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## Women's Sexuality and the State: A Beginning Look at Virginit's Relationship to The Law

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Women's Sexuality and the State:  
A Beginning Look at Virginitv's Relationship to The Law

Senior Project Submitted to  
The Division of Social Studies  
of Bard College

by  
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Annandale-on-Hudson, New York  
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Thank you to my parents for your endless love and support.

Thank you to my brother for always challenging me.

Thank you to all my friends, especially Lila, Alec, McKinlay, and Luca, for making me happy, making sure I am okay and listening to all my rambles.

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For all the promiscuous girls.

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## Introduction

This paper is a written record of an inquiry that has been following me for years. In an attempt to control this string of persistent thoughts, I decided to use this project as a way to finally parse through this discussion that I have been having with myself, in a sufficiently fleshed out manner: Are we really living in a society that is founded on an economy that is structured around the traffic of women?

Sadly, that intrusive question was much too dense and frankly, overwhelming, for me to take on, so instead, I resorted to an off-shoot of this (but similarly as haunting) question: Does virginity actually animate the way rape trials are prosecuted and if so, in what ways and to what degree?

Now this might seem like a big jump, but Chapter One will outline and hopefully orient you on how I got from my first question to my second question, with a brief theoretical background. There could have been a lot more theory included in the first chapter to explain how I understand the regulation of women's sexuality under patriarchy, but I believe Mies, Irigaray, and MacKinnon are complicated enough that only including them would suffice for the context of this paper.

Chapter Two is a bit dense, but hopefully revealing, because I would hope you did not spend all the time that I did reading the fine print of the Model Penal Code and its provisions. At this point I hope the links and problems I see are becoming visible.

The Third Chapter is difficult because, in some ways, it produced even more questions, embedded within the questions that I already could not shake, but I guess that is alright because now, I am just more comfortable with all of these questions.

Hopefully more people will be thinking about them too.



## Chapter 1: Virginity

### a. The Regulation of Women's Sexuality under Patriarchy: Mies and Irigaray

A number of the thinkers who are foundational to my understanding about this subject base their findings on a Marxist-related analysis of women's subjugation that involves the socio-economic value of women as a central component to their marginal position in western society. The work of Maria Mies, and in particular her formative book, *Patriarchy and Accumulation on a World Scale: Women in the International Division of Labour*, has made a critical impact on my thinking of virginity. She establishes the role that capitalism has played in shaping gender relations. Mies' discussion about the connection capitalism has had in gender relations provided me with an in-depth historical and theoretical foundation about why and how men have come to regulate women's ability to reproduce. Mies outlines the history of the social origins of the unequal and hierarchical relationship of men over women by arguing that this dynamic emerged because men developed a "predatory" mode of production and appropriation.<sup>1</sup> This occurred because men were unable to experience the same type of appropriation of their own bodies, object-relation to nature, and productivity as women, because women were the producers of new women, men and "all other human productivity."<sup>2</sup> This means that women were the first "subsistence producers" and "inventors of the first productive economy," directly because of their object-relation to nature and their bodies, which was a "co-operate"

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<sup>1</sup> Mies Mies, Maria, 1998, *Patriarchy and Accumulation on a World Scale: Women in the International Division of Labour*, N.p.: Bloomsbury Academic, 44-47, 61-67.

<sup>2</sup> Mies, *Patriarchy and Accumulation on a World Scale*, 58.

appropriation and not exploitive or imbalanced.<sup>3</sup> Since men were unable to share a similar form of production, they developed their own technique for appropriating and exploiting this production and relationship to nature through hunting; however, hunting required men's utilization of tools to interact with nature and be productive.<sup>4</sup> This relationship was not only destructive (i.e., men were still unable to create life like women, and they were only able to kill/destroy/take life when interacting with nature), but also exclusively appropriative and exploitive. Their destructive ability greatly expanded as men's tools included more powerful forms of technology, such as arms.<sup>5</sup> Mies explains that the threat, and therefore power that arms granted men over an animal's life and another human's life enabled men's object-relation to nature to develop into a dominant and unequal relationship.<sup>6</sup>

Although arms did not directly force this dynamic to occur, men's monopoly over them as a substantial means of coercion provided men with enough threat over women that they were able to establish and successfully enforce an exploitive and hierarchical relationship.<sup>7</sup> Mies explains that this relationship also grew to enable men's control over a much broader audience including nature, property, animals, communities, other men, women's ability to reproduce, etc.<sup>8</sup> Mies also notes that this "patriarchal predatory mode of appropriation of producers," persisted as a transformative and actively preserved phenomenon, dependent on the type of production, and

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<sup>3</sup> Mies, *Patriarchy and Accumulation on a World Scale*, 47-48, 52-62.

<sup>4</sup> Mies, *Patriarchy and Accumulation on a World Scale*, 49-68.

Irigaray, Luce, 1985, *This sex which is not one*, Translated by Carolyn Burke. N.p.: Cornell University Press, 184.

<sup>5</sup> Mies, *Patriarchy and Accumulation on a World Scale*, 45-58, 61-62.

<sup>6</sup> Mies, *Patriarchy and Accumulation on a World Scale*, 61-62.

<sup>7</sup> Mies, *Patriarchy and Accumulation on a World Scale*, 61-65, 145.

<sup>8</sup> Mies, *Patriarchy and Accumulation on a World Scale*, 61-63.

eventually developing into institutional components such as the “...hypergamous marriage system.”<sup>9</sup>

The formation of a marriage system based on men’s appropriation of production, structurally enabled them to have access and control over women and their reproduction (children), and thus, “women became a commodity in an asymmetric or unequal marriage market, because control over more women meant accumulation of wealth.”<sup>10</sup> This means that the institutionalization of marriage and the patriarchal nuclear family directly facilitated the relegation of women’s ability to reproduce as a distinctly non-productive process and thus, not considered real labor, nor a concern/aspect of the public sphere.<sup>11</sup> This privatization of women’s production of the family devalued their labor and turned them into second class workers, which became a fundamental process in the domestication of women into “housewives.” Women, and specifically their sexuality (as a direct mediation of their reproductive capabilities) was established as a component of private property, and in doing so, a specialized market involving the valuation and exchange of these privatized concerns (women’s sexuality) emerged.<sup>12</sup>

Luce Irigaray’s chapter, “Women on the Market,” from her book *This Sex Which Is Not One*, engages with many of the ideas about gender relations from Mies’ analysis, but develops this line of thought to an even further degree, articulating how capitalism’s influence on the subjugation of women has directly led to the development of virginity as a socio-economic phenomenon. This theoretical definition of virginity is essential to how I understand virginity as a categorization for women in this paper. Irigaray emphasizes women’s reproductive use value,

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<sup>9</sup> Mies, *Patriarchy and Accumulation on a World Scale*, 65-67.

<sup>10</sup> Mies, *Patriarchy and Accumulation on a World Scale*, 66-67.

<sup>11</sup> Mies, *Patriarchy and Accumulation on a World Scale*, 47-48, 52-57.

<sup>12</sup> Mies, *Patriarchy and Accumulation on a World Scale*, 104-106, 110-116, 159-160. Irigaray, Luce, *This sex which is not one*, 172-173, 184.

their “reproduct[ion] of children and of the labor force,” and argues this is a critical component to the means of production and control in the “father-man” patriarchal society.<sup>13</sup> However, Irigaray goes on to articulate a multidimensional analysis of women’s actual valuation within the market of their exchange, by reconsidering some of Marx’s analysis of the value that characterizes the status of women. She argues that women’s bodies are objects of exchange in their “*abstracted*” manner, reduced to a common feature, compared to one another in the context of men’s “labor,” and “desire,” thus amalgamated into, “samples of the same indistinguishable work.”<sup>14</sup> This phenomenon re-objectifies women as a culmination of their accumulated work, as a single commodity, “compared by and for man,” in which they only derive value in their ability to be exchanged between men, for men’s needs and desires, creating true “*women-as-commodities*.”<sup>15</sup> Here, women as objects are “*subject[s] to a schism*,” whereupon they are divided into categories based upon their “usefulness and exchange value.”<sup>16</sup> Women’s bodies are a critical component in this process because they not only bear and transport the “*cult*” or mark of the men who are exchanging them, but because they are commodities, their bodies directly experience and represent the effects of being a speculated and exchanged entity.<sup>17</sup> Irigaray explains that this results in another schism, in which women’s bodies are thus divided into two different “*irreconcilable bodies*,” the “‘natural’ body” and the “socially valued, exchangeable body.”<sup>18</sup>

Irigaray describes the foundation that ensures this social order is, “*the exchange of women*,” which has led to the formation of three subcategories, or “*social roles*” in which

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<sup>13</sup> Irigaray, Luce, *This sex which is not one*, 172-173.

<sup>14</sup> Irigaray, Luce, *This sex which is not one*, 174-183.

<sup>15</sup> Irigaray, Luce, *This sex which is not one*, 175-177, 180-182.

<sup>16</sup> Irigaray, Luce, *This sex which is not one*, 174-182.

<sup>17</sup> Irigaray, Luce, *This sex which is not one*, 177-182.

<sup>18</sup> Irigaray, Luce, *This sex which is not one*, 180-182.

women, as the exchanged commodity, can exist.<sup>19</sup> The first grouping is the “*mother*,” who is explicitly the “reproductive instrument marked with the name of the father and enclosed in his house...private property, excluded from exchange.”<sup>20</sup> She is no longer viable for circulation in the economy because her use value, reproduction, has already been exchanged by her father to her husband, and thus already used by her husband. The second grouping is the “*virginal woman*.”<sup>21</sup> Irigaray explains that the virgin is “*pure exchange value*,” because she has not yet been exchanged (deflowered, penetrated, etc.) and still possesses the value of potentially being exchanged and thus deflowered, penetrated, etc., therefore, “once deflowered, a woman is relegated to the status of use value, to her entrapment in private property; she is removed from exchange among men.”<sup>22</sup> This means virgins are exchanged between men (father to husband) and then, are vaginally penetrated for the first time (which is what their potential is/was), transforming them into mothers. However, Irigaray discusses a third category, the “*prostitute*,” which categorizes women whose value “*has already been realized*,” because their “*usage*” (being vaginally penetrated) has already been “*exchanged*,” unlike the potential that values a virgin.<sup>23</sup> Prostitutes are both a complicated and unfavorable category because they directly conflict with the structural values of exchange that men have created.

## **b. The Virgin-Promiscuous Continuum and Contemporary Constructions of Female Sexuality**

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<sup>19</sup> Irigaray, Luce, *This sex which is not one*, 184, 186-187.

<sup>20</sup> Irigaray, Luce, *This sex which is not one*, 185.

<sup>21</sup> Irigaray, Luce, *This sex which is not one*, 186.

<sup>22</sup> Irigaray, Luce, *This sex which is not one*, 186.

<sup>23</sup> Irigaray, Luce, *This sex which is not one*, 186.

The virgin-promiscuous continuum exists as a gradient within the much greater classification system of girls and women based on their sexuality and its value. The larger classification system that my analysis lives within has (at least) three sub-groupings that form a triad, which include: the virgin, the mother, and the prostitute (also known as the modern day whore). I use Irigaray's development of the triad and specifically examine some of the intricacies that have developed in a contemporary context. My development of the virgin-promiscuous continuum comes from my own social experiences and analysis of how the connecting lines within Irigaray's triad are navigated and delineated, specifically with an updated definition, valuation, and expectation of exchange of virginity.

The virgin-promiscuous continuum is located within the virgin category of the triad, as a metric for determining when an unmarried but coupled woman loses her virginity, but is not necessarily relegated to the whore category. This metric should not be mistaken as simply a replication of Irigaray's delineation between virgin and prostitute because, as I argue in my definition of virginity, these categories are not as literal as they may have once been. This is not to say that a categorization of virgin or non-virgin does not hold the same social or legal significance, more that the delinations of these categories have changed in many cases. Girls and women who would still receive many of the virgin privileges, can now engage in (a very specific type of) premarital sex, and are not guaranteed to be banished to the prostitute categorization.

The virgin-promiscuous continuum of female sexuality occurs along a gradient; it is not a binary system. The categories of "virgin" and "promiscuous" are the two poles that structure this scheme, with various positions along this spectrum. The in-between positions along the continuum mean that individuals associated with the virgin side include more than just girls who

have *not* been vaginally penetrated by a penis and who have an intact hymen (“literal virgins”). For example, a girl who may have participated in the act of vaginal penetration, and did so in a committed, monogamous, heterosexual, cisgender, un kinky, small age gap relationship, with a relatively homogeneous partner is still affiliated with the virgin side. This is because this system of evaluation is more about *the socially accepted circumstances*, in which the sexual act occurs, rather than the actual *physicality* of the girl *participating in sexual intercourse*.

This is not to say that a girl who is identified towards the virgin side of the continuum transforms and becomes a literal virgin, but rather that this social mechanism exists as a spectrum to enable many women to inhabit an area close to the “virgin” side, despite their actual lack of physical virginity status. One’s participation in socially acceptable sex places her in a *virgin-adjacent position* on the continuum. She will unlikely be evaluated with all the privileges of a virgin, however, due to her proximity to the virgin end of the gradient, I argue she is allotted many of the virgin-related benefits of this value system.

On the other hand, a girl who has been vaginally penetrated, but in a circumstance that is not as socially approved of (i.e., not in a committed or monogamous relationship or with a heterogeneous partner, large age gap, kinky) would *not* be considered a member of the virgin category, nor adjacent to this end of the continuum. The social dictation of *appropriate* types or scenarios of sex is central to the definition of virgin and virgin-adjacent people because the actual amount of sex the girl has had is not the relevant characteristic, particularly when it occurred in a respectable circumstance. A girl who has had sex outside of a socially-approved relationship is classified as “promiscuous,” despite potentially having had much less sex than the “virgin-adjacent” girl in her committed relationship. Thus, although not a binary system,

women's sexuality is still typically evaluated with these two opposing categories in mind. They structure the mechanism of assessment.

This particular definition of virginity and virgin-privileged people is not meant to insinuate that some of the varied American conceptions about whether a female has ever physically experienced sexual intercourse (penis penetration of the vagina) is irrelevant to the classification system, more that this spectrum is actually a *value system* around which the law is structured. This value system is predicated on the social perceptions of “*acceptable*” versus “*unacceptable*” forms of sexuality for women. While for some women their literal penetration status matters in determining their virginity, it is not the most relevant concern in the context of American law. The context of the virgin-promiscuous value system is critical because it elucidates a more systematic and institutional definition of virginity, that is about *how* and in what *context* the penile penetration occurs. “Virgin” and “virgin-adjacent” encompasses the “acceptable” context, while “promiscuous” encompasses the “unacceptable.”

This paper is attentive to virginity because I believe its prominence, as an actively relevant social category and entity in law, is substantially unrecognized, specifically because the term “virgin” has been explicitly written out of contemporary American regulations. I argue instead that the presence, or lack thereof, of the actual term “virgin” is inconsequential to the argument about whether or not this concept exists in or informs American law, precisely because the law has maintained its use of the term “promiscuous.” The law's use of the term “promiscuous” inherently evokes the entire virgin-promiscuous continuum, therefore implicitly relying on the perception and role of the virgin and virgin-adjacent subgroups in this evaluation system. One cannot understand what promiscuity is, or rule in favor of it, without at some point,



delineating what virginity is beforehand. Virgin and promiscuous are innately tied adjectives, categories, and social concepts. They depend on each other to distinguish themselves from one another. One cannot be mentioned without implicitly supporting the existence of the other. Thus, it is of little importance that the explicit use of the term “virgin” is not present in most American codes, laws, and regulations. This omission does not actually cancel out any of the foundational ideas of the virgin-promiscuous value system. Instead, I argue that this omission actually makes the process of women’s moral, intellectual, and dimensional appraisal and categorization, based on their sexual experiences, an even more implicit, under-acknowledged, and accepted process in American society, particularly in the legal system.

The way I define and use virgin or virginity in this paper must not be misconstrued as my belief that the varied international and historical contexts, which have resulted in numerous cultures’, religions’ and states’ developments of their own definitions and practices relating to virginity, are irrelevant. Instead, my interpretation of virginity, and its potential locations of convergence and divergence from these diverse meanings throughout the world should elucidate that virginity has rarely been a fixed social category and has seldom relied on a singular form of evaluation or attribution of value.

For example, David Malkiel discusses the practice of “digital defloration” of women in various Jewish, Middle Eastern, and Pacific Islander societies during the Middle Ages. It was common for the husband to “deflower” his bride, by penetrating her vagina with his fingers, or in some cases, with a foreign object, but distinctly not with his penis.<sup>24</sup> This practice is noted as a technique where a man “virginity test[s]” his bride, by checking if this penetration results in

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<sup>24</sup> Malkiel, David, “Manipulating Virginity: Digital Defloration in Midrash and History,” *Jewish Studies Quarterly* 13, no. 2 (2006): <http://www.jstor.org/stable/40753394> 105, 118, 121.

blood, to determine if her hymen is intact.<sup>25</sup> The hymen is commonly defined as “a membrane, partially closing the external vaginal opening,” and has a long and diverse history of being associated with girl’s virginites.<sup>26</sup> (For many cultures that have used the presence of a hymen as a component for virginity testing, they distinctly assume virginity to be a characteristic exclusively applicable to people with vaginas.) These few accounts demonstrate that many cultures share some attention to the hymen in the context of the status of one's virginity, however the practices and evaluations of these ideas can occur in a wide variety of ways. Nonetheless, the hymen has not been a component of all cultural and historical ideas of virginity, let alone women’s sexuality. Malkiel notes that in some instances, girls would self remove their own hymen, or have this done by family members, priests, older women, etc. Interestingly, Malkiel explains that in specific instances, “a girl has great difficulty finding a husband if her hymen is intact when she reaches the age of puberty and marriage.”<sup>27</sup>

Malkiel describes that, although digital deflowering tests are not explicitly instructed in the Torah, this practice has been identified in other significant Jewish religious texts such as the Talmud, a number of rabbinical texts about the law, and the Midrash (i.e., Jewish explanatory texts about the Old Testament).<sup>28</sup> This is similarly the case in Christianity. While the New Testament does not explicitly instruct any type of virginity status testing or examination, the religion has had a diverse and evolving relationship with the notion of virginity. According to Elizabeth Castelli, although references about virginity can be found in the first century of

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<sup>25</sup> Malkiel, David, “Manipulating Virginity: Digital Defloration in Midrash and History,” 106.

<sup>26</sup> [https://www.academia.edu/download/33194501/a\\_Hymen\\_facts\\_and\\_conceptions.pdf](https://www.academia.edu/download/33194501/a_Hymen_facts_and_conceptions.pdf) 109 - 110

<sup>27</sup> Malkiel, David, “Manipulating Virginity: Digital Defloration in Midrash and History,” 107.

<sup>28</sup> Malkiel, David, “Manipulating Virginity: Digital Defloration in Midrash and History,” 108 - 111, 119.

Christianity with Paul the Apostle, they most likely did not become an institutional category or component of the religion until the second or third century.<sup>29</sup>

Similar to Judaism, Christian discourse about virginity appears to have circulated in discussion by more local figures. Conceptions and rules were determined by specific councils, discussed in letters between pastors, and dictated within differing church fathers' religious interpretations of asceticism, varying depending on location and time period.<sup>30</sup> Castelli notes that the unfolding of the ideology of virginity has a complex history, involving the "intertwining [of] theological arguments, current philosophical ideas, and a collection of contemporary rhetorical themes."<sup>31</sup>

The limited, inconsistent, and at times contradictory, accounts of the hymen, virginity, deflowering, etc., and their relationship with females' worth that I outline, underscores this ongoing, fluid understanding of virginity, even in a single, extremely old, and relatively small religion, like Judaism.<sup>32</sup> These variations also highlight that despite being able to find references to the historical importance of virginity in contemporary religions and cultures, many of these ideas and customs have changed and do not necessarily reflect how these groups perceive virginity today. (Note also that not all cultures that have ever existed place an importance or even mention virginity.)

In an attempt to avoid both extensive historical accounts of virginity and vast generalizations about other cultures that I am unfamiliar with, my definition of virginity is not a historically cumulative definition, but one more anchored in modern United States society. This

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<sup>29</sup> Castelli, Elizabeth, "Virginity and Its Meaning for Women's Sexuality in Early Christianity," *Journal of Feminist Studies in Religion* 2, no. 1 (1986): 61–88. <http://www.jstor.org/stable/25002030>, 67, 78.

<sup>30</sup> Castelli, Elizabeth, "Virginity and Its Meaning for Women's Sexuality in Early Christianity," 67 - 68, 70, 80.

<sup>31</sup> Castelli, Elizabeth, "Virginity and Its Meaning for Women's Sexuality in Early Christianity," 67.

<sup>32</sup> Malkiel, David, "Manipulating Virginity: Digital Defloration in Midrash and History," 117 - 119, 124.

inattention to the varied history of virginity's meaning and importance is meant to underscore that the concept is a cultural, social, political, and economically constructed idea, and is not limited to a historical belief about the physical experience of one's vagina.

Furthermore, there are varied perceptions of virginity at different time periods of the United States. My omission of these differing ideas of virginity in American culture is not meant to one-dimensionalize them or their significance. Instead, I have intentionally chosen to center my analysis on the dominant social perceptions about virginity that have been institutionalized in American law. Therefore, this paper does not go into detail about the varied social perceptions of virginity in the United States. My specific focus is on this virgin-promiscuous value system, which is meant to highlight the cultural perception and reality creating hierarchy in the United States, by illuminating the manner in which it only considers a limited population's perspective of female sexuality.

I believe it is important to explicitly state that this conceptualization of women's sexuality is not based on natural phenomena, but on a thought up, developed, and institutionalized practice that is part of male supremacy upon which American society is constructed.<sup>33</sup> Although the United States law may not refer to tactics such as the inspection of a female's hymen, I argue that consideration of virginity still occurs, as exemplified by the virgin-promiscuous continuum as an important governing tool in America. In using a broader understanding of virginity in this paper, I underscore that women's sexuality is regulated by laws and policies in a more complicated, and at times, less explicit manner, that centers on a virgin-promiscuous value system.

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<sup>33</sup> Mies, *Patriarchy and Accumulation on a World Scale*, 169.

### c. Women's Sexuality and the Law: MacKinnon and the State

Once women's reproductive work was established with unrecognized use value and with the obscuring of a commodity production obscured, it was officially relegated outside of the official economy.<sup>34</sup> This led to women's reproduction being categorized as an activity, because it was not work, and thus, now framed as activities, it was easily and uncontroversially controlled by political and legal institutions.<sup>35</sup>

Another feminist thinker that has been fundamental in my understanding of virginity is Catharine MacKinnon because of her emphasis on the state's under-recognized role in mediating and reproducing gender relations and thus, women's subjugation. Her discussion about the states' contribution to women's status in Chapter 8, "The Liberal State," from her book, *Towards a Feminist Theory of the State*, provides a critical link between the theoretical understandings of women's sexuality and how these concepts are reified. MacKinnon specifically dissects the role law and politics play in this relationship through their association with and administration of power over society. She notes that the state is, "not a discrete location, but a web of sanctions throughout society, which 'control[s] the principal means of coercion' that structures womens' everyday lives."<sup>36</sup> She argues that the state is not an autonomous institution, but a system that takes on society's perceptions and mirrors them. In this discussion, the idea of "society" is not a neutral entity and must be understood as distinctly male.<sup>37</sup>

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<sup>34</sup> Mies, *Patriarchy and Accumulation on a World Scale*, 160.

<sup>35</sup> Mies, *Patriarchy and Accumulation on a World Scale*, 116.

<sup>36</sup> MacKinnon, Catharine A., 1989, *Toward a feminist theory of the state*, N.p.: Harvard University Press, 169.

<sup>37</sup> MacKinnon, Catharine, *Toward a feminist theory of the state*, 161, 163.

American society is distinctly male because of its replication of pre-existing social dynamics of power that subordinate women on the basis of their reproductive abilities. Therefore, since society is distinctly male, when the state mirrors society it is institutionalizing the male point of view and practice of subordinating women.<sup>38</sup> The significant impact of institutionalizing the male point of view is that the state creates laws and policies about women's situations, from a male standpoint, that cannot be considered impartial or uninvolved.<sup>39</sup> MacKinnon asserts, "gender is a social system...[of inequality] that divides power," and is directly administered through men's subjugation; therefore, a male perspective of the social dynamic of women's oppression is both an implicit and explicit part of the state's thought process when creating laws.<sup>40</sup> An example of this inseparable unity between the subordinating male standpoint and the state's perspective (that creates policy) is the male social assumption that, "...women generally consent to sex, is the assumption that women consent to this government."<sup>41</sup>

MacKinnon argues that the state not only adopts this male perspective, but also actively replicates and reproduces it by "the law see[ing] and treat[ing] women the way men see and treat women."<sup>42</sup> MacKinnon discusses three famous court cases, *Lochner v. New York*, *Muller v. Oregon*, and *West Coast Hotel v. Parrish*, to highlight the role that the state's decision to follow "negative freedom" instead of positive legal affirmations is fundamental in influencing the status quo.<sup>43</sup> Negative freedom or liberty is the state's active decision to not interfere and therefore allow the existing circumstances to remain in place. Positive freedom is the state's decision to be

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<sup>38</sup> MacKinnon, Catharine, *Toward a feminist theory of the state*, 161, 163.

<sup>39</sup> MacKinnon, Catharine, *Toward a feminist theory of the state*, 168.

<sup>40</sup> MacKinnon, Catharine, *Toward a feminist theory of the state*, 160, 167.

<sup>41</sup> MacKinnon, Catharine, *Toward a feminist theory of the state*, 161.

<sup>42</sup> MacKinnon, Catharine, *Toward a feminist theory of the state*, 161 -163.

<sup>43</sup> MacKinnon, Catharine, *Toward a feminist theory of the state*, 164.

actively involved in a circumstance, in which they determine and mediate the freedom at hand.<sup>44</sup> MacKinnon explains the difference between these two approaches as, “Positive freedom, freedom to do rather than to keep from being done to...”<sup>45</sup>

MacKinnon critically notes that the state’s choice to respond to a situation with negative freedom does not mean they are acting or letting the circumstance remain neutral, but rather, the complete opposite. “If one group is socially granted the positive freedom to do whatever it wants to another group, to determine that the second group will be and do this rather than that, no amount of negative freedom legally guaranteed to the second group will make it the equal to the first.”<sup>46</sup> This point underscores that the state’s lack of intervention means it is leaving the situation up to civil society and culture, which are distinctly partial entities and systems; thus, the state is approving whatever biases that exist in the culture and civil society contexts. MacKinnon explains that the depth of this implied approval, “has meant that civil society, the domain in which women are distinctively subordinated and deprived of power, has been replaced beyond the reach of legal guarantees.”<sup>47</sup> Since “women are oppressed socially, prior to law,” the state’s decision to not intervene in the law relegates it to the already unequal and women-subordinating society.<sup>48</sup>

Throughout MacKinnon’s analysis of the three significant court cases, she illustrates what has occurred as a result of the male point of view framing state policy. This analysis leads her to two very important points: these laws treat and regulate women from a standpoint of male

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<sup>44</sup> MacKinnon, Catharine, *Toward a feminist theory of the state*, 164.

<sup>45</sup> MacKinnon, Catharine, *Toward a feminist theory of the state*, 164.

<sup>46</sup> MacKinnon, Catharine, *Toward a feminist theory of the state*, 164.

<sup>47</sup> MacKinnon, Catharine, *Toward a feminist theory of the state*, 164 - 165.

<sup>48</sup> MacKinnon, Catharine, *Toward a feminist theory of the state*, 165.

dominance; and second, the issues or ideas recognized as important in the male point of view get a place in state policy.

This paper examines how the state's decision to act with negative freedom is a direct result of the male point of view, and as such, does not recognize women's subjugation. I discuss how this phenomenon specifically occurs in the context of American laws, regulations, and procedures regarding rape and sexual violence against women, by evaluating how the state has institutionalized the male perspective on women's sexuality, centered on the valuation of virginity. I discuss how the male perspective on women's sexuality has developed a value categorization spectrum that I call the virgin-promiscuous continuum, which is based on social beliefs about girls' virginity and sexuality, and the various social and legal consequences of the institutionalization of such a mechanism.

To begin to understand this phenomenon, this paper understands virginity as an important classification within a greater spectrum of how women's sexuality is conceived in the United States. This spectrum is a continuum, flanked by virginity and promiscuity as opposing categorical ends with a number of habitable positions between these two groups. The virgin-promiscuous continuum is a mechanism that identifies components of what is socially perceived as relevant aspects of women's sexuality, and evaluates them based on where they fall along the continuum. Women's sexuality is a classification system because their sexuality is a critical component of how the patriarchy in America determines their worth. This means that the sexual practices of a woman directly determines her location along this continuum, which then marks her with her socially constructed value, desirability, etc. in the American cultural context.



I am particularly interested in the positions between the two ends of the continuum and how they are interpreted and delineated from each other by American institutions to form subgroups within this spectrum. This paper investigates how the perceptions and biased analysis of these subgroups along the continuum have penetrated other American institutions, such as the legal system, and affects further decisions about the crimes and convictions of sexual violence, as well as the framing of survivors.

The socio-economic value of women is founded on women's sexual exploitation and exchange, which creates and then requires virginity as a social and economic category. I apply this lens to the United States legal system, as an attempt to understand the current relationship that the state has with women and girls, regulated and mediated by American laws and codes.

## Chapter 2: Virginity and the Law

I focus on the Model Penal Code, which was first developed in the mid 20th century. The Model Penal Code is a revered guide for U.S. criminal law principles. It was published in 1962 by the American Law Institute (ALI), which is a non-governmental organization of “highly regarded judges, lawyers, and law professors.”<sup>49</sup> The Model Penal Code’s inception began three decades earlier, after the organization had hoped to create a model code in the U.S. to “...articulate and rationalize the governing rules in American jurisdictions,” specifically in the context of criminal justice.<sup>50</sup>

The initial ALI proposal for this project, which was endorsed by the Bar Association and various law schools, had been denied funding because, according to *The American Law Institute’s Memorandum for Advisory Committee on Criminal Law, The Proposal to Prepare A Model Penal Code*, dated June 1951, the Rockefeller Foundation was concerned about how the project would treat youth-age offenders who were older than Juvenile Court age.<sup>51</sup> The Rockefeller Foundation was hesitant about ALI creating these codes, and questioned the context and role these codes would have in American society and future American legal ideas.

Do the real problems ‘lie in the realm of a more nearly adequate law – to which a model code would contribute’ or ‘do they lie in the questions that still have to be answered more adequately in the behaviorist sciences?’ Would ‘a model code written at once tend to

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<sup>49</sup> Robinson, Paul H, and Markus D. Dubber. “The American Model Penal Code: A Brief Overview.” Penn Law: Legal Scholarship Repository. Accessed October 15, 2021. [https://scholarship.law.upenn.edu/faculty\\_scholarship/131/?utm\\_source=scholarship.law.upenn.edu%2Ffaculty\\_scholarship%2F131&utm\\_medium=PDF&utm\\_campaign=PDFCoverPages](https://scholarship.law.upenn.edu/faculty_scholarship/131/?utm_source=scholarship.law.upenn.edu%2Ffaculty_scholarship%2F131&utm_medium=PDF&utm_campaign=PDFCoverPages).

<sup>50</sup> Robinson, and Dubber, “The American Model Penal Code: A Brief Overview,” 320.

<sup>51</sup> *The American Law Institute’s Memorandum for Advisory Committee on Criminal Law, The Proposal to Prepare A Model Penal Code*, 1.

‘freeze’ what is, without plumbing these underlying questions?’ Does the ‘main problem lie in the field of a more adequate law – important though that is – or does it lie in the human organization for administering the law...?’<sup>52</sup>

The Rockefeller Foundation expressed these doubts while also recognizing that perhaps attempting to write a model code may be one of the best ways to answer these questions.<sup>53</sup>

After finally receiving a grant from the Rockefeller Foundation in the mid 1930s, the ALI began their work on draft codes, starting with a “pondering committee,” which included individuals from medical and social science disciplines, as well as from the world of law.<sup>54</sup> As the ALI worked on this project, their proposed restatement of the law eventually grew into a new set of codes that states could “...use to draft new criminal codes.”<sup>55</sup>

Throughout the 1950s and early 60s, over 50 Counsel, Discussion, and Tentative Drafts were written and finally in April of 1961, a “Proposed Final Draft 1” was developed, with the “Proposed Official Draft” shortly following in May of 1962.<sup>56</sup> I use this “Proposed Official Draft,” from 1962, as my first point of reference for the Model Penal Code. I also note some of the changes that developed later as part of the limited Reprint Tentative Drafts and Commentaries that led to the 1985 “Model Penal Code Official Draft and Explanatory Notes, As Adopted by ALI.”<sup>57</sup> <sup>58</sup>

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<sup>52</sup> *The American Law Institute’s Memorandum for Advisory Committee on Criminal Law, The Proposal to Prepare A Model Penal Code*, 1-2.

<sup>53</sup> *The American Law Institute’s Memorandum for Advisory Committee on Criminal Law, The Proposal to Prepare A Model Penal Code*, 1-2.

<sup>54</sup> *The American Law Institute’s Memorandum for Advisory Committee on Criminal Law, The Proposal to Prepare A Model Penal Code*, 2.

<sup>55</sup> *The American Law Institute’s Memorandum for Advisory Committee on Criminal Law, The Proposal to Prepare A Model Penal Code*, 320.

<sup>56</sup> Robinson, and Dubber, “The American Model Penal Code: A Brief Overview,” 320.

<sup>57</sup> Robinson, and Dubber, “The American Model Penal Code: A Brief Overview,” 320.

<sup>58</sup> Robinson, and Dubber, “The American Model Penal Code: A Brief Overview,” 320.

According to the U.S. Department of Justice, the Model Penal Code's completion was hugely influential in the development of nearly three dozen American states' individual codes, (some examined later in this paper) and evoked a, "widespread revision and codification of the substantive criminal law of the United States."<sup>59</sup> The United States Department of Justice further explains that, "Thirty-four State codifications or revisions have now drawn upon the model as have sustained congressional efforts to produce a Federal criminal code."<sup>60</sup> While the Model Penal Code was never officially enacted into American judicial law, it has remained an extremely instrumental influence on the United States' social and judicial framework for how criminal law is understood, rationalized, and accepted.

From early on, the Model Penal Code received overwhelming support, as discussed in the Institute's *Memorandum for Advisory Committee on Criminal Law, The Proposal to Prepare A Model Penal Code*. This long lasting influence was a critical consideration and goal in the Model Penal Code's inception.

...no one will question its importance in society...men [will] place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions...penal law governs the strongest force that we permit official agencies to bring to bear on individuals. Its promise as an instrument of safety is matched only by its power to destroy...nowhere in the entire legal field is more at stake for the community or for the individual.<sup>61</sup>

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<sup>59</sup> Robinson, and Dubber, "The American Model Penal Code: A Brief Overview," 320-326.

<sup>60</sup> Robinson, and Dubber, "The American Model Penal Code: A Brief Overview," 326.

<sup>61</sup> *The American Law Institute's Memorandum for Advisory Committee on Criminal Law, The Proposal to Prepare A Model Penal Code*, 2-3.

The second “ground” discussed the lack of “specialized attention” in the United States’ pre-existing penal law, and how, despite some progress, this lack of specialization has resulted in an uneven distribution of the growth of American law across society.<sup>62</sup> The third “ground” discusses how this new set of penal codes would fix the widespread problem of using old concepts from out of date statutes in common law.<sup>63</sup> The sixth ground explains that this redevelopment of penal law would come from joining various disciplines to produce, “a treatise on the major problems of the penal law and their appropriate solutions from which future legislation, adjudication and administration would be able to draw aid.”<sup>64</sup>

The Model Penal Code has been described as, “...the closest thing to being an American criminal code,” that influenced the revision of more than half of American states' laws.<sup>65</sup> According to the University of Pennsylvania Carey Law School, the specific aspects of the Model Penal Code that has held the strongest historic influence include, “...the criminal law portion of the code – the statement of general principles of liability in part I and the definition of specific offenses in part II.”<sup>66</sup>

My analysis focuses on one of the most influential aspects of the codes, “PART II. Definition of Specific Crimes,” including “Article 213, Sexual Offenses.” Article 213, Sexual Offenses details institutionally accepted provisions, specifically related to sexual offenses and

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<sup>62</sup> *The American Law Institute’s Memorandum for Advisory Committee on Criminal Law, The Proposal to Prepare A Model Penal Code*, 3-4.

<sup>63</sup> *The American Law Institute’s Memorandum for Advisory Committee on Criminal Law, The Proposal to Prepare A Model Penal Code*, 4-6.

<sup>64</sup> *The American Law Institute’s Memorandum for Advisory Committee on Criminal Law, The Proposal to Prepare A Model Penal Code*, 11.

<sup>65</sup> Robinson, and Dubber, “The American Model Penal Code: A Brief Overview,” 320.

<sup>66</sup> Robinson, and Dubber, “The American Model Penal Code: A Brief Overview,” 326.

discusses the specifics of how the court should interact with related cases.<sup>67</sup> Article 213 has six sections: § 213.0. Definitions; § 213.1. Rape and Related Offenses; § 213.2. Deviate Sexual Intercourse by Force or Imposition; § 213.3. Corruption of Minors and Seduction; § 213.4. Sexual Assault; § 213.5. Indecent Exposure; § 213.6. Provisions Generally Applicable to Article 213. In this final section there are five provisions titled: (1) Mistake as to Age; (2) Spouse Relationships; (3) Sexually Promiscuous Complainants; (4) Prompt Complaint; (5) Testimony of Complainants.

The third provision, “Sexually Promiscuous Complainants,” states,

It is a defense to prosecution under Section 213.3 and paragraphs (6), (7) and (8) of Section 213.4 for the actor to prove by a preponderance of the evidence that the alleged victim had, prior to the time of the offense charged, engaged promiscuously in sexual relations with others.<sup>68</sup>

This provision means that one can defend themselves from prosecution of the offenses defined under 213.3 “Corruption of Minors and Seduction,” and paragraphs (6), (7) and (8) of Section 213.4 “Sexual Assault,” if they can prove the promiscuity of the victim, before the event of the charge occurred.

The offenses listed that this provision applies to are:

Section 213.3. Corruption of Minors and Seduction.

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<sup>67</sup> American Law Institute, *Model Penal Code: Official Draft and Explanatory Notes : Complete Text of Model Penal Code as Adopted at the 1962 Annual Meeting of the American Law Institute at Washington, D.C., May 24, 1962*, Philadelphia, Pa. :The Institute, 1985, 49-51.

<sup>68</sup> Model Penal Code, 51.

Offense Defined. A male who has sexual intercourse with a female not his wife, or any person who engages in deviate sexual intercourse or causes another to engage in deviate sexual intercourse, is guilty of an offense if:

- (a) the other person is less than [16] years old and the actor is at least [4] years older than the other person; or
- (b) the other person is less than 21 years old and the actor is his guardian or otherwise responsible for general supervision of his welfare; or
- (c) the other person is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over him; or
- (d) the other person is a female who is induced to participate by a promise of marriage which the actor does not mean to perform.

Grading. An offense under paragraph (a) of Subsection (1) is a felony of the third degree. Otherwise an offense under this section is a misdemeanor.

#### Section 213.4. Sexual Assault.

A person who has sexual contact with another not his spouse, or causes such other to have sexual contact with him, is guilty of sexual assault, a misdemeanor, if:

- (6) the other person is less than [16] years old and the actor is at least [4] years older than the other person; or
- (7) the other person is less than 21 years old and the actor is his guardian or otherwise responsible for general supervision of his welfare; or

(8) the other person is in custody of law or detained in a hospital or other institution and the actor has supervisory or disciplinary authority over him.

Sexual contact is defined as, “any touching of the sexual or other intimate parts of the person for the purpose of arousing or gratifying sexual desire.”<sup>69</sup> This means that in a case of alleged “corruption of minors” and “seduction or sexual assault,” the alleged perpetrator could be considered innocent if they prove that the alleged victim had “promiscuous” sexual experiences prior to this encounter, regardless of being a minor.

This provision and other sections of the Model Penal Code’s use of the previous “promiscuous” sexual experiences of the alleged victim, prior to the encounter, is a critical example of the institutionalization of the virgin-promiscuous value system in American law because a girl’s promiscuity is not an explicitly legally defined, nor scientifically legitimate category, but a classification based directly on men’s understanding, interpretation, and categorization of women’s sexuality, that has been adopted into American law.

As outlined in The Introduction by MacKinnon, the state develops its ideas by incorporating the male point of view in the creation of laws and regulations.<sup>70</sup> MacKinnon emphasizes that, the institutionalization of this perspective, “ensures that the law will...reinforce existing distributions of power when it most closely adheres to its own ideal of fairness.”<sup>71</sup> I argue that subsections 6, 7, and 8 of section 213.3 are critical examples of the Code’s biased social and cultural ideas of virginity and its value in girls, which have directly contributed to the construction of subordinating laws criminalizing and punishing rape. Since American states’ have adopted into law society’s (men’s) perceptions of women’s sexuality, this section of the

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<sup>69</sup> Model Penal Code, 50-51.

<sup>70</sup> MacKinnon, Catharine, *Toward a feminist theory of the state*, 162.

<sup>71</sup> MacKinnon, Catharine, *Toward a feminist theory of the state*, 163.



Model Penal Code and its provisions are an explicit institutionalization of the male-informed virgin-promiscuous value system.<sup>72</sup>

MacKinnon provides a framework for which the presence of the virgin-promiscuous continuum can be identified in American legal codes including Section 213 of the Model Penal Code. She notes that in matters of sex discrimination “male is the implicit reference for human...the measure of entitlement to equality.”<sup>73</sup> Therefore, when issues of sex discrimination against women are raised, the law can only assist in the limited perspective from a men’s view. MacKinnon finds that, “it gives little to women that it cannot also give to men,” but this does not acknowledge the social inequality that already distinguishes between how men and women are viewed, therefore, “maintaining sex inequality while appearing to address it.”<sup>74</sup>

This analysis is particularly illuminating in the context of the American Law Institute’s Memorandum for Advisory Committee on Criminal Law, *The Proposal to Prepare A Model Penal Code*. As part of the fundamental reasoning for the Model Penal Code, the eighth section of this document develops the grounds in which the Code’s decision-making will function by stating, “It is essential to confine the project within areas where such variety does not preclude a uniform solution or else to meet the difficulty by the presentation of alternative solutions adapted to? the various conditions posed.”<sup>75</sup> The ALI also acknowledges that the Code is socially informed, with “many legislative choices may so largely turn on matter of opinion,” and assures this is an institutional component to it. Though they also express that a single answer to legal questions is non-endorsable.

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<sup>72</sup> MacKinnon, Catharine, *Toward a feminist theory of the state*, 163.

<sup>73</sup> MacKinnon, Catharine, *Toward a feminist theory of the state*, 168.

<sup>74</sup> MacKinnon, Catharine, *Toward a feminist theory of the state*, 168.

<sup>75</sup> *The American Law Institute’s Memorandum for Advisory Committee on Criminal Law, The Proposal to Prepare A Model Penal Code*, 13.

The act of including a virgin-promiscuous value system in the Code ensures that the creation, interpretation, and implementation of laws based on the Model Penal Code will remain within the bounds of societal norms of the time. While the interpretation and implementation of the Code will evolve with changing social perceptions, the writers have implicitly delineated social guideposts that will be used when “adapting” the laws’ perspective. They are controlling the Model Penal Code’s evolution to the confines of the pre-existing institution.

The ALI includes a mechanism in the Code to adjust biases to the current social conditions and public attitudes. That is why the virgin-promiscuous value system I have created works best as a continuum with virgin and promiscuous on each end. This structure is quite malleable, with the delineation between virgin, virgin-adjacent, promiscuous, etc. to be redrawn depending on the existing social and legal context. The Model Penal Code was not meant to directly institutionalize the social perceptions of women’s sexuality at the time of its original writing, but to be adaptable to a changing mentality. The intent of the Code was to *guide* perspective used in legal precedents, explaining, “The enterprise will have an ample scope within these limitations. They will, indeed, do little more than to assure that emphasis is placed where it should be in any case, namely, on the pervasive problems posed in shaping law to deal with the serious injuries and threats to vital human interests rather than the vast, heterogeneous mass of special legislation declaring this or that conduct a petty offense, subject to a minor penalty.”<sup>76</sup>

In, Duncan Chappell, Camille LeGrand, and Jay Reich’s text, “Forcible Rape: An Analysis of Legal Issues (1978),” from the National Institute of Law Enforcement and Criminal Justice, they discuss the relationship between how social and cultural ideas are heavily relied on

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<sup>76</sup> *The American Law Institute’s Memorandum for Advisory Committee on Criminal Law, The Proposal to Prepare A Model Penal Code*, 13.

and adapted to legal rulings. According to Duncan et al., “Legal theory has long held that a crime exists only when there is concurrence of an unacceptable act and a criminal intent with respect to that act.”

MacKinnon describes how the law does not recognize rape as a crime of “assault.”<sup>77</sup>

In, “PART II. DEFINITION OF SPECIFIC CRIMES OFFENSES AGAINST EXISTENCE OR STABILITY OF THE STATE ARTICLE 200. OFFENSES AGAINST EXISTENCE OR STABILITY OF THE STATE,” of The Model Penal Code, “ARTICLE 210. CRIMINAL HOMICIDE” includes four important definitions (210.0) that are relevant in Articles 210-213, “unless a different meaning plainly is required,” and cover the following four terms: human being; bodily injury; serious bodily injury; and deadly weapon.<sup>78</sup>

#### ARTICLE 211. ASSAULT; RECKLESS ENDANGERING; THREATS

##### Section 211.0. Definitions.

In this Article, the definitions given in Section 210.0 apply unless a different meaning plainly is required.

##### Section 211.1. Assault.

(1) Simple Assault. A person is guilty of assault if he:

- (a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another; or
- (b) negligently causes bodily injury to another with a deadly weapon; or
- (c) attempts by physical menace to put another in fear of imminent serious bodily injury.

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<sup>77</sup> MacKinnon, Catharine, *Toward a feminist theory of the state*, 172 - 174.

<sup>78</sup> Model Penal Code, 44.

Simple assault is a misdemeanor unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty misdemeanor.

(2) Aggravated Assault. A person is guilty of aggravated assault if he:

(a) attempts to cause serious bodily injury to another, or causes such injury purposely, knowingly or recklessly under circumstances manifesting extreme indifference to the value of human life; or

(b) attempts to cause or purposely or knowingly causes bodily injury to another with a deadly weapon.

Aggravated assault under paragraph (a) is a felony of the second degree; aggravated assault under paragraph (b) is a felony of the third degree.<sup>79</sup>

#### ARTICLE 213. SEXUAL OFFENSES

##### Section 213.0. Definitions.

In this Article, unless a different meaning plainly is required:

(1) the definitions given in Section 210.0 apply;

(2) "Sexual intercourse" includes intercourse per os or per anus, with some penetration however slight; emission is not required;

(3) "Deviate sexual intercourse" means sexual intercourse per os or per anus between human beings who are not husband and wife, and any form of sexual intercourse with an animal.<sup>80</sup>

This legal distinction is critical because it reveals the problematic manner in which the state understands consent, "normal" sex, violent crimes, and female sexuality. This is in stark

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<sup>79</sup> Model Penal Code, 47.

<sup>80</sup> Model Penal Code, 49.

contrast to “assault.” The state views assault in a straightforward manner, “Usually, assault is not consented to in law; either it cannot be consented to, or consensual assault remains assault.”<sup>81</sup>

This lack of ambiguity is important because it protects the victim by narrowing the defense’s justification for their actions. Some examples of defenses that this definition would prevent include: that the victim “wanted” to be kicked, and had changed their mind in the middle of the attack; that the victim insinuated in some physical manner “wanting” to be kicked; or that it was acceptable to kick the victim because they had been kicked by someone else previously. None of these arguments would justify acquitting the defendant, as they would, and are commonly used, in cases of rape.

Unlike rape, the legal definition of assault possesses power because it is constructed in a simple yet socially accepted manner, where acts of assault (like getting kicked) are viewed as just bad acts of violence that deserve to be punished. There is a socially shared sentiment that these actions are undesirable, unacceptable, and unjustifiable (except in some cases of self-defense), and the intent of the law is to protect the victim. Since assault can victimize both women and men, it is taken at face value and is difficult to justify or defend; the law is less biased against the victim. This is not to say that laws regarding assault are innocent of bias, nor are practiced in an equitable manner; rather that these regulations are not based on or exacerbated by social inequality, as compared to laws about rape and consent.

MacKinnon explains the connection between the state’s use of the male standpoint and the two main causes for why rape is excluded from the legal definition and regulation of assault. The law defines rape as, “violence not sex,” as an attempt to argue that rape is ungendered. By

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<sup>81</sup> MacKinnon, Catharine, *Toward a feminist theory of the state*, 174.

arguing that rape is ungendered, the state is able to “deny the reality of women’s violation,” and ignore how these violations have been systematically used to subjugate women and further institutionalize the male perspective.<sup>82</sup> Men view women’s sexuality as “socially, a thing to be stolen, sold, bought, bartered, or exchanged by others”; therefore, the law distinguishes rape from assault with this ideology as a motive.<sup>83</sup>

Since the concept of rape is framed around a male perspective of sex, common definitions of rape normally “center around penetration.”<sup>84</sup> One reason why this occurs is because men define and attribute value to women based on their virginal status, which is usually understood as lack of vaginal penetration. Although this focus on penetration may appear relatable for some women, MacKinnon notes that, “penile invasion of the vagina may [actually] be less pivotal to women’s sexuality, pleasure or violation, than it is to male sexuality.”<sup>85</sup> Again, this is because the law is focused on women’s virginity (the experience of penetration), which is viewed as a loss for women and a point of access to power for men. This demonstrates how the law defines women’s sexuality and rape of women on men’s terms, by only considering cases that involve male-defined loss, such as the penetration of a virgin female that the perpetrator was not entitled to, and becomes an act worthy of punishment and criminalization.<sup>86</sup> MacKinnon notes, “Rape, as legally defined, appears more a crime against female monogamy (exclusive access by one man) than against women’s sexual dignity, or intimate integrity.”<sup>87</sup>

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<sup>82</sup> MacKinnon, Catharine, *Toward a feminist theory of the state*, 173 - 174.

<sup>83</sup> MacKinnon, Catharine, *Toward a feminist theory of the state*, 172.

<sup>84</sup> MacKinnon, Catharine, *Toward a feminist theory of the state*, 172.

<sup>85</sup> MacKinnon, Catharine, *Toward a feminist theory of the state*, 172.

<sup>86</sup> MacKinnon, Catharine, *Toward a feminist theory of the state*, 172.

<sup>87</sup> MacKinnon, Catharine, *Toward a feminist theory of the state*, 171.

I also argue that the implications of these social ideas have had a huge impact on the legal system including influencing how certain types of violence towards virgin or virgin-adjacent women, are deemed (more) “unacceptable,” and therefore illegal than in cases in which the “promiscuity” of women is evident, as directly reflected in the Model Penal Code. This delineation is because of the virgin-promiscuous continuum’s association with how the state understands what consent is, and who is privileged and given the right to argue if they did or did not evoke it.

This attention to the conditions of the sexual act is because of the law’s relationship to regulating women’s sexuality. In the contemporary United States, why does the legal system have the right to explicitly promote the ideological belief that women’s virginity is a valued entity that should be saved until they are married? Why is this concept still rooted in a social perspective that frames the discourse? The result is the law continues to institutionalize the regulation and protection of certain types of sexuality promoting certain mentalities such as ‘saving one’s self until marriage,’ while also acknowledging that young women are having sex before they are married and becoming mothers. Yet, a woman’s “physical” virginity status is still relevant, and virgins continue to be more socially valued and therefore legally protected (the fact that virgin flanks this continuum is evidence of that). But the evaluation of the circumstances in which a girl participates in sex perpetuates this type of virginity-monitored and desired system. Socially accepted circumstance is the next best thing that the legal system can use to regulate without seemingly pushing a pro-virgin narrative. That is why the continuum incorporates the consideration of social perception as a relevant gauge for acceptable aspects of women’s sexuality. The virgin-promiscuous continuum recognizes the complexity of women’s sexuality

beyond whether a woman is a virgin or not being a virgin; however, this continuum is open for interpretation and is heavily dependent on who is interpreting the continuum.

The second cause that MacKinnon identifies as why rape is legally excluded from assault is the state's biased and limited definition of sexual consent. To understand this male controlled understanding of consent, MacKinnon suggests one should first examine what is correct about conceptions of sex, rather than what is wrong with notions of rape. In doing so, she centers women's perspectives of sex, rather than the hegemonic male perspective determining current definitions. Thus, MacKinnon reveals that, "Perhaps the wrong of rape has proved so difficult to define because the unquestionable starting point has been that rape is defined as distinct from intercourse."<sup>88</sup> She argues the state has failed to provide a definition for rape that rape survivors can approve because the laws distinctly differentiate between rape and sex, although they are not that different.<sup>89</sup>

In the American Law Institute's Memorandum for Advisory Committee on Criminal Law, The Proposal to Prepare A Model Penal Code, this distinction is discussed. This document explains that a vital purpose of these codes is to delineate the "important differences...as to the conduct that is criminal even in fields that involve serious behavior problems (e.g., justification and excuse in homicide and other crimes involving bodily injury; the extent to which reckless or negligent injury or creation of the risk of injury is criminal; the range of sexual offenses). No less important, there is even wider variation in the lines dividing minor from major crimes, the nature and number of legal categories used to cover the most serious offenses, the extent to which categories overlap, the differentiations drawn to vary applicable penalties or modes of treatment,

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<sup>88</sup> MacKinnon, Catharine, *Toward a feminist theory of the state*, 174.

<sup>89</sup> MacKinnon, Catharine, *Toward a feminist theory of the state*, 173, 176.



the distribution of authority to make decisive Judgments as to the offender's treatment and the Penalties or treatment methods used. The differences would call for exploration of the bases of competing views and some attempt to aid the rationality of judgment on the issues.” because “we know in what large part their grounds are accidental or fortuitous, an old decision deemed to be authoritative, the mood that dominated a tribunal or a legislature at strategic moments in the past, a flurry or public excitement on some single matter, the imitative aspects of so much of our penal legislation, the absence of effective legislative reconsideration of the problems posed.”<sup>90</sup>

Unlike in cases of assault, the state’s perspective assumes that “intercourse with force or coercion can be or become consensual.”<sup>91</sup> This idea supports the premise that men are allowed unlimited access to women’s sexuality, regardless of coercion, and that this is still considered consensual sex. The state reifies this through legal standards of sexual norms in which courts rule that there is insufficient evidence of significant force in accusations of rape because “acceptable sex, in the legal perspective, can entail a lot of force.”<sup>92</sup>

MacKinnon argues that the state’s false distinction between rape and sex has failed women because, from many of their experiences, “it is difficult to distinguish the two [rape and intercourse] under conditions of male dominance.”<sup>93</sup> The law disregards women’s experience in which there is little difference between rape and “normal” sex.<sup>94</sup> Both are forced and violent, to some degree, because they involve women who are treated unequally in society compared to men.

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<sup>90</sup> Proposal 13

<sup>91</sup> MacKinnon, Catharine, *Toward a feminist theory of the state*, 172.

<sup>92</sup> MacKinnon, Catharine, *Toward a feminist theory of the state*, 173, 181.

<sup>93</sup> MacKinnon, Catharine, *Toward a feminist theory of the state*, 174.

<sup>94</sup> MacKinnon, Catharine, *Toward a feminist theory of the state*, 181.

There is a lack of social and legal recognition that sex and violence are not mutually exclusive, but inherently intertwined.<sup>95</sup> Women are subjugated in complex and underlying social systems, and this inequality is intrinsically present in sexual dynamics. The state's inability to acknowledge this relationship reflects men's inability to conceptualize that women may experience and view sex differently than them.<sup>96</sup> The false assumption of shared views between men and women about sex has resulted in men and the laws' widespread inference of women's consent that constructs a reality in which, for many women, "normal" sex and rape are quite indistinguishable.<sup>97</sup> "Rape is only an injury from women's point of view...this means that the man's perception of the woman's desires determine whether she is deemed violated."<sup>98</sup> MacKinnon argues that this set of social and legal circumstances has resulted in men believing that, "women they know do meaningfully consent to sex with them. *That* cannot be rape; rape must be by someone else, someone unknown. They do not rape women they know...The law assumes that, because the rapist did not perceive that the woman did not want him, she was not violated. She had sex."<sup>99</sup>

MacKinnon ties this phenomenon to a more expansive problem in which, "women are socialized to passive receptivity." She believes this passiveness can be a survival tactic for women who exist in a society where ordinary sex they experience is indistinguishable from rape. Many women feel as if they have "no alternative," except to submit to these acts, preferring to participate instead of, "the escalated risk of injury and the humiliation of a lost fight..."<sup>100</sup> Since

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<sup>95</sup> MacKinnon, Catharine, *Toward a feminist theory of the state*, 174.

<sup>96</sup> MacKinnon, Catharine, *Toward a feminist theory of the state*, 182.

<sup>97</sup> MacKinnon, Catharine, *Toward a feminist theory of the state*, 176.

<sup>98</sup> MacKinnon, Catharine, *Toward a feminist theory of the state*, 180.

<sup>99</sup> MacKinnon, Catharine, *Toward a feminist theory of the state*, 176, 181.

<sup>100</sup> MacKinnon, Catharine, *Toward a feminist theory of the state*, 177.

sex is already a forced experience for women, many would rather go along with it and construct a fake sense of control for themselves. The differentiation of what is happening to them as sex, and not rape, perpetuates their own fear of “real” rape from occurring. Maintaining their compliance in forced sex further excuses men from confrontation, so they continue to believe this (violent) sex is not rape.<sup>101</sup> Mies agrees, “this ideology is the outcome of thousands of years of direct and structural violence against women, first practiced in some patriarchal societies, but universalized today by capitalism. Those who are constantly oppressed directly - and women have no autonomy over their lives even now - have no other psychological choice but to interpret what they are forced to do into voluntariness if they do not want to lose all self-respect as a human being. This is the deepest reason why women also share in the ideology of their oppressors, and subscribe to the notion that their ‘honour,’ their family’s honour, is violated when they are raped.”<sup>102</sup>

MacKinnon argues that since men do not understand a true definition of consent, and because the state replicates men’s perspective, the definitions and laws regarding consent and rape institutionalize incorrect and subordinating definitions. Therefore, in cases of rape, the state has limited understanding of what rape actually is, and thus, women are ignored. MacKinnon underscores that “The distance between most intimate violations of women and the legally perfect rapes measures the imposition of an alien definition. From women’s point of view, rape is not prohibited; it is regulated...Measuring consent from the socially reasonable, meaning objective man’s, point of view reproduces the same problem under a more elevated label.”<sup>103</sup>

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<sup>101</sup> MacKinnon, Catharine, *Toward a feminist theory of the state*, 178, 183.

<sup>102</sup> Mies, *Patriarchy and Accumulation on a World Scale*, 166

<sup>103</sup> MacKinnon, Catharine, *Toward a feminist theory of the state*, 181.

### Chapter 3: Virginity and the Law, In Practice

Despite the importance of a theoretical, historical and legally informed analysis about the role virginity has played in the United States' perception and regulation of women and girls' sexuality, specifically in the context of sexual violence, I believe it is also important to consider the real-world dynamic of how this relationship transpires. This is not to say that the theoretical, historical, or legally codified aspects of this are irrelevant to the development of this real-world dynamic, but in order to have a more well-rounded understanding of this matter, I believe it is also important to look at actual instances of sexual violence and examine how the state and its laws mediate these cases.

Throughout this examination, I engage with numerous ethnographic works that record and analyze how the state interacts with women and girls' complaints of sexual violence. Many of the examples and their analysis that I reference do not actually include a victim's direct interaction with a court, jury, judge or even the law. This is not to insinuate that the real world implications of American laws, relating to sexual violence, do not actually impact women and girls or rely on an evaluation system that considers their virginity. Instead, I argue that this lack of interaction between the court and victims of sexual violence demonstrates the depth of this evaluation system in the American legal system. I also want to emphasize that at times, my attention to these smaller interactions and their meanings is meant to reveal the expansiveness that concepts of virginity, as a system of value, have in the United States' legal system.

I begin my research with Lisa Frohmann's groundbreaking 1991 investigation, *"Discrediting Victims' Allegations of Sexual Assault: Prosecutorial Accounts of Case*

*Rejections\**,” which is a critical text that highlights how embedded the virgin-promiscuous valuation system is in the real-world practice of American law. Frohmann examines the influence of prosecutors’ judgment of victims’ credibility, that frequently causes many allegations of sexual assault to never reach court. This landmark study is evidence of how the virgin-promiscuous valuation system has influenced the construction of American codes, and how the legal system interacts with individual girls and women who have experienced sexual violence. I do so by engaging Frohmann’s analysis of her findings with more current research to illuminate that the examination of a victim’s credibility is “promiscuous coded,” thus demonstrating the degree to which these actors of the state engage with the virgin-promiscuous valuation system, specifically when assessing women and girls’ sexuality, in the context of rape.

Frohmann explains that how and when a complaint of sexual assault is first filed to the police and prosecution is a hugely determinative moment for the future of that allegation. This is because she found that many allegations do not make it past this early reporting stage and are never actually brought to the attention of a court because before a prosecutor decides if they will take on a case and represent the victim, they “case screen.”<sup>104</sup> Case screening is when the prosecutors evaluate the character, believability, credibility, etc. of the victim and their account of what happened because the victim’s credibility is understood to be one of the most critical components of how judges and juries decide the outcomes in these kinds of cases. Since these types of trials have such a hard time succeeding in getting convictions in court, (despite the recent widespread “prioritization” of sexual assault cases by many American courts), case

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<sup>104</sup> Alderden, M. A., & Ullman, S. E. (2012), Creating a More Complete and Current Picture: Examining Police and Prosecutor Decision-Making When Processing Sexual Assault Cases, *Violence Against Women*, 18(5), 525–551 <https://doi.org/10.1177/1077801212453867>;

Frohmann, Lisa, “Discrediting Victims’ Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections,” *Social Problems* 38, no. 2 (1991): 213–26, <https://doi.org/10.2307/800530>.

screening has become a common preemptive tactic used by prosecutors.<sup>105</sup> This allows them to be exclusive about taking on cases they believe will have a likely chance of conviction, and is an attempt to maintain high conviction rates and thus, more power and success.<sup>106</sup>

In a research article from 2012, “Creating a More Complete and Current Picture: Examining Police and Prosecutor Decision-Making When Processing Sexual Assault Cases,” Megan Alderden and Sarah Ullman find a similar type of case-screening and court-gatekeeping going on at the police level.<sup>107</sup> Their findings uncovered that police officers also consider the likelihood of a case's success when they first interact with the victim and investigate their allegation's credibility. Police officers take into account how the victims' credibility would hold up in court, and how it would be addressed by the prosecutors, pre-court, finding that, “officers did not pursue these cases because the desired outcome— charging and prosecution—was unlikely.”<sup>108</sup> This reveals the multistep pre-court case-screening processes that these victims' have to endure and pass because, if police officers deem a case as not legitimate, they hold the power for it to become “officially unfounded” and “no longer actively investigated.”<sup>109</sup>

During Frohmann's examination of more than 300 cases over a 17 month period, she observed how police officers, detectives, prosecutors and deputies evaluate victims of sexual assault, uncovering the widespread discrediting of many of the rape allegations made by victims during the prosecutions' case-screening process. Frohmann argues this was a tactic to justify

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<sup>105</sup> Alderden, & Ullman, *Creating a More Complete and Current Picture*, 526; Frohmann, “Discrediting Victims' Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections,” 213.

<sup>106</sup> Frohmann, “Discrediting Victims' Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections,” 215.

<sup>107</sup> Alderden, & Ullman, *Creating a More Complete and Current Picture*, 526-527.

<sup>108</sup> Alderden, & Ullman, *Creating a More Complete and Current Picture*, 526-527.

<sup>109</sup> Alderden, & Ullman, *Creating a More Complete and Current Picture*, 527.

their decisions to not take on many of the cases.<sup>110</sup> In Frohmann's research, she outlines two central techniques that prosecutors use to discredit victims' complaints, "discrepant accounts" and "ulterior motives."<sup>111</sup>

Although these studies focus on pre-court proceedings, these activities highlight a pattern of behavior that I believe demonstrates the virgin-promiscuous value rating system institutionalized in American societies that is adopted in legal codes, regulations, and even pre-court screening activities by law enforcement. Value decisions about girls and women's sexuality influence whether the state chooses to bring cases to court to have the privilege of being under scrutiny of the law.

In more recent years, other researchers have identified a similar phenomenon. Bradley Campbell, Tasha Menaker, and William R. King's findings, in a 2014 study titled, "The Determination of Victim Credibility by Adult and Juvenile Sexual Assault Investigators" are consistent with Frohmann's earlier analysis. While researching the amount that "legal and extralegal factors" are considered by police officers when evaluating victim credibility in cases of sexual assault, they found evidence that matched Frohmann's findings.<sup>112</sup> They describe extralegal factors as characteristics of the victim, the case, etc. that can impact, in this context, negatively, the credibility of the allegation. These extralegal factors include, "moral character, voluntary victim intoxication, inconsistent statements, mental deficiencies, previous sexual relationship with the suspect, inability to recall details of the assault, delayed reporting of the

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<sup>110</sup> Frohmann, "Discrediting Victims' Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections," 213 - 215.

<sup>111</sup> Frohmann, "Discrediting Victims' Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections," 217.

<sup>112</sup> Campbell, B. A., Menaker, T. A., & King, W. R. (2015). The determination of victim credibility by adult and juvenile sexual assault investigators. *Journal of Criminal Justice*, 43(1), 29-39. <https://doi.org/10.1016/j.jcrimjus.2014.12.001>.

assault, and engaging in prostitution.”<sup>113</sup> This study also found that a victim’s “consistency in statements,” “moral character,” and “participation in risk-taking behaviors,” are heavily determinate in affecting the victim’s credibility.<sup>114</sup> According to Alderden and Ullman, prosecutors and police go as far as openly evaluating a victim’s (not the perpetrators of a crime) moral character and characterize this as a relevant factor in, “contributing to her sexual violation.” I argue these extralegal factors are heavily promiscuous-coded and underscore the role that these state actors play in evaluating where a victim falls in the virgin-promiscuous continuum. Credibility is a legally accepted guise that encompasses the value rating system and its patriarchal perspective, and is actively being used by police and prosecutors to sort through worthy victims. “Negative moral character, or ‘perceived immorality,’ also reduces victim credibility. In other words, when a victim’s moral character is viewed as problematic, concerns with convictability arise. More specifically, veracity of allegations made by victims viewed as sexually promiscuous are questioned.”<sup>115</sup>

Alderden and Ullman also include a similar finding in their conclusion in which, “factors that mattered most were those that should not matter when determining if a crime occurred.”<sup>116</sup> I believe this ongoing discrediting of allegations brought to police and prosecutors is overwhelmingly harmful and highlights the depth to which the state actively perceives, values, and sorts girls and women’s sexuality in the context of sexual violence cases *before women are even given the opportunity to interact with the formal laws and codes.*

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<sup>113</sup> Campbell, Menaker, King The determination of victim credibility by adult and juvenile sexual assault investigators, 30-31.

<sup>114</sup> Campbell, Menaker, King The determination of victim credibility by adult and juvenile sexual assault investigators, 33.

<sup>115</sup> Campbell, Menaker, King The determination of victim credibility by adult and juvenile sexual assault investigators, 30.

<sup>116</sup> Alderden, & Ullman, Creating a More Complete and Current Picture, 541.



Another manifestation of this type of rape scenario includes if a victim's allegation does not align with a prosecutor's predetermined expectation of how these crimes usually occur. When the victim's story does not fit in the states' confines of appropriate or valid rape, the problem at hand (the rape) is dismissed and recentered on the victim being unreliable and in many cases, a victim's allegation is dropped altogether. The victim's lack of credibility is now credited as the problem at hand. Since the victim *failed* to convince the prosecutor that her assault was credible (which is the only path to potential care and protection from the state) she becomes the scapegoat as to why the prosecutor decides not to take on her case. The prosecutor frames this lack of credibility as the victim's own fault for being in a situation that diverges from what they are invested in protecting/prohibiting, also known as *being promiscuous*.

Once a lack of credibility is determined and the victim is officially identified to be somewhere near the promiscuous end of the continuum, she is blamed for the reason why her allegation, getting raped, is dismissed and cannot be or is not important enough to be convicted by the state. Prosecutors punish victims' for being in disapproving circumstances, (promiscuously deviant activity) by refusing to protect them in these instances of violation. This communicates to the victim that rape is not the actual illegal concern, but *the valuation of virginity and virgin-adjacent practices are*, only, in these circumstances rapists are also not the problem, but the women who diverge from their expectations are. "Rape, as legally defined, appears more a crime against female monogamy (exclusive access by one man) than against women's sexual dignity, or intimate integrity."

In one example from Frohman, a victim reports specific injuries that were not included in the police's initial record of the crime. Instead of further investigating the injury claims, the

DA/DDA assumes no mistake on the police's part, and does not question the original description of the victim's experience by the police. The prosecutor claims that, "if the police went to the trouble of photographing the victim's injured hand they would have taken pictures of her face had it also shown signs of injury."<sup>117</sup> I contend incidences like these underscore assumptions built into state legal processes that do not necessarily favor the victims. The perspective that has informed and shaped what the police officer believes is relevant evidence to record in cases of assault, is more accurate, trustworthy, and important than the full accounting of the individual who experienced the violence. A police officer's perspective is prioritized over a victim's, despite recent research on police decision-making in sexual assault cases that has shown police to be, "highly suspicious of sexual assault allegations," specifically in the context of proving consent and victim credibility.<sup>118</sup> This not only communicates a general disregard for what victims experience and for their well being as survivors, but it underscores the reality of what is taking place in these circumstances: the state only cares about the assessment of the assault from the male point of view because of the implications of what this perspective is evaluating.

In the specific example that Frohmann is using, the exclusive interest of the institutionalized male point of view can be identified as the police officer's original assessment of the assault being the winning and most trusted account; despite the police officer not having been present during the event and regardless of the fact that the prosecutor literally has access to various recorded accounts of the events from the most reliable person – the victim the actual witness/party to the events. This is because the state's actual intentions when evaluating these cases is not helping the women and girls, *but determining their location on the*

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<sup>117</sup> Frohmann, "Discrediting Victims' Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections," 216.

<sup>118</sup> Alderden, & Ullman, *Creating a More Complete and Current Picture*, 526 - 527.

*virgin-promiscuous continuum* and then using this spot to determine how the state should proceed and potentially respond to these events. As MacKinnon aptly notes, “From whose standpoint, and in whose interest, is a law that allows one person’s conditioned unconsciousness to contraindicate another’s violation?”<sup>119</sup>

Not only are the prosecutors the administrators of the virgin-promiscuous value rating system, but they are also the gatekeepers for which cases are worthy enough to go to court. And so are the police officers who work as the primary administrators and assessors of this continuum.

Another notable part of the devaluation of victims’ accounts, that emphasizes the attention to concepts of virginity by the state, is the prosecutors’ use of the statement from the defendant (the accused rapist) given to the police. Frohmann notes that, “When the prosecutor compared the suspect's accounts with the victim's account, she interpreted the suspect's accounts as credible because both of their accounts, given separately to police, were similar.”<sup>120</sup> In these situations, the prosecutor is literally *relying on the rapists’ perspective* of the event *as a superior perspective, needed to validate the victim’s account*. This tactic of evaluating a victim’s description of their assault is not only unlikely, because it would require a rape suspect to admit their crimes, but also because it reemphasizes the level of disregard that the state has to the victim’s experiences.

Frohmann’s development of these typifications further reveal the depth of the states’ implicit motivation in this process. She explains that these typifications have emerged from the prosecutor’s development of a “repertoire of knowledge” about the various features of this type

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<sup>119</sup> MacKinnon, Catharine, *Toward a feminist theory of the state*, 182.

<sup>120</sup> Frohmann, “Discrediting Victims’ Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections,” 216 - 217.

of crime, which include “how particular kinds of rape are committed, post-incident interaction between the parties in an acquaintance situation, and victims' emotional and psychological reactions to rape and their effects on victims' behavior.”<sup>121</sup> Simply, prosecutors have developed a confining script as to why, how, and in what manner rapes can happen, that also include post-rape expectations of victims where normal, acceptable, and expected responses have also been distinguishing. Therefore, these assumptions also outline another meter for gauging the credibility of a victim, and thus, their potential eligibility to actually have their case brought to court.

There are an assumed set of ideas, expectations, etc. about sexual violence crimes, and the prosecutor institutionalize these social perceptions when they determine a case's likelihood of success in court.<sup>122</sup> This predictive screening practice is significant, for it not only illuminates how prosecutors, as direct actors of the state, replicate social ideas about sex, sexual violence, and women's sexuality, but how this is an institutional part of the American legal systems and the decision making about which cases are worthy enough to go to court. Frohman notes that the phenomenon of evaluating this type of victim credibility has been widely accepted as an objective and necessary process in these types of allegations, “neglect[ing] the processes whereby prosecutors actively assess and negotiate victim credibility in actual, ongoing case processing.” Not only do prosecutors prioritize having an easily accessible high conviction rate in court, rather than investigating the allegations made by many women and girls, but so do judges. According to Frohmann's findings, “judges become annoyed when they feel that court time is

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<sup>121</sup> Frohmann, “Discrediting Victims' Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections,” 217.

<sup>122</sup> Frohmann, “Discrediting Victims' Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections,” 214.

being ‘wasted’ with cases that ‘should’ have been negotiated or rejected in the first place, especially when cases have been given priority over other cases.”<sup>123</sup> Alderden and Ullman find a similar sentiment, explaining that police officers consider how they believe prosecutors will react to the allegations when they file these crimes, “For instance, although police officers believed intoxicated victims could be sexually assaulted, most believed prosecutors would not charge and prosecute suspects in these cases. Thus, officers did not pursue these cases because the desired outcome— charging and prosecution—was unlikely.”<sup>124</sup>

This type of female subjugation are examples of the acceptance of these types of practices, and the systemic perspective that the state’s relationship to women’s sexuality does not concern itself with girls’ and women’s wellbeing, but with their exchange value. As revealed by MacKinnons, these social perceptions of the victim (credible versus not, etc.) are explicitly not an independent nor neutral matter, but the direct result and active manifestation of the skewed manner in which a male society’s institutions understand and navigate girls and women’s sexuality. A victim’s credibility is not a neutral nor natural phenomenon that merely exists before these pre-court case-screenings occur, but is an actively created conception used an extension of the process of evaluating women and determining if the sexual violence they experienced is worthy of legal pursuits by the male state. MacKinnon says, “Its first state act is to see women from the standpoint of male dominance; its next act is to treat them that way.”<sup>125</sup> “Women who charge rape say they were raped twice, the second time in court. Under a male state, the boundary violation, humiliation, and indignity of being a public sexual spectacle makes this more

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<sup>123</sup> Frohmann, “Discrediting Victims’ Allegations of Sexual Assault: Prosecutorial Accounts of Case Rejections,” 213 - 215.

<sup>124</sup> Alderden, & Ullman, *Creating a More Complete and Current Picture*, 526 - 527.

<sup>125</sup> MacKinnon, Catharine, *Toward a feminist theory of the state*, 169.

than a figure of speech.”<sup>126</sup> The interactions between victims’ or sexual violence and the state, pre-court elucidates that women are actually raped three times, the second time before they even have the chance to enter the court room, when they are being assessed and then categorized by prosecutors.

Frohmann’s findings of what actually matters to the prosecutors illuminate that the true purpose of this entire process is not actually about the victim’s welfare, but evaluating the level of defilement to these girls and women that actually occurs. In reality, the prosecutors’ actual intentions are collecting the needed information to determine the victims’ pre-assault location on the virgin-promiscuous continuum (their worth), to conclude if they are virgin-adjacent enough to have their case matter, and be taken to the next step and investigated in court. Principally, the prosecutors’ are assessing if there is an (man’s) interest at stake, because the victim was virgin-adjacent enough that their assault has resulted in their (or the men around them) loss of value (exchange value as socially prized virgin-adjacent girl), thereby the state then has an obligation to consider the case and potentially punish the perpetrator. This means that the state not only disregards girls and womens’ experiences of sexual violence, but trusts and values police officers’ perceptions, as actors of the state, more than the actual victims although they were not present during the event.

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<sup>126</sup> MacKinnon, Catharine, *Toward a feminist theory of the state*, 179 - 180.

## Conclusion

Currently, the United States exists in a time, in which there are Rape Shield Laws meant to prohibit the use of certain evidence, including a victims' sexual history, to assist their cases' viability in court. Despite the two decades since many Rape Shield Laws have been implemented, a new updated copy of the Model Penal Code has not been officially published (although one is supposed to be approved soon) and from my survey of research, the ideas behind the information that Rape Shield Laws are attempting to prohibit, seem to still be widely considered.

After engaging in this abundant research and analysis, I would still define virginity as a value-derived category for girls and women in contemporary American society. Although analysis that begins to recognize the depths of women's subjugation, specifically administered by the States' implementation of laws and codes, does exist, I feel it is still limited and lacks significant recognition of how and what informs these systems and their implementation.

I recognize that big steps and significant progress in the world of law, women's subjugation, and patriarchy as a whole, are complicated and multifaceted, however I think special attention must be paid to the historical and foundational ideas and perspective that have led us to this point.

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