and some of the Australian states.

³⁰ Criminal Law (Rape) (Amendment) Act 1990 § 4.

³¹ Päivi Honkatukia, *Rough Sex? Understandings of Rape in Finnish Police Reports*, 2 J. SCANDINAVIAN STUD. CRIMINOLOGY & CRIME PREVENTION 15 (2001).

³² For discussion, see *infra* note 37.

³³ Five states continue to have gender-specific rape laws: Alabama, Georgia, Maryland, Mississippi, and North Carolina. See STOP PRISONER RAPE, RAPE AND SEXUAL ASSAULT LAWS: A STATE-BY-STATE LEGISLATIVE REVIEW, available at http://www.spr.org/en/doc_01_rapelaws.html. The gender-specific Alabama law has been the subject of an unsuccessful challenge on the grounds that it only protected females from non-consensual sex. See *Smith v. State*, 409 So. 2d 455, 460 (Ala. Crim. App. 1981). Likewise, in one of the other minority states, Maryland, the Court of Special Appeals in *Brooks v. State*, 330 A.2d 670, 672 (Md. Ct. Spec. App. 1975), rejected a challenge to its gender specific rape law stating, “that only females may be raped is nothing short of a physiological reality.” See also Patricia Searles & Ronald J Berger, *The Current Status of Rape Reform Legislation: An Examination of State Statutes*, 10 WOMEN’S RTS. L. REP. 25 (1987).

³⁴ For example, in Washington state, rape is defined as follows: “A person is guilty of rape in the first degree when such a person engages in sexual intercourse with another person by forcible compulsion.” WASH. REV. CODE § 9A.44.010 (2006) (defining sex offenses generally). See also WASH. REV. CODE § 9A.44.040 (2006) (defining rape in the first degree). In *United States v. Smith*, 574 F.2d 988 (9th Cir. 1978), the Ninth Circuit noted that sexual intercourse was defined as “any penetration of the vagina or anus however slight, by an object, when committed on one person by another, whether such persons are of the same or opposite sex [and] any act of sexual contact between persons involving the sex organs of one person and the mouth or anus of another.”

³⁵ In Michigan, sexual penetration is defined as “sexual intercourse, cunnilingus, fellatio, anal intercourse or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of another person’s body.” MICH. COMP. LAWS § 750.520a (2005).

³⁶ See *id.*, for example.

³⁷ Male rape was first recognized under English law when § 1 of the Sexual Offences Act 1956 was amended by § 142 of the Criminal Justice and Public Order Act 1994, which stated that “[i]t is an offence for a man to rape a woman or another man.” § 1(2). Sexual intercourse, for the purposes of rape, was defined as penile penetration of the vagina or anus. § 1(2). The recent enactment of the Sexual Offences Act 2003 continues to recognize the rape of males and also includes penile penetration of the mouth as rape. § 1(1). Assaults by females who force males or other females to engage in penetrative sex acts are contained in the offence of sexual assault by penetration, which like rape, carries a maximum term of life imprisonment. § 2. See Philip N.S. Rumney, *The Review of Sex Offences and Rape Law Reform: Another False Dawn?*, 64 MOD. L. REV. 890, 894–98 (2001) for discussion of the policy background to these recent reforms.

³⁸ For several centuries, females have been held liable as accessories to rapes physically committed by males. See *Lord Baltimore’s Case*, 4 Burr 2179 (1768), and *R v. Ram and Ram Cox* CC 609 (1893), for examples. See also Sarah Hall, *Woman Found Guilty of Towpath Rape*, GUARDIAN (London) Mar. 17, 2001, at 5.

³⁹ In Indiana, a person who commits rape is “a person who knowingly or intentionally has sexual intercourse with a member of the opposite sex.” IND. CODE § 35-42-4-1 (2004).

⁴⁰ Novotny, *supra* note 2, at 743.

⁴¹ The following is a statement by Rev. Louis Dwights, who on April 25, 1826, recounted:

Since October, 1824, I have visited most of the prisons on two routes, between Massachusetts and Georgia, and a large number of Prisons besides, in the New England States and New York...and I have found melancholy testimony to establish one general fact, viz., That Boys are Prostituted to the Lust of old Convicts... the Sin of Sodom is the Vice of Prisoners, and Boys are the Favorite Prostitutes. Sodomy is said to be practiced constantly among them. When a boy was sent to Prison, who was of a fair countenance, there many times seemed to be quite a strife...No art was left untried, to get the boy into the same room and into the same bed...I will only add to this testimony, the following conversation which I had with a boy in the Penitentiary: ‘Was the crime ever committed upon you?—Yes, Sir!—By whom?—Pat!—Why did you submit?—He choked me! He was stronger than I!—Why did you not complain?— I did, in the room! but they said if I told of it, they would punish me!—Who said so?—They all said, I must not tell any thing out of the room!—Did Pat effect his object?—Yes, Sir.’ Nature and humanity cry aloud for redemption from this dreadful degradation.

Massachusetts Legis. Hearing, J. Comm. on Public Safety, 1994 Leg. (Mass. 1994) (testimony of Stephen Donaldson), available at http://www.spr.org/en/stephendonaldson/doc_01_massachusetts.html.

⁴² Teemu Ruskola, *Law, Sexual Morality and Gender Equality in Qing and Communist China*, 103 YALE L.J. 2531, 2550 (1994). For other examples of historic prosecutions for

male rape, see MALE VICTIMS OF SEXUAL ASSAULT ch. 6 (Gillian C. Mezey & Michael B. King eds., 2d ed. 2000).

⁴³ Novotny, *supra* note 2, at 750. For a list of goals of rape law reform, see Novotny, *supra* note 2, at 745. For any reform jurisdiction that redefined rape to include male victims, Novotny's claim is clearly inaccurate.

⁴⁴ During the passage of Pennsylvania's gender-neutral law, Representative Harper stated: "I think that we as legislators should make laws to protect those who cannot protect themselves... So let us go ahead... and protect women, especially women, a few men, who cannot protect themselves." *Commonwealth v. Shoemaker*, 518 A.2d 591, 593 n.3 (Pa. Super. Ct. 1986). See also CASSIA SPOHN & JULIE HORNEY, RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT 18 (1992). In the context of England and Wales, the needs of male victims were explicitly recognized during the passage of the Criminal Justice and Public Order Act 1994. 241 PARL. DEB., H.C. (6th ser.) (1994); 556 PARL. DEB., H.L. (5th ser.) (1994).

⁴⁵ Susan Estrich, *RAPE*, 95 YALE L.J. 1087, 1150 (1986) (citing MODEL PENAL CODE § 213.1 cmt. at 338 (1980)).

⁴⁶ *Id.* at 1134.

⁴⁷ *Id.* at 1184 n.142.

⁴⁸ Deborah W. Denno, *Why the Model Penal Code's Sexual Offense Provisions Should be Pulled and Replaced*, 1 OHIO ST. J. CRIM. L. 207, 211 (2003).

⁴⁹ For example, the Court of Appeals of New York in *People v. Liberta*, 474 N.E.2d 567, 577 (N.Y. 1984), stated that the claim that a man cannot be raped by a woman is:

simply wrong. The argument is premised on the notion that a man cannot engage in sexual intercourse unless he is sexually aroused, and if he is aroused he is consenting to intercourse. 'Sexual intercourse' however, 'occurs upon any penetration, however slight,' [citation omitted]; this degree of contact can be achieved without a male being aroused and thus without his consent.

For criticism of this view, see *Liberta v. Kelly*, 839 F.2d 77, 83 (2d Cir. 1988). It should be noted that while the decision in *Liberta* recognized the existence of female-on-male rape, the decision rests upon an assumption that men cannot gain erections during sexual assault. There is research showing that males can experience erections and even ejaculation during sexual assaults by male or female assailants. In their study of 11 males sexually assaulted by women either as children or adults, Sarrel and Masters found that "men or boys have responded sexually to female assault or abuse even though the males' emotional state during the molestations has been overwhelmingly negative-embarrassment, humiliation, anxiety, fear, anger, or even terror." Philip M. Sarrel & William H. Masters, *Sexual Molestation of Men by Women*, 11 ARCHIVES SEXUAL BEHAV. 117, 118 (1982). See also Michael King & Ernest Woollett, *Sexually Assaulted Males: 115 Men Consulting a Counselling Service*, 26 ARCHIVES SEXUAL BEHAV. 579, 587 (1997) ("Just under 20% of the men were stimulated by their assailants until they ejaculated."). In a small-scale study of male rape victims and offenders, Groth and Burgess found:

A major strategy used by some offenders in the assault of males is to get the victim to ejaculate. This effort may have several purposes. In misidentifying ejaculation with orgasm, the victim may be bewildered by his physiological response to the offense and thus discouraged from reporting the assault for fear his sexuality may become suspect. Such a reaction may serve to impeach his credibility in trial testimony and discredit his allegation of nonconsent. To the offender, such a reaction may symbolize his ultimate and complete sexual control over his victim's body and confirm his fantasy that the victim really wanted and enjoyed the rape. This fantasy is also prominent in the rape of females.

A. Nicholas Groth & Ann W. Burgess, *Male Rape: Offenders and Victims*, 137 AM. J. PSYCHIATRY 806, 809 (1980).

⁵⁰ Novotny, *supra* note 2, at 743.

⁵¹ *Id.* at 745.

⁵² *Id.*

⁵³ *Id.* at 746.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 745.

⁵⁷ It is worth pointing out that a significant minority of the abuse victims uncovered as part of the abuse crisis within the Catholic Church are female. A study published subsequent to Novotny's article by the John Jay College of Criminal Justice found that 19 percent of victims were female. JOHN JAY COLL. OF CRIMINAL JUSTICE, THE NATURE AND SCOPE OF THE PROBLEM OF SEXUAL ABUSE OF MINORS BY CATHOLIC PRIESTS AND DEACONS IN THE UNITED STATES 9 (2004).

⁵⁸ For detailed discussion of these issues, see: THE NAT'L REVIEW BD. FOR THE PROT. OF CHILDREN AND YOUNG PEOPLE, A REPORT ON THE CRISIS IN THE CATHOLIC CHURCH IN THE UNITED STATES (2004); JOHN JAY COLL. OF CRIMINAL JUSTICE, *supra* note 57. It is also worth pointing out that the abuse by church officials is hardly unique to the Roman Catholic Church. News stories continue to highlight abuse scandals and the failure of various dominations to deal with the problem appropriately. For a recent example, in Britain, see Ben Mitchell, *Life Sentence for Church Minister Who Preyed on Boys*, GUARDIAN (London), July 29, 2006, available at http://www.guardian.co.uk/uk_news/story/0,1832796,00.html.

⁵⁹ Within legal scholarship there are variations on this theme. Some scholars take the view that male victimization is irrelevant to their legal analysis. Fishman, for example, has stated that "to employ gender-neutral language in discussing the evidentiary issues that arise in rape cases would... ignore reality and serve no useful purpose." Clifford S. Fishman, *Consent, Credibility, and the Constitution: Evidence Relating to a Sex Offense Complainant's Past Sexual Behaviour*, 44 CATH. U. L. REV. 709, 713 n.10 (1995). For an explanation as to why such an analysis may serve a useful purpose for male victims and to further highlight the difficulties faced by all rape complainants, see Elizabeth J. Kramer, *When Men Are Victims: Applying Rape Shield Laws to Male Same-Sex Rape*, 73 N.Y.U. L. REV. 293 (1998), and *infra* note 64.

⁶⁰ Carissa Casey, *Effects of Child Abuse Exaggerated, Says Priest*, SUNDAY TIMES (London), May 28, 2006, available at <http://www.timesonline.co.uk/article/0,,2091-2200518.html>.

⁶¹ *Id.*

⁶² This problem extends to the judiciary. In the exercise of its sentencing powers, the judiciary continues to show ignorance of the trauma suffered by female victims of non-stranger rape. For discussion, see *Progress at a Price: The Construction of Non-Stranger Rape in the Millberry Sentencing Guidelines*, 66 MOD. L. REV. 880 (2003), and *When Rape Isn't Rape: Court of Appeal Sentencing Practice in Cases of Marital and Relationship Rape*, 19 O.J.L.S. 243 (1999).

⁶³ Novotny, *supra* note 2, at 745.

⁶⁴ This does not mean that the recognition of male victimization is unproblematic. Indeed, the current evidence suggests that the treatment of male victims within the criminal justice process is similar to that experienced by female victims. See Philip N.S. Rumney & Martin Morgan-Taylor, *The Construction of Sexual Consent in Male Rape and Sexual Assault*, in MAKING SENSE OF SEXUAL CONSENT 141 (Mark Cowling & Paul Reynolds eds., 2004); Philip N.S. Rumney, *Male Rape in the Courtroom: Issues and Concerns*, CRIM. L. REV. 205 (2001). However, in the context of England and Wales there have also been significant improvements in the police response to male victimization since the early 1990s, along with a very significant increase in recorded offenses of male rape since the inclusion of male victims within the legal definition of rape in 1994. See J. Walker et al., *Effects of Rape on Men: A Descriptive Analysis*, 34 ARCHIVES SEXUAL BEHAV. 69 (2005).

⁶⁵ Novotny, *supra* note 2, at 750.

⁶⁶ Florence Rush, *The Many Faces of Backlash*, in THE SEXUAL LIBERALS AND THE ATTACK ON FEMINISM 165, 169 (Dorchen Leidholdt & Janice G. Raymond eds., 1990).

⁶⁷ *Id.*

⁶⁸ See, e.g., SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 257–68, 378 (1975); RAPE: THE FIRST SOURCEBOOK FOR WOMEN 164–69 (Noreen Connell & Cassandra Wilson eds., 1974); JEANNE GREGORY & SUE LEES, POLICING SEXUAL ASSAULT ch. 5 (1999); SUE LEES, RULING PASSIONS: SEXUAL VIOLENCE, REPUTATION, AND THE LAW ch. 5 (1997); ROSEMARIE TONG, WOMEN, SEX, AND THE LAW (1984); Hall, *supra* note 12; Scutt, *supra* note 12.

⁶⁹ See, e.g., Rus Ervin Funk, *Men Who Are Raped: A Profemnist Perspective*, in MALE ON MALE RAPE, *supra* note 26, at 12; Fred Pelka, *Raped: A Male Survivor Breaks His Silence*, in RAPE AND SOCIETY: READINGS ON THE PROBLEM OF SEXUAL ASSAULT 250 (Patricia Searles & Ronald J. Berger eds., 1995).

⁷⁰ Novotny, *supra* note 2, at 750.

⁷¹ GREGORY & LEES, *supra* note 68, at 131.

⁷² LEES, *supra* note 68, at 91.

⁷³ BROWNMILLER, *supra* note 68, at 378.

⁷⁴ *Id.* at 378.

⁷⁵ Ngaire Naffine, *A Struggle over Meaning: A Feminist Commentary on Rape Law Reform*, AUSTL. & N.Z. J. CRIMINOLOGY 100, 102 (1994).

⁷⁶ Similarly, in response to Catharine MacKinnon's claims that "male power produces the world before it distorts it" and "few if any aspects of life are free of male power," Carol Smart notes that "this raises the question then of how feminism is possible at all." CAROL SMART, *FEMINISM AND THE POWER OF LAW* 77 (1989).

⁷⁷ Novotny, *supra* note 2, at 744. Honkatukia, in discussing rape reporting within Finland, claims that "gendered understandings of heterosexuality and sexual violence... are often hidden by the prevailing ethos of gender-neutrality." Honkatukia, *supra* note 31, at 15. As is customary in critical analysis of gender neutrality, she gives no examples of such understandings being "hidden."

⁷⁸ Novotny, *supra* note 2, at 748.

⁷⁹ Naffine, *supra* note 10.

⁸⁰ Catharine A. MacKinnon, *Liberalism and the Death of Feminism*, in *THE SEXUAL LIBERALS AND THE ATTACK ON FEMINISM*, *supra* note 66, at 3 [hereinafter *Liberalism*]. Elsewhere, MacKinnon argues that "women and men are not similarly situated with regard to sexual assault in the sense that they are not equally subject to it or equally subjected to it." *Reflections on Sex Equality Under Law* 100 YALE L. J. 1281, 1304 (1991). On the basis of the incidence of sexual assault, MacKinnon's assertion is entirely accurate. She does not explore, however, how and in what ways men and women are similarly situated in instances where men are sexual victimized.

⁸¹ *Liberalism*, *supra* note 80, at 3.

⁸² *Id.* at 6, 12.

⁸³ Catharine A. MacKinnon, *ONLY WORDS* 87 (1994). The drafting of this ordinance in gender-neutral language may have been an attempt by MacKinnon and Dworkin to prevent it from being challenged on equal protection grounds under the Fourteenth Amendment. However, given MacKinnon's negative characterisation of the concept, presumably the gender neutrality of her ordinance would render it, at best, ineffective, with the attendant danger that it would ignore "what is distinctively done to women."

⁸⁴ Catharine A. MacKinnon, *Points Against Postmodernism*, 75 CHI.-KENT L. REV. 687 (2000). This is hardly unique to MacKinnon's earlier writings. As Halley has recently acknowledged, ignoring harm that is done to men is a common theme in the writing of many feminists. See JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* (2006).

⁸⁵ Christine Boyle, *Sexual Assault and the Feminist Judge*, 1 CANADIAN J. WOMEN & L. 93, 104 (1985). If, indeed, gender neutrality were a "legislative order," then it has been a resounding failure.

⁸⁶ TONG, *supra* note 68, at 91-92.

⁸⁷ *Id.* at 92.

⁸⁸ Indeed, in the view of this author, such a focus is entirely justifiable given the most victims of rape and many other forms of sexual violence are female.

⁸⁹ JOAN MCGREGOR, *IS IT RAPE? ON ACQUAINTANCE RAPE AND TAKING WOMEN'S CONSENT SERIOUSLY* 37 (2005).

⁹⁰ Gillian Mezey & Michael King, *The Effects of Sexual Assault on Men: A Survey of 22 Victims*, 19 PSYCHOL. MED. 205, 208 (1989). This finding is also supported by subsequent research. See Allen, *supra* note 24; Walker et al., *supra* note 64, at 78.

⁹¹ 55 N.B.R.2d 97 (1984).

⁹² *Id.* at 190.

⁹³ 82 N.B.R.2d 229 para. 11 (1987).

⁹⁴ Graycar and Morgan suggest, in discussing the work of another scholar, that *Chase* “highlights one of the problems of gender-neutrality.” REGINA GRAYCAR & JENNY MORGAN, *THE HIDDEN GENDER OF LAW* 343 (1990). See Boyle, *supra* note 85, for detailed discussion.

⁹⁵ Criminal Code of Canada § 244(1).

⁹⁶ Terri Gillespie rather weakly argues that the reason for wishing to keep a gender specific definition of rape in England and Wales was because “the only gender specific crime in British [sic] law would dis-appear from the statute book.” Terri Gillespie, *Rape Crisis Centres and ‘Male Rape’: A Face of the Backlash*, in WOMEN, VIOLENCE AND MALE POWER, *supra* note 22, at 151.

⁹⁷ Ngaire Naffine, *Windows on the Legal Mind: The Evocation of Rape in Legal Writings*, 18 MELB. U. L. REV. 741, 767 (1992).

⁹⁸ *Id.* at 743. See also Liz Kelly and Jill Radford, ‘Nothing Really Happened’: *The Invalidation of Women’s Experiences of Sexual Violence*, in WOMEN, VIOLENCE AND MALE POWER, *supra* note 22.

⁹⁹ See *supra* note 64.

¹⁰⁰ Gillespie, *supra* note 96, at 151.

¹⁰¹ See, e.g., SCARCE, *supra* note 26; Allen, *supra* note 24; Walker et al., *supra* note 64.

¹⁰² See *supra* note 64.

¹⁰³ For discussion of how myths and stereotypes can influence the enforcement of the law of rape, see Emily Finch & Vanessa E Munro, *Breaking Boundaries? Sexual Consent in the Jury Room*, 26 LEGAL STUD. 303 (2006); Philip N.S. Rumney & Martin Morgan Taylor, *The Use of Syndrome Evidence in Rape Trials*, 13 CRIM. L.F. 471 (2002).

¹⁰⁴ For a discussion of attitudes toward male victimization, see Helen Eigenberg, *Male Rape: An Empirical Examination of Correctional Officers’ Attitudes Toward Male Rape in Prison*, 69 PRISON J. 39, 50 (1989) (finding that, of 166 correctional officers, 46.4 percent “believe that inmates deserve rape if they have consented to participate in consensual acts with other inmates.”); Damon Mitchell et al., *Attributions of Victim Responsibility, Pleasure, and Trauma in Male Rape*, 36 J. SEX RES. 369 (1999) (finding that students were prepared to attribute more blame and pleasure, and less trauma, to a male rape victim who is gay than one who is heterosexual); Anna Wakelin & Karen M. Long, *Effects of Victim Gender and Sexuality on Attributions of Blame to Rape Victims*, 49 SEX ROLES 477, 483 (2003) (finding that students attributed more blame to heterosexual women and gay male victims of rape, than to lesbians and heterosexual male victims); Bradley H. White & Sharon E. Robinson Kurpius, *Effects of Victim Sex and Sexual Orientation on Perceptions of Rape*, 46 SEX ROLES 191 (2002) (finding that students inter alia attributed more blame to male, than to female rape victims and more blame to gay male and lesbian victims than heterosexual victims). For a useful overview of the research that has been done in this area, see Michelle Davies & Paul Rogers, *Perceptions of Male Victims in Depicted Sexual Assaults: A Review of the Literature*, 11 AGGRESSION & VIOLENT BEHAV. 367–77 (2006).

¹⁰⁵ This argument is based on the similarities in the nature of non-consensual penetrative sex acts. See RICHIE J. MCMULLEN, *MALE RAPE: BREAKING THE SILENCE ON THE LAST*

TABOO (1990); SCARCE, *supra* note 26; Allen, *supra* note 24 (discussing similarities in power relations between victim and perpetrator in male and female rape); *supra* notes 12–25 and accompanying text; *infra* notes 154–67 and accompanying text (discussing the effects of sexual victimization on victims).

¹⁰⁶ See Note, *Feminist Legal Analysis and Sexual Autonomy: Using Statutory Rape Laws as an Illustration*, 112 HARV. L. REV. 1065 (1999), for example. Novotny notes that “[gender-neutral] reforms themselves reflect the liberal feminist impulse toward formal equality, with its concomitant effacement of sex differences.” Novotny, *supra* note 2 at 748.

¹⁰⁷ Rush argues:

Gender-neutrality is rooted in the idea that both genders, male and female, are equally oppressed and that any attempt to hold men and male institutions accountable for transgressions against women is no longer fashionable nor acceptable. This concept has become a useful tool in an attempt to establish that women are as guilty as men for the offences attributed to them.

Rush, *supra* note 66, at 170.

¹⁰⁸ Estelle Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913 (1983).

¹⁰⁹ Novotny, *supra* note 2, at 744.

¹¹⁰ *Id.* at 744.

¹¹¹ *Id.*

¹¹² Rush, *supra* note 66.

¹¹³ GRAYCAR & MORGAN, *supra* note 94, at 345.

¹¹⁴ See *Commonwealth v. Shoemaker*, 518 A.2d 591, 593 n.3 (Pa. Super. Ct. 1986).

¹¹⁵ Novotny, *supra* note 2, at 747.

¹¹⁶ Mary E. Larimer et al., *Male and Female Recipients of Unwanted Sexual Contact in a College Student Sample: Prevalence Rates, Alcohol Use, and Depression Symptoms*, 40 SEX ROLES 295 (1999).

¹¹⁷ *Id.* at 301.

¹¹⁸ See, e.g., Charlene L. Muehlenhard & Stephen W. Cook, *Men’s Self-Reports of Unwanted Sexual Activity*, 24 J. SEX RES. 58, 69 (1988); Linda P. Rouse et al., *Abuse in Intimate Relationships*, J. INTERPERSONAL VIOLENCE 414 (1988).

¹¹⁹ Novotny, *supra* note 2, at 744.

¹²⁰ Zsuzsanna Adler, *Male Victims of Sexual Assault: Legal Issues*, in MALE VICTIMS OF SEXUAL ASSAULT, *supra* note 42, at 121 (1992).

¹²¹ *Id.*

¹²² Criminal Justice and Public Order Act, *supra* note 37.

¹²³ See also, *infra* note 131.

¹²⁴ TEMKIN, *supra* note 17, at 67–70; Alan Travis, *Male Rape Recognised in Law*, GUARDIAN (London) July 12, 1994, at 1. See also the Parliamentary debates, *infra* note 131.

¹²⁵ It was recently recommended that Scottish law adopts a fully gender-neutral law. SCOTTISH LAW COMM’N, A DRAFT CRIMINAL CODE FOR SCOTLAND WITH COMMENTARY 123 (2003). See also Stephen Khan, *Call for New Laws After Male Sex*

Attacks, THE OBSERVER (London), Oct. 12, 2003, available at <http://observer.guardian.co.uk/crimedebate/story/0,12079,1061388,00.html>; Neil Mackay & Liam McDougall, *Law Failing Victims of Male Rape*, SUNDAY HERALD (Glasgow), Oct. 5, 2003, available at <http://www.sundayherald.com/37262>.

¹²⁶ Graham, *supra* note 12, at 197.

¹²⁷ *Id.* at 204 n.17.

¹²⁸ *Id.* at 196.

¹²⁹ *Id.* at 198. Graham appears unaware of a competing theory discussed by Scarce, which argues that anal rape may be viewed as less shocking and less deserving of sanction than vaginal rape because of its assumed links to homosexuality. SCARCE, *supra* note 26, at 63–64. There also appears to be some empirical support for this theory. See *supra* note 104.

¹³⁰ 556 PARL. DEB., *supra* note 44, at 63, 65–66, 1605, 1607. In earlier House of Commons debates, where the amendment was the subject of brief discussion, there was more focus on the anal rape of males than of females. 241 PARL. DEB. H.C. (6th ser.) 174–80. Graham might interpret this as evidence in support her thesis. But it is evident from the debate that Members of Parliament felt a need to highlight the existence of male rape given that, at the time, it was a problem with little, if any, societal or legal recognition. It is also worth noting that despite lobbying by those who favoured the legal recognition of male rape, the government initially rejected the amendment to extend the law of rape to cover male (and female) victims of anal rape. This hardly suggests an eagerness to “privilege” male victims as assumed by Graham.

¹³¹ 556 PARL. DEB., *supra* note 44, at 63. Taken in context, it is clear that Lord Ponsonby was highlighting male rape as an actual social problem.

¹³² “The amendments make any case of non-consensual buggery, whether of a woman or of a man, rape.” 556 PARL. DEB., *supra* note 44, at 1607.

¹³³ For example, Earl Ferrers stated that “it would probably always have surprised many people that non-consensual buggery of a woman was not ‘rape’ in law.” *Id.*

¹³⁴ PARL. DEB. H.L. (5th ser.) (1994) 66.

¹³⁵ Novotny, *supra* note 2, at 745. Caroline Fennell is another critic who has linked gender neutrality to a lack of effectiveness of rape law reform. *Reform of the Law of Rape: Is the Commission Throwing the Baby out with the Bath Water?*, 10 DUBLIN U. L. J. 109, 117 (1988). For example, she has claimed that gender-neutral reforms have “been found, once adopted, to fail to achieve many of the objectives originally envisaged.... Interesting . . . are commentaries now emanating from jurisdictions, such as Canada and the United States, where gender-neutral solutions have been introduced to reform this area of the law, yet have been found to be imperfect and so fallen into some disrepute.” For critical analysis of Fennell’s claims, see Philip N.S. Rumney & Martin Morgan-Taylor, *Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part One*, 26 ANGLO-AM. L. REV. 198 (1997).

¹³⁶ Novotny, *supra* note 2, at 745.

¹³⁷ See, e.g., SPOHN & HORNEY, *supra* note 44.

¹³⁸ JEANNE C. MARSH ET AL., RAPE AND THE LIMITS OF LAW REFORM 85 (1982).

¹³⁹ David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1384 (1997).

¹⁴⁰ SPOHN & HORNEY, *supra* note 44, at 173.

¹⁴¹ Kwong-Leung Tang, *Rape Law Reform in Canada: The Success and Limits of Legislation*, 42 INT'L J. OFFENDER THERAPY & COMP. CRIMINOLOGY 258, 264 (1998).

¹⁴² Leah Cohen & Connie Backhouse, *Desexualizing Rape: A Dissenting View on the Proposed Rape Amendments*, 2 CANADIAN WOMEN'S STUD. 99 (1980).

¹⁴³ *Id.* at 102–03. A similar observation can be made regarding Tang's reference to Canadian court decisions that de-contextualize rape. In this respect Tang refers to Diana Majury, *Seaboyer and Gayme: A Study in In Equality*, in CONFRONTING SEXUAL ASSAULT: A DECADE OF LEGAL AND SOCIAL CHANGE 268 (Julien V. Roberts & Renate M. Mohr eds., 1994). It might well be the case, as Majury argues, that the Canadian courts are not examining the issue of rape from a contextual perspective, but this has nothing to do with gender neutrality. Rather, it is a product of traditional legal thinking on rape that excludes contextual issues surrounding rape and sexual assault. See *supra* notes 97–98 and accompanying text, for discussion. Tang also cites with approval the view "that the harm suffered by rape victims has been desexualized by the gender-neutral language of the term *sexual assault*." It is not explained by what process a simple name change to "sexual assault" has "desexualized" the crime of rape. It is also worth noting that the term "sexual assault" is not in itself gender-neutral, just as the term "rape" is not gender-specific. Hence, under English law "rape" is retained, but defined as a gender-neutral offense.

¹⁴⁴ Annabelle Mooney, *When a Woman Needs to be Seen, Heard and Written as a Woman: Rape, Law and an Argument Against Gender Neutral Language*, INT'L J. SEMIOTICS L. 39, 42–43 (2006).

¹⁴⁵ See *supra* notes 138–41 and accompanying text.

¹⁴⁶ *Sexual Offences*, Working Paper No. 22, 47 (1978).

¹⁴⁷ Early in her article she quotes Anne Pauwels as stating that "the aim of the gender-neutralisation strategy is to obtain linguistic equality of sexes by minimising or disregarding gender-specific expressions and constructions." WOMEN CHANGING LANGUAGE (1998), cited *supra* note 144, at 42. Significantly, this is not primarily the reason for introducing gender-neutral rape laws.

¹⁴⁸ See *supra* note 144, at 63–65.

¹⁴⁹ *Id.* at 61, n.93.

¹⁵⁰ *Id.* at 62.

¹⁵¹ *Id.*

¹⁵² Novotny, *supra* note 2, at 744.

¹⁵³ Nathan W. Pino & Robert F. Meier, *Gender Differences in Rape Reporting*, 40 SEX ROLES 979 (1999). It is acknowledged by the authors of this study that their findings are "preliminary." They also note that several of the differences between male and female reporting behavior are not statistically significant. *Id.* at 987–88. Interestingly, unlike Novotny, the authors do not use their findings to question the status of men as victims of rape. Indeed, they conclude that "to neglect the study of male rape and rape reporting behaviour is to uphold the stereotype that men cannot be rape victims." *Id.* at 989.

¹⁵⁴ A number of studies have detailed the way in which male victims of sexual assault report feeling that their masculinity has been undermined by rape or sexual assault. Studies have also reported how male victims become insecure about their sexuality.

Michael F. Myers, *Men Sexually Assaulted as Adults and Sexually Abused as Boys*, 18 ARCHIVES SEXUAL BEHAV. 203, 210 (1989); Mezey & King, *supra* note 90, at 208; *see also* Allen, *supra* note 24.

¹⁵⁵ *See* SCARCE, *supra* note 26; Allen, *supra* note 24; P. L. Huckle, *Male Rape Victims Referred to a Forensic Psychiatric Service*, 35 MED. SCI. & LAW 187 (1995); Walker et al., *supra* note 64.

¹⁵⁶ One does have to acknowledge that many of the studies in this area do not adopt a single definition of rape or sexual assault. Consequently, comparisons can be difficult. However, if one adopts the current actus reus of rape under English law, which includes penile penetration of the vagina, anus and mouth, then in many of the early studies most of the research participants are victims of sex acts covered by the legal definition of rape. Mezey & King, *supra* note 90; Huckle, *supra* note 155. More recent studies have focused on only those who have been victim of penetrative sex acts covered by the legal definition of rape. Allen, *supra* note 24; Walker et al., *supra* note 64. On similar effects in male and female rape, *see infra* notes 162–63.

¹⁵⁷ For discussion, *see* Sarrel & Masters, *supra* note 49; William H. Masters, *Sexual Dysfunction as an Aftermath of Sexual Assault of Men by Women*, 12 J. SEX & MARITAL THERAPY 35 (1986); Linda Murray, *When Men Are Raped by Women*, SEXUAL MED. TODAY July 1982, at 14.

¹⁵⁸ E. Sandra Byers & Lucia F. O'Sullivan, *Similar but Different: Men's and Women's Experiences of Sexual Coercion*, in SEXUALLY AGGRESSIVE WOMEN 144 (Peter B. Anderson & Cindy Struckman-Johnson eds., 1998). For an explanation of various reasons as to why men may report less trauma, *see* Philip N.S. Rumney & Martin Morgan-Taylor, *Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part Two*, 26 ANGLO-AM. L. REV. 330, 338–40 (1997).

¹⁵⁹ *See, e.g.*, DIANA E. H. RUSSELL, RAPE IN MARRIAGE 118 (2d ed. 1990) ch. 14.

¹⁶⁰ Other factors are also of relevance in comparing male and female victimization. Gay men may find it easier to leave violent relationships than women because they might be more likely to have financial independence and less likely to have children. Though factors that influence a decision to remain, e.g., a wish to make the relationship work, self-blame, and the control exercised by abusers, may affect men and women more equally.

¹⁶¹ VIOLENCE IN GAY AND LESBIAN DOMESTIC PARTNERSHIPS, *supra* note 27, at 72–74. Since the publication of this book, some further research in this area has been published. *See* SCARCE, *supra* note 26, at ch. 4 (discussing inter alia the difficulties faced by gay men in discussing their experiences, problems of trust, and sexual problems following rape). For discussion of societal and legal responses to homosexual victims of male rape, *see*: Philip N.S. Rumney, *Male Victims of Rape and Sexual Assault*, J. CRIM. L. (forthcoming 2008).

¹⁶² In their interviews with male victims of sexual assault, Gillian Mezey and Michael King noted that “[m]any of the characteristics of the victims, their reactions and the nature of the assaults have parallels with those described in female victims.” Mezey & King, *supra* note 90, at 207. A recently published survey found: “Consistent with other studies . . . this study found no significant differences on self report measures of emotional distress between males and female who reported abuse.” Andrew V. Schack,

Prior History of Physical and Sexual Abuse Among the Psychiatric Inpatient Population: A Comparison of Males and Females, 75 PSYCHIATRIC Q. 343, 354 (2004).

¹⁶³ For a discussion of some of the consequences of male and female rape, including sexual problems, depression, self-blame, low self-esteem, and relationship problems, see Adrian W. Coxell & Michael B. King, *Male Victims of Rape and Sexual Assault* 11 SEX & MARITAL THERAPY 297, 302–04 (1996); Pino & Meier, *supra* note 153, at 205–12. For a discussion of the reactions of female victims, see Gillian C. Mezey & Pamela J. Taylor, *Psychological Reactions of Women Who Have Been Raped: A Descriptive and Comparative Study*, 152 BRIT. J. PSYCHIATRY 330, 334–36 (1988).

¹⁶⁴ This analysis also has relevance to those jurisdictions that have adopted partial gender neutrality, which only labels as rape, sexual assaults between heterosexuals. GIRSHICK, *supra* note 27, at 144.

¹⁶⁵ *Id.* at ch. 6.

¹⁶⁶ 637 N.Y.S.2d 625 (1995).

¹⁶⁷ *Id.* at 627, 630. At several points, Justice Shea suggests that male victims may suffer greater trauma than female victims. On a more detailed review of evidence, however, such an assertion must be doubted. For discussion, see Philip N.S. Rumney & Martin P. Morgan Taylor, *Male Rape Trauma Syndrome in the US Courts: People v. Yates*, 1 INT'L J. EVIDENCE & PROOF 232 (1997).

¹⁶⁸ HALLEY, *supra* note 84, at 387 n.15.

¹⁶⁹ GRAYCAR & MORGAN, *supra* note 94, at 345.

¹⁷⁰ Graham, *supra* note 12, at 201. This comment is made in the context of Rumney & Morgan-Taylor, *supra* notes 135, 158.

¹⁷¹ In reality, Graham's work is itself poorly researched. She warns off scholars from "seeking to contribute to established theoretical debates [on gender neutrality]" that have been dominated by feminist theorists, yet also criticizes the scholarship on male rape for lacking "theoretical engagement with feminist theorizing on sexual violence." Graham, *supra* note 12, at 192. The contradiction is less important than Graham's lack of awareness of the literature. She does not cite scholarship that has increasingly linked male victimization with feminist perspectives on such things as victim reactions (Allen, *supra* note 24); constructions of non-consent in rape trials (Rumney & Morgan-Taylor, *supra* note 64); work that has challenged rape definitions that exclude male victims (Hall, *supra* note 12; TONG, *supra* note 68); and the links between male rape and other forms of male-perpetrated violence and oppression (RUS ERVIN FUNK, STOPPING RAPE: A CHALLENGE FOR MEN 16–17 (1993)). See also *supra* notes 71–73 and accompanying text.

¹⁷² See, e.g., *supra* notes 136–44 and accompanying text.

¹⁷³ Donald E. MacNamara and Edward Sagarin have claimed that, "for obvious biological reasons, a woman cannot be guilty of raping a man . . . clearly a woman cannot bring about sexual intercourse with a male against his will," and that "so-called lesbian rape is probably extremely rare and no such case has come to our attention." SEX, CRIME AND THE LAW 28 (1977). Christine Boyle has claimed that "[the Canadian gender-neutral law] corresponds to no documented social problem." Boyle, *supra* note 85, at 97. In *Liberta v. Kelly*, such assaults were described as a "hypothetical problem," while in contrast, the rape of women by men was a "real problem." 839 F.2d at 83. See also

Willan v. Willan 2 All ER 363 (1960). For the leading qualitative research on the subject of female sex offenders, see Sarrel & Masters, *supra* note 157; Byers & O'Sullivan, *supra* note 158; GIRSHICK, *supra* note 27.

¹⁷⁴ However, it is the position of this author that the incidence of rape and its victims and perpetrators should not influence who is recognized as victim and perpetrator. In *People v. Liberta*, the point was made thus:

[W]hile forcible sexual assaults by females upon males are undoubtedly less common than those by males upon females this numerical disparity cannot by itself make the gender discrimination constitutional. Women may well be responsible for a far lower number of all serious crimes than are men, but such disparity would not make it permissible for the State to punish only men who commit, for example, robbery.

474 N.E.2d 567, 577 (N.Y. 1984). A more fundamental point might be made in this context. If the incidence of female rape should mean that rape is defined in gender-specific language, thus excluding male victims, then why should this analysis not apply to all sexual offenses where females make up the bulk of victims and males the bulk of perpetrators?

¹⁷⁵ Janice Richardson, *Feminist Legal Theory and Practice: Rethinking the Relationship* 13 FEMINIST LEGAL STUD. 275, 282 (2005).

¹⁷⁶ Though, as demonstrated, some critics do attempt to give credence to their opposition by misrepresenting the work of others. For discussion, see *supra* notes 141–43 and accompanying text.