TAKING RAPE SERIOUSLY: RAPE AS SLAVERY

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INTRODUCTION

> [*T*]*he test of a first-rate intelligence is the ability to hold two opposed ideas in the mind at the same time, and still retain the ability to function. One should, for example, be able to see that things are hopeless and yet be determined to make them otherwise.*
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> – F. Scott Fitzgerald, *The Crack-Up*[1]

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[1] F. Scott Fitzgerald, *The Crack-Up*, *in* THE CRACK-UP 69, 69 (Edmund Wilson, ed., 1945).

> [*A*]*trocities . . . are authoritatively regarded as either too extraordinary to be believable or too ordinary to be atrocious. . . . [I]f it's happening, it's not so bad, and if it's really bad, it isn't happening.*
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> – Catharine A. MacKinnon[2]

In bedrooms and back alleys, at parties, in offices, and within families: rape happens, rape is real. At this very moment, there are approximately twenty million women in the United States who have been raped during their lifetime,[3] and in one year, over one million women are raped in the United States.[4] The numbers are staggering, but not unfamiliar. One in four women are victims[5] of attempted or completed rape in the United States.[6]

Despite the devastating and continuing prevalence of rape in the United States,[7] estimated state rape conviction rates are as low as two to nine percent of total instances of rape (reported and unreported).[8] At the state level, a local robber is thirty percent more likely to be convicted than a rapist, and

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[2] CATHARINE A. MACKINNON, *Introduction: Women's Status, Men's States*, *in* ARE WOMEN HUMAN?: AND OTHER INTERNATIONAL DIALOGUES 1, 3 (2006).

[3] DEAN G. KILPATRICK, HEIDI S. RESNICK, KENNETH J. RUGGIERO, LAUREN M. CONOSCENTI & JENNA MCCAULEY, MED. UNIV. OF S.C., DRUG-FACILITATED, INCAPACITATED, AND FORCIBLE RAPE: A NATIONAL STUDY 2 (2007), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/219181.pdf.

[4] *Id.* (citing data from 2006–07).

[5] The terms "victim," "victim-survivor," and "survivor" are used interchangeably in this Article. Where possible, "victim-survivor" is used. Where victims are not survivors or where criminal law uses the term "victim," "victim" is employed.

[6] CATHARINE A. MACKINNON, SEX EQUALITY 753 (2d ed. 2007) (citing, *e.g.*, MARY P. KOSS, LISA A. GOODWIN, ANGELA BROWNE, LOUISE F. FITZGERALD, GWENDOLYN PURYEAR KEITA & NANCY FELIPE RUSSO, NO SAFE HAVEN: MALE VIOLENCE AGAINST WOMEN AT HOME, AT WORK, AND IN THE COMMUNITY 167–71 (1994) (collecting major studies on rape prevalence completed as of 1994, many showing approximately twenty percent of women raped, some lower, some higher)).

[7] *See Women and Violence: Hearing Before the S. Comm. on the Judiciary*, 101st Cong. 7, 12 (1990) (statement of Sen. Joseph R. Biden, Chairman, S. Comm on the Judiciary) (describing how a woman is raped every six minutes); STAFF OF S. COMM. ON THE JUDICIARY, 102D CONG., VIOLENCE AGAINST WOMEN: A WEEK IN THE LIFE OF AMERICA 3 (Comm. Print 1992) (reporting that a women has between a one-in-five and one-in-seven chance of being raped); KILPATRICK, ET AL., *supra* note 3, at 8 (estimating that one-in-seven U.S. women have been raped at least once during their lifetime); DIANA E.H. RUSSELL, SEXUAL EXPLOITATION: RAPE, CHILD SEXUAL ABUSE, AND WORKPLACE HARASSMENT 35 (1984) (finding that twenty-four percent of women in this study had experienced a completed rape).

[8] These percentages were calculated using two different reporting rates (forty percent as offered by RAINN and sixteen percent as offered by the Medical University of South Carolina). These reporting rates were then multiplied by the average arrested rate (50.8%), the average prosecution rate (80%), and the average conviction rate (58%), as provided by RAINN. KILPATRICK, ET AL., *supra* note 3, at 2; Rape, Abuse & Incest National Network, *Reporting Rates,* RAINN, http://www.rainn.org/get-information/statistics/reporting-rates (last visited Oct. 11, 2011) [hereinafter RAINN]; *see also* STAFF OF S. COMM. ON THE JUDICIARY, 103D CONG., THE RESPONSE TO RAPE: DETOURS ON THE ROAD TO EQUAL JUSTICE 2 (Comm. Print 1993) [hereinafter SENATE RESPONSE TO RAPE] (ninety-eight percent of rape victims never see their attacker caught, tried, and imprisoned).

a rape prosecution is twice as likely to be dismissed vis-à-vis a murder prosecution.[9] Similarly, federal conviction rates for non-rape crimes, such as immigration and narcotics crimes, average as high as ninety-six percent.[10] In effect, the rift between the widespread perpetration of rape and sexual assault and the minimal prosecution and conviction of rapists[11] questions the commitment and priority of law enforcement, lawmakers, courts, and the public in treating rape as seriously before the law as it is treated in name. If rape is serious, why don't we take rape prosecution seriously?

In the 1980s, rape reform advocates predicted that rape law reforms would create instrumental changes—namely, higher rates of investigation, prosecution, and conviction for rape crimes.[12] Continuously low conviction rates in the United States, however, indicate that instrumental change has not occurred and that adequate investigation and prosecution of rape is an illusion.[13] While legal scholars and advocates have raised the issue of impunity for rape and sexual assault crimes in the past,[14] forty years after the emergence of the rape law reform movement in the United States[15] and more than fifteen years after the passage of the Violence Against Women Act ("VAWA"),[16] it is important to reexamine the progress or stagnancy of rape impunity in the United States in order to devise new ways to tackle an old problem.

This Article identifies and challenges the incongruity between the purportedly accepted gravity of rape crimes and the pervasive continuance of

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[9] SENATE RESPONSE TO RAPE, *supra* note 8, at 2.

[10] U.S. DEP'T OF JUSTICE, EXEC. OFFICE FOR U.S. ATTORNEYS, UNITED STATES ATTORNEYS' ANNUAL STATISTICAL REPORT: FISCAL YEAR 2009, at Fiscal Year 2009 Statistical Highlights (2009), *available at* http://www.justice.gov/usao/reading_room/foiamanuals.html.

[11] *See* JENNIFER TEMKIN & BARBARA KRAHÉ, SEXUAL ASSAULT AND THE JUSTICE GAP: A QUESTION OF ATTITUDE 1, 23 (2008) (discussing the "justice gap," or the discrepancy between rape convictions and the incidence of rape). Under the aegis of existing legal approaches, most sexual assaults remain unreported, unprosecuted, and unremedied—legally undistinguished from sex. MACKINNON, *supra* note 6, at 742; *see also* Federal Bureau of Investigation, U.S. Dep't of Justice, Crime in the United States, 2010 Uniform Crime Reports tbls. 1 & 29 (2011), *available at* http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/index-page (noting that in 2010, 84,767 forcible rapes were reported to authorities and only 20,088 arrests for forcible rape were made); Joan McGregor, *Introduction* to *Philosophical Issues in Rape Law*, 11 LAW & PHIL. 1, 2 (1992) (estimating the likelihood of rape complaints ending in conviction at two to five percent); LEE MADIGAN & NANCY C. GAMBLE, THE SECOND RAPE: SOCIETY'S CONTINUED BETRAYAL OF THE VICTIM 7 (1991); *see also* RAINN, *supra* note 8 (reporting that fifteen out of sixteen, or approximately ninety-four percent, of rapists walk free); *supra* notes 7–8 and accompanying text.

[12] *See* CASSIA SPOHN & JULIE HORNEY, RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT 77 (1992).

[13] *See id.* at 100–05 ("[L]egal changes did not produce the dramatic results that were anticipated by reformers. The reforms had no impact in most of the jurisdictions.").

[14] *See* SUSAN ESTRICH, REAL RAPE 15–20 (1987).

[15] *See* SPOHN & HORNEY, *supra* note 12, at 20.

[16] Violence Against Women Act of 1994 (VAWA), Pub. L. No. 103-322, 108 Stat. 1902 (1994) (codified as amended in scattered sections of 16, 18, and 42 U.S.C.).

rape impunity in the United States. This Article argues that rape should be considered a form of slavery prohibited by the Thirteenth Amendment of the Constitution, allowing for the creation of a federal criminal regime to prosecute and prioritize rape in conjunction with state regimes.

Part I presents the problem of local or state *rape tolerance* through the improper legal conceptualization of rape and the inadequate investigation and prosecution of rape crimes. Discussing the problematic consequences inherent in local rape law, Part I highlights the grading of rape that defines legitimate rape as *rape-and* or *rape-plus* and marginalizes "mere" rape as *rape-alone* or *rape-lite*, with the latter as less deserving of prosecution than the former. Part I also reveals that neither *rape-and* nor *rape-alone* crimes are adequately investigated or prosecuted.

Part II discusses federal *rape tolerance* by comparing the Supreme Court's incongruent maximization of congressional authority for the long-standing federal crimes of mail fraud and extortion alongside the Court's minimization of violence against women as a local problem. The purposes of this Part are threefold: to explain the current status of rape in U.S. federal law; to compare rape to widely accepted federal crimes; and to reveal federal *rape tolerance* in the fictional and inconsistent limits of congressional authority advanced by the Court.

Part III explores the prospect of federal rape law. Examining the broad intentions and application of the Thirteenth Amendment, Part III challenges Congress's hesitancy to advance federal anti-rape laws under the Thirteenth Amendment and argues that rape falls within, and is prohibited by, the Thirteenth Amendment. Rape is slavery.[17] While the idea that the Thirteenth Amendment might apply to rape will undoubtedly strike some readers as "novel, if not farfetched,"[18] this Article "ask[s] these readers for patience and remind[s] them that, for example, only a generation ago, the ideas that abortion and pornography implicate equality rights for women—ideas now widely held—were seen by many as similarly novel and farfetched."[19] Part III also applies and incorporates rape as slavery to existing federal civil rights legislation, concluding with an assessment of the necessity, practical

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[17] Literature discussing rape and Thirteenth Amendment has found rape to be a "badge or incident" of slavery, but has not discussed rape as slavery. While rape may certainly constitute a "badge or incident" of slavery, this Article focuses on rape as slavery. *See, e.g.*, Marcellene Elizabeth Hearn, Comment, *A Thirteenth Amendment Defense of the Violence Against Women Act*, 146 U. PA. L. REV. 1097, 1144–45 (1998) (discussing rape as a badge or incident of slavery); Lawrence G. Sager, *A Letter to the Supreme Court Regarding the Missing Argument in* Brzonkala v. Morrison, 75 N.Y.U. L. REV. 150, 152–53 (2000).

[18] Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to* DeShaney, 105 HARV. L. REV. 1359, 1360 (1992) (discussing potential litigation of child abuse under the Thirteenth Amendment).

[19] *Id.*; *see also* Neal Kumar Katyal, Note, *Men Who Own Women: A Thirteenth Amendment Critique of Forced Prostitution*, 103 YALE L.J. 791, 792 (1993) ("While the idea that forced prostitution is slavery may not be immediately apparent to some readers . . . .").

advantages, and challenges involved in the prospective implementation of federal rape law.

In order to construct and prosecute rape in a manner consistent with its purported gravity, rape must be effectively prosecuted, prohibited, protected against, and abolished under the Thirteenth Amendment. Continued *federal rape tolerance* or federal inaction against rape impunity stems from an unwillingness rather than an inability to intervene. Federal inaction against rape is a constructed choice, not an inevitability.

I. LOCAL *RAPE TOLERANCE*: THE INADEQUATE LOCAL CONSTRUCTION, INVESTIGATION, AND PROSECUTION OF RAPE IN THE UNITED STATES

Rape tolerance is the lenient and inadequate construction and prosecution of rape crimes that consequently accepts rape prevalence and impunity. *Rape tolerance* is the inability of law enforcement, lawmakers, courts, and the public to prioritize and treat rape as seriously before the law as it is treated in name.[20] Presenting the problem of *rape tolerance* on the state level, this Part discusses the legal conceptualization of rape and the inadequate investigation and prosecution of rape crimes.

Section A examines how rape in the United States has been traditionally defined, policed, and prosecuted by the states, primarily because rape is currently constructed as a "truly local"[21] crime that involves "private" actors.[22] State definitions of rape vary.[23] Mapping the possible contexts of rape crimes reveals a curious result of graded rape crimes that produce the perhaps unintended—but nevertheless real—consequences of prioritizing some forms of rape and marginalizing others, ultimately detracting from rape's core harm, and contributing to local *rape tolerance*. Section B briefly discusses the inadequate investigation and prosecution of rape in the United States, as evidenced, for example, by the "rape kit backlog" and the treatment of rape on college campuses.

A. Rape-and, Rape-alone, *and* Rape-Lite*: The Grading of Rape in the United States and Its Problematic Consequences*

The problem of local rape tolerance begins with legal definitions of rape. The traditional, common law definition of rape, which remains the essence of most local rape statutes is: "intercourse (in the old statutes, carnal

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[20] The term "rape tolerance" and its definition are the author's own.

[21] *See* United States v. Morrison, 529 U.S. 598, 617–19 (2000) (discussing the suppression of violent crime as a local police power).

[22] *Id.* at 621 (noting that the Fourteenth Amendment does not prohibit "merely private conduct").

[23] *See, e.g.*, MD. CODE ANN., CRIM. LAW §§ 3-303–04 (LexisNexis Supp. 2011); N.Y. PENAL LAW CODE §§ 130.25, 130.30, 130.35 (McKinney 2009); WIS. STAT. ANN. § 940.225 (West Supp. 2011); MODEL PENAL CODE §§ 2.11(3), 213.1 (1962).

knowledge) with a woman not his wife; by force or threat of force; against her will and without her consent."[24] State laws, in definition and in sentencing, grade rape and sexual assault into "degrees."[25] Grades of rape are determined by the level of force, threat of force (forcible compulsion), or "proxies" for forcible compulsion that accompany the rape crime.[26] Force, threat of force, and force proxies are defined differently by state. Proxies that may constitute force or the threat of force include: physical assault, the presence or use of a dangerous weapon,[27] the commission of a burglary, causing pregnancy, illness, disease, or the impairment of a sexual or reproductive organ, unconsciousness, mental incapacity, age of the victim, or age of the victim in relation to the perpetrator, and the marital or non-marital relationship between the victim and the perpetrator.[28] Not surprisingly, sentences for rape and sexual assault depend on the level of force, threat of force, or a force proxy, that accompanies the rape crime.[29] In actuality, however, the requirement of force and proxies for force are redundant in the definition of rape, which also includes an element of non-consent, as where force is present, consent is absent.[30]

Rationales for the grading of rape fester in the archaic and entrenched belief that "rape was not real unless the victim fought back" as it was thought that the victim's physical response determined consent.[31] Part of the focus on the victim's physical response stems from a belief that rape victims

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[24] ESTRICH, *supra* note 14, at 8.

[25] For example, rape in New York is parsed into three degrees. N.Y. PENAL LAW CODE §§ 130.25, 130.30, 130.35 (McKinney 2009). *See* DONALD BRAMAN, CRIMINAL LAW 262–64 (forthcoming) (adapted with permission from DAN M. KAHAN, NEAL KATAYL & TRACEY MEARES, CRIMINAL LAW (forthcoming)) (on file with author) (collecting statutes).

[26] *See, e.g.*, Md. Code Ann., Crim. Law §§ 3-303–04 (LexisNexis Supp. 2011); N.Y. PENAL LAW CODE §§ 130.25, 130.30, 130.35 (McKinney 2009); WIS. STAT. ANN. § 940.225 (West Supp. 2011); MODEL PENAL CODE §§ 2.11(3), 213.1 (1962).

[27] Most rape and sexual assault victims (eighty-four percent) report that no weapon was used by the offender. LAWRENCE A. GREENFELD, U.S. DEP'T OF JUSTICE, SEX OFFENSES AND OFFENDERS: AN ANALYSIS OF DATA ON RAPE AND SEXUAL ASSAULT 3 (1997), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/SOO.PDF.

[28] *See supra* note 26 and accompanying text (citing various state rape laws); *see also* Hearn, *supra* note 17, at 1105 (noting the non-prosecution of rape within marriage and its gradations based on force, separation, cohabitation, divorce, and serious injury other than the rape itself) (citing Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45, 47–48 (1990) (listing state statutes modifying the marital rape exemption where the couple is separated or has begun proceedings)).

[29] *See also* BRAMAN, *supra* note 25, at 262–64 (forthcoming).

[30] CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 172 (1989).

[31] BRAMAN, *supra* note 25; *see also* State v. Terry, 215 A.2d 374, 376 (N.J. Super. Ct. App. Div. 1965) ("[I]f a woman assaulted is physically and mentally able to resist, is not terrified by threats, and is not in a place and position that resistance would have been useless, it must be shown that she did, in fact, resist the assault."); MENACHEM AMIR, PATTERNS IN FORCIBLE RAPE 162–64 (1971); ESTRICH, *supra* note 14, at 22; Note, *Recent Statutory Developments in the Definition of Forcible Rape*, 61 VA. L. REV. 1500, 1505–07 (1975) (describing the "utmost resistance" requirement in rape law).

are "inherently more untrustworthy" than other victims of criminal attack.[32] The continued grading of rape through force and force proxies demonstrates that such entrenched beliefs prevail. Physical protest or resistance by the victim is assumed to produce the use of force or threat of force by the perpetrator in order to effectively commit the crime of rape.[33]

At first glance, it may seem logical to incorporate the attendant circumstances surrounding the rape into the definition of the crime. However, the distinction or oddity about the construction of rape law is that the attendant circumstances of the crime are *central—not supplemental*—to the definition of rape, rather than constituting an additional crime or creating an entirely new combined crime. The baseline of rape crimes is rape at its most extreme,[34] such that other versions of rape are considered lesser, and thus minimized. Meanwhile, the paradigmatic cases for other crimes, such as theft,[35] advance a less extreme baseline, perhaps increasing the ability to prosecute. For instance, under federal drug law, the attendant circumstances of a trafficking crime are supplemental to the definition of drug trafficking. Distribution or intent to distribute unlawful drugs within a school zone,[36] or with the use, carriage, or possession of a firearm in furtherance of the crime[37] constitute different crimes that do not alter the definition of the core harm. In fact, drug trafficking with the use of a firearm could hypothetically constitute two separate counts: one for drug trafficking and one for gun possession. The definition of drug trafficking remains the baseline offense.[38] In rape law, however, rape is combined with its attendant circumstances to construct and inflate the baseline offense, producing an extreme starting point for the investigation and prosecution of rape crimes. The attendant circum-

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[32] BRAMAN, *supra* note 25, at 289 (citing Note, *Toward a Consent Standard in the Law of Rape*, 43 U. CHI. L. REV. 613, 638 (1976)); *see also* People v. Barnes, 721 P.2d 110, 117–18 (Cal. 1986); ESTRICH, *supra* note 14, at 29, 55; JENNIFER TEMKIN, RAPE AND THE LEGAL PROCESS 272–73 (2d ed. 2002) (discussing continued suspicion and hostile treatment of rape victims).

[33] Jane Kim, *Trafficked: Domestic Violence, Exploitation in Marriage, and the Foreign-Bride Industry*, 51 VA. J. INT'L L. 443, 490 n.269 (2011).

[34] For example, rape at its most extreme may include rape perpetrated by a stranger, the use of a deadly weapon or physical force in addition to the rape itself, physical acts of resistance by the victim-survivor, the rape of a minor child, and rape in conjunction with an additional crime. These situations of *rape-and* constitute the baseline for rape under the current rape law regime. *See, e.g.*, ESTRICH, *supra* note 14, at 8 (discussing cases where an "armed stranger [is] jumping from the bushes").

[35] For example, the progression of larceny, robbery, and burglary highlight the less extreme baseline used for theft crimes where the crime of robbery requires the commission of larceny plus additional elements or force proxies, and burglary further adds additional elements or force proxies. *See, e.g.*, N.Y. PENAL LAW §§ 155.00–155.45, §§160.00–160.15 (McKinney 2009); Rutkowski v. United States, 149 F.2d 481, 482 (6th Cir. 1945) (discussing how "[r]obbery is in fact larceny committed by violence, and includes stealing and asportation as well as assault").

[36] 21 U.S.C. § 860 (2006).

[37] 18 U.S.C. § 924(c)(1)(A) (2006).

[38] 21 U.S.C. §§ 841, 844 (2006).

stances begin to define what rape is by gauging consent and the presence of force through proxy.

Grading rape crimes by the level of accompanied force produces several harmful and interconnected consequences. First, the grading of rape crimes by force creates classes of rape crimes that have effectively labeled some forms of rape—*rape-and* ("forcible rape" or "rape with force")—as legitimate or real rape that deserve prosecution.[39] Meanwhile, other forms of rape—*rape-alone* ("non-forcible rape" or "rape without force")—are minimized and marginalized as *rape-lite*, as an illegitimate or illusory claim, a misunderstanding.[40] Colloquially termed "acquaintance rape" or "date rape,"[41] *rape-alone* cases, which are prevalent on college campuses,[42] are consequently treated as "that other thing," as not "real rape."[43] This is particularly problematic as the vast majority of sexual assaults are perpetrated by persons known to the victim, with estimates ranging from eighty-four to nearly ninety-eight percent.[44] Thus, it is likely that the majority of rape cases are classified as *rape-alone* cases and therefore treated as illegitimate claims.

Second, tethering the definition and punishment of various levels or kinds of rape detracts from the core harm—the rape or nonconsensual act[45]—and questions whether the rape or the attendant circumstances are the targets of punishment. Creating classes of rape crimes investigates, prose-

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[39] Susan Estrich discusses this grade of rape as "aggravated rape," as opposed to "technical" or "simple" rape. ESTRICH, *supra* note 14, at 10. Aggravated rape "involv[es] more than one man, or strangers, or weapons and beatings." *Id.*; *see also* TEMKIN & KRAHÉ, *supra* note 11, at 31–32 (discussing the "real rape" stereotype where many people view rape as perpetrated by a stranger on an unsuspecting victim with use or the threat of force and active physical resistance by the victim).

[40] *See* ESTRICH, *supra* note 14, at 10, 19–20 (noting that technical rapes are minimized).

[41] David Lisak, *Understanding the Predatory Nature of Sexual Violence*, HARVARD KENNEDY SCHOOL, ASH CTR. FOR DEMOCRATIC GOVERNANCE AND INNOVATION, 2 (2008), http://www.innovations.harvard.edu/cache/documents/1348/134841.pdf.

[42] Joseph Shapiro, *Myths That Make It Hard to Stop Campus Rape*, NPR (Mar. 4, 2010), http://www.npr.org/templates/story/story.php?storyId=124272157.

[43] *See* ESTRICH, *supra* note 14, at 10, 17–20 (discussing the different treatment of aggravated versus technical rape); HEATHER M. KARJANE, BONNIE S. FISHER & FRANCIS T. CULLEN, CAMPUS SEXUAL ASSAULT: HOW AMERICA'S INSTITUTIONS OF HIGHER EDUCATION RESPOND 4 (2002) (stating that the majority of rapes are perpetrated by men known to the victim), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/196676.pdf.

[44] KARJANE, FISHER & CULLEN, *supra* note 43, at 4.

[45] While defining rape is beyond the scope of this Article, for the purposes of this point, nonconsensual penetration is used as a broad definition of rape for which the rape's attendant circumstances are not central to its construction. Susan Brownmiller advances a similar definition of rape: "A female definition of rape can be contained in a single sentence. If a woman chooses not to have intercourse with a specific man and the man chooses to proceed against her will, that is a criminal act of rape. . . . [T]his is not and never has been the legal definition. . . . [V]ictims of rape and other forms of sexual assault . . . need to prove . . . that they resisted, that they didn't consent, that their will was overcome by overwhelming force and fear—because the law has never been able to satisfactorily distinguish an act of mutually desired sexual union from an act of forced, criminal sexual aggression." SUSAN BROWNMILLER, AGAINST OUR WILL: MEN, WOMEN AND RAPE 8, 431–32 (1975).

cutes, and punishes the core crime of rape in different ways, rather than prosecuting and punishing rape and its attendant circumstances as two separate crimes. The grading of rape consequently offers unequal remedies to rape victims based on, for example, the level of force present or on their level of protest.[46] Such variances impose different levels of wrongness and punishment onto the core violation.

Third, in addition to detracting from the core harm, the grading of rape negates the force inherent in the act of rape itself. The grading of rape demonstrates that the law continues to struggle with the distinction between rape and sex,[47] thus requiring an accompaniment to sex to transform it into a legitimate rape. Indeed, "[t]he notion that rape is a crime of lust persists today even in the highest echelons of law enforcement, notwithstanding longstanding critiques debunking such a notion."[48] Confusing rape and sex, courts thus commonly draw the distinction between force incidental to the act of nonconsensual penetration and the external force required to establish rape.[49] Such a distinction follows U.S. law's longstanding history and practice "of elevating physical force as the keystone to claims of violence against women."[50] The failure of lawmakers to distinguish between both rape-and-sex and rape-and-force negates the core harm of rape and the fact that the act of rape itself is forcible. Additional indicators of force or force proxies are unnecessary in defining the nonconsensual act of rape.[51]

Fourth, the creation of a class of *rape-lite* crimes perpetuates the misguided belief that victims of "acquaintance rape" or "date rape" are not true or truthful,[52] and that their existence and their rapes are somehow illegitimate myths.[53] In fact, even some victims of rape and sexual assault do not

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[46] *See* MacKinnon, *supra* note 26 and accompanying text.

[47] *See id.* at 172–74 (discussing law's difficulty in distinguishing between rape and sex); Susan Estrich, *Rape*, 95 Yale L.J. 1087, 1092–93 (1986) (describing how, in the view of some feminists, "most of what passes for 'sex' in our capitalist society is coerced"); Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 Stan. L. Rev. 691, 740 n.249 (1997) (discussing the notion that rape is a crime of lust); Charlene L. Muehlenhard, Sharon Danoff-Burg & Irene G. Powch, *Is Rape Sex or Violence? Conceptual Issues and Implications*, *in* Sex, Power, Conflict: Evolutionary and Feminist Persepctives 119, 120 (David M Buss & Neil M. Malamuth eds., 1996) [hereinafter Sex, Power, Conflict].

[48] Franke, *supra* note 47, at 740 n.249.

[49] *See* Estrich, *supra* note 14, at 60 ("The distinction between the 'force' incidental to the act of intercourse and the 'force' required to convict of rape is one commonly drawn by courts.").

[50] Kim, *supra* note 33, at 489–90.

[51] *See* MacKinnon, *supra* note 30, at 172.

[52] Estrich, *supra* note 14, at 29, 55–56, 58 (discussing distrust that continues in the definition of rape); Temkin, *supra* note 32, at 272–73 (discussing skepticism towards rape victims); Temkin & Krahé, *supra* note 11, at 34–35 (presenting statistics on negative attitudes towards rape victims across fifteen countries).

[53] Temkin & Krahé, *supra* note 11, at 34 (quoting Heike Gerger, Hanna Kley, Gerd Bohner & Frank Siebler, *The Acceptance of Modern Myths About Sexual Aggression Scale: Development and Validation in German and English*, 33 Aggressive Behav. 422, 425 (2007) (discussing rape myths as "descriptive or prescriptive beliefs about sexual aggression . . . that . . . downplay or justify sexually aggressive behavior")); s*ee also id.*

directly or expressly refer to their experiences as rape, attempted rape, or sexual assault, which has serious implications for reporting,[54] and for the investigation and prosecution of rape crimes. This is particularly problematic for college students, as the majority of rapes on college campuses are perpetrated by persons known to the victim.[55] Indeed, the vast majority of studies show that the prevalence of rape myth acceptance comes from United States college students, who believe that resistance must be shown, women's reputation plays a role, and victims are to be mistrusted.[56]

B. The Inadequate Investigation and Prosecution of Rape in the United States

The practical problem of *rape tolerance* is simple: it is the inadequate investigation and prosecution of rape crimes.[57] In the United States, approximately ninety-four to ninety-eight percent of total rapists[58] and approximately eighty-four percent of reported rapists go free.[59] Rape and sexual assault are the crimes with the lowest reported arrest and prosecution rates in the United States.[60] Most rapes are not treated as crimes.[61] In 1994, the U.S. Senate concluded that:

> [C]rimes against women are often treated differently and less seriously than other crimes. Police may refuse to take reports; prose-

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(citing Kathryn B. Anderson, Harris Cooper & Linda Okamura, *Individual Differences and Attitudes Toward Rape: A Meta-Analytic Review*, 23 PERSONALITY AND SOC. PSYCHOL. BULL. 295 (1997); Linda A. Anderson, Matthew P. Stoelb, Peter Duggan, Brad Hieger, Kathleen H. Kling & June P. Payne, *The Effectiveness of Two Rape Prevention Programs in Changing the Rape-Supportive Attitudes of College Students*, 39 J. OF C. STUDENT DEV. 131 (1998)) (explaining that rape myths create "rape-supportive attitudes").

[54] KARJANE, FISHER & CULLEN, *supra* note 43, at 5.

[55] Lisak, *supra* note 41, at 2.

[56] TEMKIN & KRAHÉ, *supra* note 11, at 34–35.

[57] *See supra* notes 7–11 and accompanying text.

[58] *Id.*

[59] *Id.*

[60] *Rape Kit Backlogs: Failing the Test of Providing Justice to Sexual Assault Survivors: Hearing before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 50 (2010) [hereinafter *2010 Subcomm.*, *Rape Kit Backlog*] (statement of Mariska Hargitay, Founder and President, Joyful Heart Foundation); s*ee* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 194530, RAPE AND SEXUAL ASSAULT: REPORTING TO POLICE AND MEDICAL ATTENTION, 1992–2000, at 2 tbl.3 (2002) (finding that 36% of completed rapes were reported to the police, 34% of attempted rapes were reported and 26% of sexual assaults were reported to the police from 1992 to 2000, which produces a reporting average of 32% for rape, attempted rape, and sexual assault); MACKINNON, *supra* note 6, at 742 (citing, e.g., National Victim Center, Crime Victims Research and Treatment Center, Rape in America 5 (1992) (finding 16% of rapes reported); RUSSELL, *supra* note 7, at 31 (documenting 9.5% of rapes reported) (citing additional sources); RAINN, *supra* note 8 (citing U.S. DEP'T OF JUSTICE, 2005 NATIONAL CRIME VICTIMIZATION STUDY (2005)) (noting 40% of rape and sexual assault victims report their attacks).

[61] *See* MACKINNON, *supra* note 6, at 766 ("Most sexual abuse that happens is not treated as, or possibly even defined as, a crime.").

> cutors may encourage defendants to plead to minor offenses; judges may rule against victims on evidentiary matters . . . . At every step of the way, the criminal justice system poses significant hurdles for victims . . . .[62]

Seventeen years later, improvements in the criminal prosecution of rape crimes remain questionable.[63]

One example of local *rape tolerance* is the rape kit backlog, or the failure of local officials to ensure proper evidence collection and processing of physical evidence of a rape. In the United States, there are currently 400,000 to 600,000 rape kits sitting for months or years, unopened, untested,[64] abandoned, and left vulnerable to the effects of flooding, fire, and evidentiary breakdown. Not surprisingly, testing rape kits "can identify the assailant, confirm a suspect's contact with a victim, corroborate the victim's account of the sexual assault, and exonerate innocent defendants."[65] As approximately sixty-three percent of rapists are thought to be repeat offenders,[66] testing rape kits may connect rape crimes and identify repeat and serial rapists.[67]

The rape kit backlog highlights that local officials are inadequately investigating and prosecuting rape, beginning with the initial failure to ensure proper evidence collection and to process the kits. Such local failures allow for free rapists to repeat their offenses,[68] as evidenced by New York City's 2,000 cold hits on rape kits and increase in rape arrests when the city reduced its 17,000 rape kit backlog.[69] Law enforcement agencies have stated

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[62] S. REP. NO. 103-138, at 50 (1994).

[63] *See supra* notes 7–11, 58–62 and accompanying text; *see infra* notes 65–95 and accompanying text.

[64] *2010 Subcomm.*, *Rape Kit Backlog*, *supra* note 60, at 21 (statement of Rep. Anthony Weiner, Member, H. Subcomm. on Crime, Terrorism & Homeland Security) (noting that there are over 542,000 untested rape kits); *Justice for Sexual Assault Victims: Using DNA Evidence to Combat Crime: Hearing Before the Subcomm. on Crime & Drugs of the S. Comm. on the Judiciary*, 107th Cong. 3, 19, 20 (2002) [hereinafter *2002 Subcomm., Rape Kit Backlog*] (statement of Sen. Joseph Biden, Chairman, S. Subcomm. on Crime & Drugs) (estimating as many as 500,000 untested rape-kits); Human Rights Watch, *Eliminate the Rape-Kit Backlog*, HUMAN RIGHTS WATCH, www.kintera.org/c.nllWlgN2JwE/b.5706887/k.37FC/Eliminate_the_Rape_Kit_Backlog/siteapps/advocacy/ActionItem.aspx (last visited Nov. 15, 2010) (estimating 400,000–500,000 untested rape kits).

[65] HUMAN RIGHTS WATCH, TESTING JUSTICE: THE RAPE KIT BACKLOG IN LOS ANGELES CITY AND COUNTY 1 (2009), *available at* www.hrw.org/sites/default/files/reports/rapekit0309web.pdf.

[66] David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, VIOLENCE AND VICTIMS, Feb. 2002, at 73, 78 (finding that 63.3% of rapists interviewed for the study had committed repeat rapes, either against multiple victims or more than one against the same victim).

[67] *See* MARK NELSON, DEP'T. OF JUSTICE, MAKING SENSE OF DNA BACKLOGS, 2010—MYTHS VS. REALITY 2 (2011), *available at* www.nij.gov/pubs-sum/232197.htm.

[68] *2010 Subcomm., Rape Kit Backlog*, *supra* note 60, at 2 (statement of Rep. Robert C. Scott, Chairman, H. Comm, Subcomm. on Crime, Terrorism & Homeland Security).

[69] *Id.* at 21 (statement of Rep. Anthony Weiner, Member, H. Subcomm. on Crime, Terrorism & Homeland Security).

that they do not even submit forensic evidence for unsolved cases because they do not believe that the evidence is useful.[70] As rape kit evidence has been shown to be useful—in investigating the specific rape and in investigating other serial rapists and other violent crimes through Combined DNA Index System ("CODIS") matches[71]—local apathy towards rape kits suggests local apathy or disbelief regarding the perpetration of rape crimes. Such inadequate investigation and prosecution of rape cases may further deter rape victims from coming forward.

Additionally, although Congress has known about the rape kit backlog for at least a decade,[72] federal advancements have been slow at best.[73] The Department of Justice ("DOJ") continues to argue that the rape kit backlog is a product of a broader and heightened demand for DNA testing that exceeds the capabilities of DNA labs throughout the country.[74] As such, although $400 million of federal funding from the National Institute of Justice was provided from 2004 to 2009 to reduce the backlog, such funding was redirected toward DNA backlogs for *all* crimes and not specifically to the rape kit backlog.[75] In this way, the rape kit backlog and lethargic efforts to address this backlog evidence *rape tolerance* in the investigation of rape crimes.

A second example of local *rape tolerance* is the treatment of rape on college campuses. More than one-in-four college-aged women report that they have been victims of rape or attempted rape, and one-in-five college women report that they have been raped in college.[76] In most cases, these rapes are perpetrated by persons known to the victim,[77] and the vast majority of these rapists are serial offenders who rape an average of six victim-survivors.[78]

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[70] *Cf.* KEVIN J. STROM, JERI ROPERO-MILLER, SHELTON JONES, NATHAN SIKES, MARK POPE & NICOLE HORSTMANN, RTI INTERNATIONAL, THE 2007 SURVEY OF LAW ENFORCEMENT FORENSIC EVIDENCE PROCESSING §3.2.1 (2009) (discussing police practices in processing and analyzing forensic evidence for all local crimes).

[71] U.S. DEP'T OF JUSTICE, OFFICE OF VIOLENCE AGAINST WOMEN, ELIMINATING THE RAPE KIT BACKLOG: A ROUNDTABLE TO EXPLORE A VICTIM-CENTERED APPROACH 4–5 (2010) [hereinafter DOJ, RAPE KIT BACKLOG], *available at http://www.ovw.usdoj.gov/docs/rape-kit-roundtable-summary-10262010.pdf*.

[72] *See 2002 Subcomm., Rape Kit Backlog*, *supra* note 64, at 3 (statement of Sen. Joseph Biden, Chairman, Subcomm. on Crime & Drugs) (acknowledging a rape-kit backlog at the time of the hearing, approximately 10 years ago).

[73] *See 2010 Subcomm., Rape Kit Backlog*, *supra* note 60, at 56 (statement of Mariska Hargitay, Founder and President, Joyful Heart Foundation) ("Experts estimate that there are hundreds of thousands—*hundreds of thousands*—of untested rape kits . . . throughout the country) (emphasis in original).

[74] DOJ, RAPE KIT BACKLOG, *supra* note 71, at 9; NELSON, *supra* note 67, at iii.

[75] *Id.* at 6.

[76] KARJANE, FISHER & CULLEN, *supra* note 43, at 4.

[77] *Id.*

[78] Jennifer Peebles & Kristen Lombardi, *Undetected Rapists' on Campus: A Troubling Plague of Repeat Offenders*, SEXUAL ASSAULT ON CAMPUS: A FRUSTRATING SEARCH FOR JUSTICE, THE CENTER FOR PUBLIC INTEGRITY (February 26, 2010), http://www.publicintegrity.org/investigations/campus_assault/articles/entry/1948/; *see also* Shapiro,

Despite the particular pervasiveness of rape on college campuses, Institutes of Higher Education ("IHEs"), including colleges and universities, inadequately investigate and prosecute rape in several ways, tolerating and minimizing rape's harm. First, university administrators rarely believe the few students who report their rapes, often continuing to place blame on the victim by asking how she was dressed and whether she encouraged the rape.[79] Second, where rape and sexual assault claims make it to university disciplinary boards, such boards are hesitant to name rapists as rapists because they are also college students.[80] University disciplinary boards often approach rape proceedings as a "teachable moment," focusing on allegedly educating rather than punishing the rapist.[81] Third, universities often rename rape as a lesser crime, minimizing the offense in name, in punishment, and in effect on the rapist.[82] Fourth, even where a rapist is found responsible, the rapist's punishment is often considerably lower than the punishments im-

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supra note 42 (discussing psychologist David Lisak's study of over 2,000 male students over 20 years that found that serial rape on college campuses accounts for approximately nine out of ten rapes); Lisak & Miller, *supra* note 66, at 78 (finding that the majority of rapists commit repeat rapes, either against multiple victims or more than once against the same victim).

[79] *See* KARJANE, FISHER & CULLEN, *supra* note 43, at xi ("IHEs unintentionally condone victim-blaming "when they circulate materials that focus primarily on the individual victim's responsibility to avoid sexual assault without balancing this risk management information with prevention education targeted toward men that stresses the perpetrator's responsibility for committing the crime."); Kristin Jones, *Lax Enforcement of Title IX in Campus Sexual Assault Cases*, SEXUAL ASSAULT ON CAMPUS: A FRUSTRATING SEARCH FOR JUSTICE, THE CENTER FOR PUBLIC INTEGRITY (February 25, 2010), http://www.publicintegrity.org/investigations/campus_assault/articles/entry/1946/ (explaining that Assistant Dean of Student Affairs Suzanne Jones of the University of Wisconsin Madison stated that "she was not pursuing the matter because there were no eyewitnesses other than [the three students involved]" and because "alcohol played a part in their lack of clarity").

[80] The "myth of the crazed rapist" is relevant and remains deeply entrenched. *See* Christina E. Wells & Erin Elliott Motley, *Reinforcing the Myth of the Crazed Rapist: A Feminist Critique of Recent Rape Legislation*, 81 B.U. L. REV. 127, 129 (2001) (citing JOYCE E. WILLIAMS & KAREN A. HOLMES, THE SECOND ASSAULT: RAPE AND PUBLIC ATTITUDES 118 (1981); Aviva Orenstein, *No Bad Men!: A Feminist Analysis of Character Evidence in Rape Trials*, 49 HASTINGS L.J. 663, 677–78 (1998)).

However, "[m]odern social science data debunks this myth and suggests that the average rapist is psychologically normal." *Id.* (referencing Katharine K. Baker, *Once A Rapist? Motivational Evidence and Relevancy in Rape Law*, 110 HARV. L. REV. 563, 576–78 (1997) (reviewing social science data regarding the "normality" of rapists)).

[81] *See* Kristen Lombardi, *A Lack of Consequences for Sexual Assault,* SEXUAL ASSAULT ON CAMPUS: A FRUSTRATING SEARCH FOR JUSTICE, THE CENTER FOR PUBLIC INTEGRITY (February 24, 2010), http://www.publicintegrity.org/investigations/campus_assault/articles/entry/1945/ (citing interviews with university administrators).

[82] *See* United States v. Morrison, 529 U.S. 598, 603 (1999) (labeling Christy Brzonkala's rape a "sexual assault" then renaming it to "using abusive language"); ESTRICH, *supra* note 14, at 81–82 (discussing renaming of rape as sexual assault or criminal sexual conduct); Kristin Jones, *An Uncommon Outcome at Holy Cross*, SEXUAL ASSAULT ON CAMPUS: A FRUSTRATING SEARCH FOR JUSTICE, THE CENTER FOR PUBLIC INTEGRITY (February 24, 2010), http://www.publicintegrity.org/investigations/campus_assault/articles/entry/1947/ (explaining that a college rapist was charged with "sexual misconduct" for sex without consent (rape)); Lombardi, *supra* note 81 (describing universities that renamed rape as "sexual contact" or "sexual assault" or a "miscommunication").

posed through the public criminal justice system.[83] College rapists are rarely expelled,[84] and almost always graduate on time.[85] Rather, the consequences for rapists may take the form of counseling, education on sexual consent, or writing an apology letter.[86] Meanwhile, rape victim-survivors carry the burden of the consequences of the violation—both by the rapist and by unjust university proceedings—and rape remains rampant on college campuses.[87]

Finally, despite the inadequate treatment of rape on college campuses, local law enforcement, local prosecutors, and federal agencies rarely mitigate the *rape tolerance* of university disciplinary proceedings, further highlighting the prevalence of *local rape tolerance*. Where rapes are investigated by college police and college disciplinary proceedings, local investigators and prosecutors may choose not to intervene without referral.[88] Even where local law enforcement may intervene, pervasive *rape tolerance* across local police and prosecutors' offices further obstructs the adequate investigation and prosecution of rape on college campuses.[89] Additionally, under Title IX, despite the fact that federal funding from the U.S. Department of Education's Office for Civil Rights ("OCR") requires "prompt and equitable" action in response to allegations of rape and sexual assault crimes,[90] OCR has only investigated approximately two cases of "botched" college sexual assault investigations each year since 1998, finding only five violations in eleven years.[91] Moreover, "OCR officials have said punishing schools is unnecessary and impractical."[92] Perhaps this is in part because OCR does not currently hold the legal or human capacity for more adequate regulation. Accordingly, none of the investigated schools were punished even when OCR found that colleges had inadequately treated rape or sexual assault cases,[93] thus perpetuating and financially feeding the continuation of *rape tolerance* on college campuses.

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[83] *See* Lombardi, *supra* note 81 (quoting Administrators who explain that a college judicial system is "not the same thing as a court of law").

[84] *See id.*

[85] *See* Jones, *supra* note 79 (discussing a University of Wisconsin at Madison crew team member accused of rape and able to "start his fourth year at the university, compete in another rowing season, and glide into another spring as a celebrated college athlete").

[86] Lombardi, *supra* note 81.

[87] *See id.* (explaining that while college rapists face little or no consequence for their acts, victims' lives are frequently turned upside down, potentially leading to withdrawals from school, while their alleged attackers graduate).

[88] *See, e.g.*, Stacy St. Clair and Todd Lighty, *Notre Dame Silent on Teen's Death,* CHI. TRIB., Nov. 21, 2010, http://articles.chicagotribune.com/2010-11-21/news/ct-met-notre-dame-story-20101121_1_sexual-attack-campus-police-sexual-assault (noting that "St. Joseph County Prosecutor Michael Dvorak said campus authorities have not asked the office to charge anyone in connection with the alleged sexual attack" and could not say whether the office had been consulted on the case).

[89] *See supra* note 60–63 and accompanying text.

[90] Jones, *supra* note 79.

[91] *Id.*

[92] *Id.*

[93] *Id.*

II. Federal *Rape Tolerance* and the Commerce Clause: Comparing Rape, Extortion, and Mail Fraud

In 2000, the Court held that the federal civil remedy of the 1994 Violence Against Women Act (§ 13981 of VAWA) was unconstitutional, constructing violence against women as a local problem that did not have a sufficient jurisdictional nexus to Congress's Commerce Clause power.[94] Curiously, however, the Court has had no qualms about authorizing the congressional regulation and the federal criminalization of all sorts of crimes, including mail fraud and extortion—no matter how petty or seemingly local—so long as they do not involve sexual violence.

This Part compares the Court's approach to rape with its approach to the longstanding federal crimes of extortion and mail fraud to unravel the Court's conceptualization, deprioritization, and minimization of rape crimes, as well as the participation of the Court and of federal legislators in *rape tolerance*. Section A presents an overview of the Court's view of violence against women as insufficiently connected to interstate commerce, despite Congress's attempts to demonstrate that violence against women has substantial aggregate effects on the national economy. Closely examining the "jurisdictional nexus" requirements advanced by the Court for mail fraud and extortion,[95] Section B discusses the *de minimis* jurisdictional nexuses required by the Court in recognizing Congress's constitutional authority to regulate these crimes under Congress's postal and commerce powers. In advancing a more demanding jurisdictional nexus standard for crimes of violence against women versus extortion and mail fraud, and by effectively barring the congressional regulation of rape under the Commerce Clause, Section C argues that the Court minimizes rape by privatizing or pushing rape crimes into the local sphere. In addition, by failing to find additional

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[94] United States v. Morrison, 529 U.S. 598, 601–02, 627 (2000). The Supreme Court has found that Congressional power under § 5 of the Fourteenth Amendment does not exist unless Congress is regulating state actors. Thus, in *Morrison*, the Supreme Court also affirmed that § 13981 was outside of Congress's remedial powers under the Fourteenth Amendment as it redressed private discrimination and violence. 529 U.S. at 619–27; *see also* City of Boerne v. Flores, 521 U.S. 507, 519–20, 527 (1997) (advancing a restrictive view of the Fourteenth Amendment where the Fourteenth Amendment does not confer any rights by itself and federal enforcement action is authorized only where a state has violated an existing federal right).

[95] Much has been written on *United States v. Morrison*'s analysis—or revision—of Congress's Commerce Clause authority, *Morrison* in contrast to the *Civil Rights Cases*, 109 U.S. 3 (1883), *Morrison's* expression of § 5 of the Fourteenth Amendment, and the institutional role of the Court in such decision-making. Dissenting in *United States v. Morrison*, Justice Souter and Justice Breyer, both joined by Justice Stevens and Justice Ginsburg, discuss each of these issues and also compare violence against women to extortion and robberies. *See Morrison*, 529 U.S. at 628–55 (Souter, J., dissenting); *id.* at 655–66 (Breyer, J., dissenting). This Article compares the jurisdictional nexus standards for rape and the federal crimes of mail fraud and extortion, which has not yet been analyzed.

avenues of constitutional authority to pass federal rape law, despite its recognized need, Congress joins the Court in advancing *rape tolerance*.

A. Rape and the Commerce Clause

In 1994, Congress passed VAWA to combat local *rape tolerance*. Identifying the impetus and grave need for federal action against rape, the Senate cited seventeen studies commissioned by various state court task forces and bar associations to conclude that state and local remedies for crimes against women were grossly inadequate.[96] Congress thus acknowledged the benefits of federal law in combating violence against women.[97] Enacted under Congress's Commerce Clause Power,[98] VAWA included a federal civil remedy (§ 13981) that enabled rape survivors to sue their attackers in federal civil court after finding that state law enforcement officials, including police and prosecutors, could not be counted on to press charges in many rape cases.[99]

In 2000, the constitutionality of VAWA's federal civil remedy was challenged in *United States v. Morrison*.[100] To establish the jurisdictional nexus between violence against women and interstate commerce and to pass the "modest threshold required by the Commerce Clause,"[101] Congress advanced an unprecedented "mountain of data" showing the effects of violence against women on interstate commerce.[102] Congress found that "crimes of violence motivated by gender have a substantial adverse effect on interstate commerce, by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting business . . . in interstate commerce."[103] As 2,000 to 4,000 deaths per year occur at the hands of domestic abusers, nearly 50 percent of rape victims quit or lost their jobs after their rape, and over $3 billion in 1990 and $5 to $10 billion in 1993 were expended on healthcare to treat gender-motivated violence,[104] the Senate found that violence against women "restricts movement, reduces employment opportunities, increases [overall] health expend-

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[96] *See* S. REP. NO. 103-138, at 56 n.52 (1993) (listing studies that have "concluded that crimes disproportionately affecting women are often treated less seriously than comparable crimes affecting men").

[97] *Morrison*, 529 U.S. at 653 (Souter, J., dissenting).

[98] U.S. CONST. art. 1, § 8, cl. 3.

[99] 42 U.S.C. § 13981 (1994), *invalidated by* United States v. Morrison, 529 U.S. 598 (2000).

[100] 529 U.S. 598 (2000).

[101] S. REP. NO. 103-138, at 60 (1993); *see also* Gonzales v. Raich, 545 U.S. 1, 24–26 (2005) (holding that Congress can regulate medical marijuana, an "economic, commercial activity"); Wickard v. Filburn, 317 U.S. 111, 124–28 (1942) (finding cumulative effects exist to satisfy the jurisdictional nexus required of the Commerce Clause in aggregating wheat production for personal use despite the quintessentially local nature of one's home).

[102] *Morrison*, 529 U.S. at 628–29 (Souter, J., dissenting).

[103] H.R. REP. NO. 103-711, at 385 (1994) (Conf. Rep.).

[104] *Morrison*, 529 U.S. at 631–34 (Souter, J., dissenting).

itures, and reduces consumer spending."[105] VAWA and Congress's findings garnered unanimous support from the National Association of Attorneys General and from the Attorneys General of thirty-eight states.[106]

Despite the substantial, aggregate impact that gender-motivated crime has on employment, business, production, transit, consumption, healthcare, and national productivity,[107] the Supreme Court rejected Congress's findings and moved from its traditional plenary view of Congress's commerce power to a new, "categorically limited" approach that scrutinized Congress's commerce power.[108] The Court entered into the business of determining what constituted a rational basis for congressional legislation under the commerce power: a role traditionally taken by the legislature.[109] According to the Court, gender-motivated crimes of violence were not considered economic activity and the Commerce Clause did not vest Congress with the authority to enact VAWA to regulate such crimes.[110] In effect, the Court departed from a tradition of rational basis review to reject Congress's determination of VAWA's sufficient relationship to interstate commerce.[111] In contrast, the continuing strength of the Hobbs Act and Mail Fraud Statute reveal that for some crimes, the jurisdictional nexus requirement is *de minimis*.[112] The substantive distinctions involved in such determinations are discussed in the next Section.

B. De Minimis*: The Jurisdictional Nexus Requirements for Mail Fraud and Extortion*

In stark contrast to the Court's barring of federal rape regulation as unconstitutional under the Commerce Clause, the Court incongruently and continuously authorizes the federal regulation of the longstanding crimes of extortion and mail fraud. The Court's constructed and inconsistent limitations on congressional authority in combating violence against women and Congress's unwillingness to maneuver around the Court constitute federal *rape tolerance*.

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[105] S. Rep. No. 103-138, at 60 (1993).
[106] *Morrison*, 529 U.S. at 653 (Souter, J., dissenting).
[107] *Id.* at 628–635 (Souter, J., dissenting).
[108] *Id.* at 640 (Souter, J., dissenting).
[109] *See id.* at 637–38 (Souter, J., dissenting); Wickard v. Fliburn, 317 U.S. 111, 124–29 (1942).
[110] *Morrison*, 529 U.S. at 617–19, 627.
[111] *See id.* at 635 (Souter, J., dissenting) (analogizing to the civil rights cases Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964), and Katzenbach v. McClung, 379 U.S. 294 (1964), and noting that more evidence of substantial effects was presented by Congress in this case than in past cases regulating race-based discrimination and violence); Robert J. Pushaw, Jr., *The Medical Marijuana Case: A Commerce Clause Counter-Revolution?*, 9 LEWIS & CLARK L. Rev. 879, 882 (2005) (discussing the different standard of review in *Gonzales v. Raich,* 545 U.S. 1 (2005)).
[112] *See infra* Part II.B.

1. *The Mail Fraud Statute: 18 U.S.C. § 1341*

The "most flexible weapon in the federal prosecutorial arsenal,"[113] "[t]he Mail Fraud Statute is among the most frequently used federal provisions for prosecuting economic crimes."[114] Under 18 U.S.C. § 1341, one perpetrates mail fraud by devising "any scheme or artifice to defraud . . . . [and] for the purpose of executing such scheme or artifice . . . places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service . . . or delivered by any private or commercial interstate carrier."[115] Such a "scheme or artifice to defraud" includes schemes for obtaining money or property"[116] and schemes "to deprive another of the intangible right of honest services."[117]

Congressional authority to regulate mail fraud stems in part from the Postal Clause of the Constitution, which authorizes Congress to "establish Post Offices and post Roads."[118] As early as 1878, the Court upheld the validity of the Mail Fraud statute as a proper exercise of Congress's exclusive grant of authority over the postal system when coupled with the Necessary and Proper Clause of the Constitution.[119] The Court has continued to uphold the constitutionality of Congress's power in this realm, even if acts regulated have traditionally been subject to state criminal law.[120] In *In re Rapier*, the Court explained:

> When the power to establish post-offices and post-roads was surrendered to the Congress it was a complete power, and the grant carried with it the right to exercise all the powers which made that power effective. It is not necessary that Congress should have the power to deal with crime or immorality within the States in order to maintain that it possesses the power to forbid the use of the mails in aid of the perpetration of crime or immorality.[121]

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[113] DANIEL C. RICHMAN, KATE STITH & WILLIAM J. STUNTZ, DEFINING FEDERAL CRIMES 190 (forthcoming 2010).

[114] Peter J. Henning, *Federalism and the Federal Prosecution of State and Local Corruption*, 92 KY. L.J. 75, 135 (2003).

[115] 18 U.S.C. § 1341 (2006).

[116] *Id.*

[117] *Id.* at § 1346.

[118] U.S. CONST. art. 1, § 8, cl. 7.

[119] *See* Badders v. United States, 240 U.S. 391, 393 (1916) (holding that Congress has the authority to prohibit the use of the mails to carry out a fraudulent scheme "whether it can forbid the scheme or not"); *Ex parte* Jackson, 96 U.S. 727, 732 (1878) ("The right to designate what shall be carried necessarily involves the right to determine what shall be excluded.").

[120] *See, e.g.*, *In re* Rapier, 143 U.S. 110, 134 (1892).

[121] *Id.*

To establish the jurisdictional nexus to the Postal Clause, the Court has also held that "[i]t is sufficient for the mailing to be 'incident to an essential part of the scheme,'"[122] or just "a step in the plot."[123]

Moreover, the Mail Fraud Statute has continued to expand, now covering the use of postal systems and shipments by "private or commercial interstate carrier."[124] Congressional authority to regulate private carriers, such as Federal Express or the United Parcel Service, unlike the United States Postal Service ("USPS"), is pursuant to the commerce power.[125] Such authority, according to the unambiguous statutory construction, extends to private and commercial interstate carriers even when they operate intrastate.[126] In effect, the mail fraud statute reaches frauds in which the use of mails is part of the execution of the fraud; the mails need not be an essential element of the scheme.[127] In this manner, Congress's longstanding authority to regulate mail fraud has been both unwavering and relatively easy to establish.

2. *The Hobbs Act: 18 U.S.C. § 1951*

Like the Mail Fraud Statute, the Hobbs Act is powerful in both reach and grasp.[128] Reaching every robbery and extortion that affects commerce in *"any way or degree*,"[129] Congress enacted the Hobbs Act in 1948 as a successor to the Anti-Racketeering Act of 1934.[130] The Hobbs Act defines extortion as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."[131] While Congress has not clearly defined extortion, it has "fired considerable statutory ammunition" at it through the Hobbs Act.[132] In effect, the Hobbs Act turns nearly all extortionate acts into federal crimes.[133]

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[122] Schmuck v. United States, 489 U.S. 705, 710–11 (1989) (quoting Pereira v. United States, 347 U.S. 1, 8 (1954)).

[123] *Id.* (quoting Badders, 240 U.S. at 394).

[124] 18 U.S.C. § 1341 (2006).

[125] U.S. CONST. art. 1, § 8, cl. 3; RICHMAN, STITH & STUNTZ, *supra* note 113, at 261 (citing United States v. Photogrammatic Data Services, 259 F.3d 229 (4th Cir. 2001); Peter J. Henning, *Misguided Federalism*, 68 MO. L. REV. 389, 429 n.174 (2003).

[126] *See* RICHMAN, STITH & STUNTZ, *supra* note 113, at 261 (citing United States v. Photogrammatic Data Services, 259 F.3d 229 (4th Cir. 2001) (discussing how Congress has unambiguously employed virtually identical statutory language with regard to public and private carriers, consequently criminalizing all mailings in furtherance of a fraudulent scheme if the mailings are placed with either the USPS or with other private or commercial mail delivery services that operate interstate, regardless of whether any particular mailing actually crosses state lines)).

[127] *Schmuck*, 489 U.S. at 710–11.

[128] *See* RICHMAN, STITH & STUNTZ, *supra* note 113, at 276.

[129] Hobbs Act of 1948, 18 U.S.C. § 1951(a) (2006) (emphasis added).

[130] Anti-Racketeering Act of 1934, ch. 569, 48 Stat. 979 (1934) (amended 1946).

[131] 18 U.S.C. § 1951(b)(2) (2006).

[132] RICHMAN, STITH & STUNTZ, *supra* note 113, at 276.

[133] *Id.* at 282; *see also* United States v. McFarland, 264 F.3d 557, 558 (5th Cir. 2001), *aff'd by an equally divided court*, 311 F.3d 376 (5th Cir. 2002) (holding that the Hobbs

Authorized by the Commerce Clause, the Hobbs Act, according to the Court, "manifest[s] a purpose to use all the constitutional power Congress has to punish interference with interstate commerce by extortion, robbery, or physical violence."[134] To prove that the defendant's conduct affects interstate commerce, courts have found that the prosecution need only prove a "minimal effect" on commerce.[135] The Seventh Circuit, in *Peterson*, explained that the prosecution "need only show some actual, even if *de minimis*, effect, or where there is no actual effect, a realistic probability of an effect, on interstate commerce . . . ."[136] Another way of articulating the Hobbs Act's *de minimis* jurisdictional nexus requirement is to say that the Hobbs Act contains an express "jurisdictional element"[137]: "[w]here the *crime itself* directly affects interstate commerce, as in the Hobbs Act, no requirement of a substantial effect is necessary to empower Congress to regulate the activity under the Commerce Clause."[138] As such, "[o]ver the past 20 years, the Hobbs Act has served as the engine for a stunning expansion of federal criminal jurisdiction into a field traditionally policed by state and local laws . . . ."[139]

Act is constitutional as it applies to local robberies). The dissent in *McFarland* argued, however, that the application of the Hobbs Act should be circumscribed in light of *United States v. Morrison* and *United States v. Lopez*. *McFarland*, 311 F.3d at 409–10 (Garwood, J., dissenting).

[134] Stirone v. United States, 361 U.S. 212, 215 (1960).

[135] United States v. Castleberry, 116 F.3d 1384, 1387 (11th Cir. 1997); *see also, e.g.*, *Stirone*, 361 U.S. at 215; United States v. Peterson, 236 F.3d 848, 851–52 (7th Cir. 2001); United States v. Malone, 222 F.3d 1286, 1294–95 (10th Cir. 2000) (holding that *Morrison* did not alter the reasoning of *United States v. Bolton*, 68 F.3d 396, 398 (10th Cir. 1995), and that the Hobbs Act applies to local robberies because only a *de minimis* effect on interstate commerce is required to sustain a Hobbs Act conviction); United States v. Harrington, 108 F.3d 1460, 1467 (D.C. Cir. 1997) ("In the case of a statute with a jurisdictional element . . . we can find no controlling authority suggesting that . . . a 'substantial' rather than a 'concrete' effect on interstate commerce must be shown."); United States v. Atcheson, 94 F.3d 1237, 1242–43 (9th Cir. 1996); United States v. Villarreal, 764 F.2d 1048, 1052 (5th Cir. 1985).

[136] *Peterson*, 236 F.3d at 851; *see also* United States v. Lynch, 437 F.3d 902, 909 (9th Cir. 2006) (quoting United States v. Huynh, 60 F.3d 1386, 1389 (9th Cir. 1995)) (holding that the "interstate nexus requirement is satisfied 'by proof of a probable or potential impact' on interstate commerce"); United States v. Woodruff, 122 F.3d 1185, 1185–86 (9th Cir. 1997) (holding that the Supreme Court's *Lopez* decision did not overrule Ninth Circuit case law holding that the government need show only *de minimis* effect on interstate commerce to satisfy Hobbs Act's jurisdictional element).

[137] Kelly D. Miller, Recent Development, *The Hobbs Act, the Interstate Commerce Clause, and* United States v. McFarland*: The Irrational Aggregation of Independent Local Robberies to Sustain Federal Convictions*, 76 TUL. L. REV. 1761, 1767 (2002) ("*Lopez*, read in conjunction with *Robertson*, does not require an inquiry into the existence of a substantial effect on interstate commerce in Hobbs cases because of the Hobbs Act's express jurisdictional element . . . ."); *see also Harrington*, 108 F.3d at 1465 (citing United States v. Lopez, 514 U.S. 549, 562 (1995)); United States v. Stillo, 57 F.3d, 553, 558 n.2 (7th Cir. 1995) ("The Court [in *Lopez*] did not call into question the Hobbs Act, which—unlike the school gun ban—is aimed at a type of economic activity, extortion, and contains an express jurisdictional element.").

[138] *See* RICHMAN, STITH & STUNTZ, *supra* note 113, at 122.

[139] Evans v. United States, 504 U.S. 255, 290 (1992) (Thomas, J., dissenting).

Even after *Morrison* and *United States v. Lopez*,[140] the majority of circuit courts, relying on *United States v. Robertson*,[141] have upheld broad readings of the Hobbs Act's jurisdictional nexus requirement on the ground that *Lopez* "did not disturb statutes containing an express jurisdictional element."[142] The dissenting opinions to such judgments have argued that the application of the Hobbs Act to local crimes exceeds constitutional Congressional authority under the commerce power, reaching local crimes that have historically been within the police power of the states, and failing to regulate only what is truly national rather than truly local.[143] Concurring in *United States v. Nutall*, Judge DeMoss explained: "Sooner or later the Supreme Court must either back down from the principles enunciated in *Lopez* or rule that the Hobbs Act cannot be constitutionally applied to local robberies."[144] Even Justice Thomas has noted that the application of the Hobbs Act to local officials amounts to a regulation of state governments that "mocks" earlier decisions limiting congressional regulation of the states.[145] Regardless, these are minority views—at least for now. Federal law continues to regulate extortion, including robberies, and any fraud involving the mail, with merely a *de minimis* jurisdictional nexus to congressional authority under the Constitution.

C. The Supreme Court's Problematic Construction of Rape

Mail fraud and extortion's *de facto de minimis* jurisdictional nexus requirements align with the Court's "plenary" view of Congress's postal and commerce powers: a view embraced throughout the latter part of the twenti-

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[140] 514 U.S. 549, 551–52 (1995) (holding that the federal Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q), was constitutionally invalid because it exceeded Congress's limitations under the Commerce Clause).

[141] United States v. Robertson, 514 U.S. 669, 671 (1995) ("The 'affecting commerce' test was developed in our jurisprudence to define the extent of Congress's power over purely intrastate commercial activities that nonetheless have substantial *inter*state effects.").

[142] Miller, *supra* note 137, at 1767. Unlike the majority of circuit courts, the Sixth, Eighth, and Eleventh circuits have probed more deeply into the jurisdictional nexus requirement of the Hobbs Act and have distinguished between robberies of individuals and robberies of businesses. *See, e.g.*, United States v. Diaz, 248 F.3d 1065, 1085 (11th Cir. 2001); United States v. Wang, 222 F.3d 234, 240 (6th Cir. 2000); United States v. Farmer, 73 F.3d 836, 843 (8th Cir. 1996).

[143] *See* Henning, *supra* note 114, at 79 n.25 (citing United States v. McFarland, 311 F.3d 376, 409–10 (5th Cir. 2002) ("A substantial block of dissenting judges . . . argu[ed] that the statute's interstate commerce element is so broad that it reaches local crimes . . . ."); Miller, *supra* note 137, at 1768; *see also, e.g.*, United States v. Hickman, 179 F.3d 230, 231–42 (5th Cir. 1999) (Higginbotham, J., dissenting) ("We believe that the[se] Hobbs Act prosecutions exceeded Congress's authority" because they involved "purely local robberies."); United States v. Kaplan, 171 F.3d 1351, 1358 (11th Cir. 1999) (Birch, J., dissenting) (expressing concerns that the majority's holding "will result in the federalization of any crime involving extortion to acquire money").

[144] United States v. Nutall, 180 F.3d 182, 190 (5th Cir. 1999) (DeMoss, J., concurring).

[145] Evans v. United States, 504 U.S. 255, 294 (1991) (Thomas, J., dissenting).

eth century.[146] *Wickard v. Filburn*, a 1942 case, exemplifies the bounds of the Court's plenary view.[147] In *Wickard*, the Court found that growing wheat for personal consumption on an individual's farm was not "commerce" in the common vocabulary, but that the aggregate of such consumption and cultivation affected commerce substantially.[148] The Court accepted Congress's decision to legislate the growing of wheat as rational, following its tradition of declining to move beyond rational basis review of Congress's assessments of what constitutes interstate commerce.[149] The federal crimes of extortion and mail fraud continue to benefit from the Court's plenary view,[150] while rape and crimes of violence against women are not, and have never been, afforded this privilege.[151]

Should we find it odd or disturbing that a petty robbery or a credit card theft constitutes a federal crime, but rape does not? Indeed, "federal law reached virtually all robberies, most schemes to defraud, many firearms offenses, all loan sharking, most illegal gambling operations, most briberies, and every drug deal, no matter how small, even the simple possession of user-amounts of controlled substances."[152] Should we find it odd or disturbing that the justification for such incongruent federal criminalization turns on the fact that a wad of twenties might be involved?

Stepping back from its plenary jurisprudence and away from federal intervention against gender-motivated violence, the Court's justification in *Morrison* was that "[t]he Constitution requires a distinction between what is truly national and what is truly local."[153] Targeting the Court's substantive construction of rape as "noneconomic" and as traditionally within the province of local regulation,[154] in light of the continued strength of the Mail Fraud Statute and the Hobbs Act, this Section discusses the Court's problematic conceptualization of rape as private, local, discrete acts, rather than as a national concern.

1. *The Money Lie*

Constitutionally, is it difficult to understand why violence against women is not considered as having an effect on interstate commerce, but the armed robbery of a convenience store that nets only a small sum, blackmail,

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[146] United States v. Morrison, 529 U.S. 598, 640 (2000) (Souter, J., dissenting); Wickard v. Filburn, 317 U.S. 111, 128–29 (1942).

[147] 317 U.S. at 128–29; *see Morrison*, 529 U.S. at 610, 643–44 (Souter, J., dissenting).

[148] 317 U.S. at 124–28; *see Morrison*, 529 U.S. at 643–44 (Souter, J., dissenting).

[149] *See Wickard*, 317 U.S. at 128–29.

[150] *See supra* Part II.B. and accompanying text.

[151] *See supra* Part II.A. and accompanying text.

[152] John C. Jeffries, Jr. & The Honorable John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1095–97 (1995).

[153] 529 U.S. at 617–18.

[154] *Id.* at 617.

a street mugging, and loan sharking are considered commercial in nature?[155] "Would evidence that desire for economic domination underlies many brutal crimes against women save the present statute?"[156] For the Court, the answer, at least to the first question, is no.[157] "Money is money" is money to the Court.[158] Violence against women, to the Court, can be easily distinguished from extortion and robbery as not traditionally economic or expressly commercial in nature because it does not involve money.[159] The Court "accordingly, reject[s] the argument that Congress may regulate noneconomic, violent criminal conduct based solely on that conduct's aggregate effect on interstate commerce."[160]

Extortion and mail fraud, however, are broad crimes that do not always involve money and may not constitute classic economic crimes.[161] Mail fraud includes obtaining money, property, or depriving another of the intangible right of honest services through any scheme or artifice to defraud.[162] While the particular definition of "honest services" may still be in dispute,[163] it is undisputed that the mail fraud statute covers frauds obtaining property,

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[155] *See id.* at 656 (Breyer, J., dissenting) (citing, e.g., Perez v. United States, 402 U.S. 146 (1971) ("Consider the problems. The 'economic/noneconomic' distinction is not easy to apply. Does the local street corner mugger engage in 'economic' activity or 'noneconomic' activity when he mugs for money?"); United States v. Lopez, 514 U.S. 549, 559 (1995) (describing loan sharking as economic because it consists of "intrastate extortionate credit transactions"); Miller, *supra* note 137, at 1774 ("Constitutionally, it is difficult to understand why possession of a firearm in a school zone with the intent to sell is not considered commercial activity by the *Lopez* Court, but the armed robbery of a convenience store that nets the robber only a small sum is considered commercial in nature.").

[156] *Morrison*, 529 U.S. at 656 (Breyer, J., dissenting).

[157] *Id.* at 617–18.

[158] Ry. Express Agency v. Virginia, 347 U.S. 359, 365 (1953); *see also, e.g.*, United States v. Ratcliff, 488 F.3d 639, 644 (5th Cir. 2007); United States v. Turner, 465 F.3d 667, 682 (6th Cir. 2006); United States v. Adler, 186 F.3d 574, 577 (4th Cir. 1999); United States v. Granberry, 908 F.2d 278, 280 (8th Cir. 1990).

[159] *See Morrison*, 529 U.S. at 610–13 (citing United States v. Lopez, 514 U.S. 549, 551 (1995) ("[A] fair reading of *Lopez* shows that the noneconomic, criminal nature of the conduct at issue was central to our decision in that case. . . . Gender-motivated crimes of violence are not . . . economic activity.")).

[160] *Id.* at 617.

[161] This is not to say that rape does not involve money or does not have its own market, although this is a topic for another project.

[162] 18 U.S.C. § 1341 (2006); Durland v. United States, 161 U.S. 306, 313-14 (1896) (finding that the statute encompasses *any* scheme or artifice to defraud, a finding ratified by Congress in 1909 when the statute was amended to include schemes for obtaining money or property by means of false or fraudulent pretenses, representations, or promises); RICHMAN, STITH & STUNTZ, *supra* note 113, at 192–94.

[163] Congress and the Court continue to have a dialogue regarding the meaning of honest services. In *McNally v. United States*, the Court held that the Mail Fraud Statute did not refer to intangible rights. 483 U.S. 350, 355–56 (1987). *McNally* was subsequently overturned by Congress through an amendment to the Mail Fraud Statute that expressly included the "intangible right of honest services." *See* Pub. L. 100-690, § 7603(a), 102 Stat. 4508 (1988) (codified at 18 U.S.C. § 1346 (2006)). The Court responded in *Skilling v. United States*, which limited the definition of "honest services" to bribes or kickbacks. 130 S. Ct. 2896, 2931 (2010). Post-*Skilling*, it is unclear if Congress will further amend the Statute.

confidential business information,[164] bribes,[165] and kickbacks.[166] Kickbacks have been defined by the Court as including "any money, fee, commission, credit, gift, gratuity, thing of value, or compensation of any kind."[167] Presumably, sexual abuse or rape could constitute a form of property, or kickback.[168] The Court's current construction of rape could thus constitutionally uphold rape as part of a scheme to defraud, authorized as economic activity, as *rape-and-fraud*, but not as *rape-alone*.

The concept of property under the Hobbs Act is "not limited to physical or tangible property . . . but includes . . . any valuable right considered as a source or element of wealth and does not depend upon a direct benefit being conferred on the person who obtains the property."[169] Thus, property rights, tangible and intangible, can qualify as extortionable.[170] The current open issue or challenge to the extortion of property rights is that the defendant must have "sought to *obtain* the right for himself," where obtain means to exercise, transfer, sell, or otherwise utilize the rights in question.[171] Meanwhile, the subjects to be obtained in extortion extend beyond money to property, intangible property, and rights. For example, in the extortion context, the Second Circuit has held that the right of members of a union to democratic participation is an intangible right,[172] and the Supreme Court has acknowledged the rights of women seeking medical services from abortion clinics, the clinic doctors' rights to perform their jobs, and the clinics' rights to conduct their business as intangible property rights.[173] Similarly, under

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[164] Carpenter v. United States, 484 U.S. 19, 24 (1987).

[165] *Skilling*, 130 S. Ct. at 2931; United States v. Addonizio, 451 F.2d 49, 72–73 (3rd Cir. 1971) ("Bribery is defined as voluntary payment made in order to exert undue influence upon performance of an official duty.").

[166] *Skilling*, 130 S. Ct. at 2931.

[167] *Id.* at 2933–34.

[168] The kickback conceptualization of sexual abuse is fairly straight-forward: a kickback could be coerced in the form of nonconsensual penetration. The property conceptualization of sexual abuse derives from several frameworks that present rape as a property trespass or taking. *See, e.g.*, MACKINNON, *supra* note 30, at 172 (discussing rape through concepts of property and trespass); BROWNMILLER, *supra* note 45, at 347 (analyzing rape in the context of war); Alexandra Wald, *What's Rightfully Ours: Toward A Property Theory of Rape*, 30 COLUM. J. L. & SOC. PROBS. 459, 459–63 (1997) (comparing and discussing the connections between rape and property offenses).

[169] United States v. Gotti, 459 F.3d 296, 320 (2d Cir. 2006) (quoting United States v. Tropiano, 418 F.2d 1069, 1075 (2d Cir. 1969)).

[170] *Id.* at 300.

[171] *Id.* at 300, 324. But the Court's holding that an extortionist must "obtain property" provides ambiguity in the Hobbs Act. Scheidler v. Nat'l Org. for Women, Inc. (*Scheidler II*), 537 U.S. 393, 397 (2003). Some commentators believe that it might not be possible to obtain a right. *See, e.g.*, RICHMAN, STITH & STUNTZ, *supra* note 113, at 340–41; Mathew T. Grady, *Extortion May No Longer Mean Extortion After* Scheidler v. Nat'l Org. for Women, Inc., 81 N.D. L. REV. 33, 61–62 (2005); *see also* United States v. McFall, 558 F.3d 951, 956–58 (9th Cir. 2009) (noting the current tension in the law).

[172] United States v. Bellomo, 176 F.3d 580, 592–93 (2d Cir. 1999).

[173] *Scheidler II*, 537 U.S. at 404 ("There is no dispute . . . that petitioners interfered with, disrupted, and in some instances completely deprived respondents of their ability to exercise their property rights."). In *Scheidler II*, however, the Court found that petitioners did not "obtain" the rights in question from respondents. *Id.* at 400–09. *See also*

the Fourteenth Amendment's liberty "right to be free from sexual abuse by a state actor,"[174] rape could be a part of an extortionate scheme. Here, as with the mail fraud statute, however, the Court recognizes congressional authority to regulate *rape-and-extortion* perpetrated by a state actor and under color of law, but not *rape-alone*, highlighting that the absence of money or traditional indicators of commerce are misleading justifications to constitutionally bar federal rape law.

2. *Constitutional Entitlement*

The *Morrison* majority emphasizes that the regulation of "noncommercial, intrastate" violence has always been the province of the States.[175] The Court declared:

> Indeed, we can think of no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims . . . . [T]he first Congresses did not enact nationwide punishments for criminal conduct under the Commerce Clause.[176]

The Court also expressed concern that if VAWA was held constitutional under the commerce power, Congress would be able to regulate almost any crime, including murder, other subsets of violent crime, and perhaps even family law and other areas of traditional state regulation.[177]

Reaching into the history of state police powers, the Court disregards the effects of a crime's history on its construction and place in the law. The Court fails to recognize that timing matters.

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supra note 171 and accompanying text (discussing the "obtaining" element of the Hobbs Act).

[174] United States v. Giordano, 442 F.3d 30, 47 (2nd Cir. 2006) (finding that the right to be free from sexual abuse, perpetrated by a state actor under color of law, is protected under the Fourteenth Amendment); *see infra* note 271 and accompanying text. Additionally, in a case involving the sexual assault and rape of multiple victims by a state court judge, under color of law, the Supreme Court found that determining whether a constitutional right exists does not require the Supreme Court's specific identification of such rights under fundamentally similar circumstances. Holding that the Sixth Circuit's standard of identifying a constitutional right under 18 U.S.C. § 242 was too demanding, and vacating and remanding the case for review under the proper standard, the Court suggested that the right to be free from sexual abuse perpetrated by a state actor under color of law is protected under the Fourteenth Amendment. *See* United States v. Lanier, 520 U.S. 259, 263, 268 (1997).

[175] United States v. Morrison, 529 U.S. 598, 617 (2000).

[176] *Id.* at 618–19 (internal citations omitted).

[177] *Id.* at 615.

First, the Court neglects the private-public divide[178] that has historically ignored—and even authorized—violence against women.[179] Rape-and, for example, domestic violence, were once invisible harms or harms prosecuted only when perpetrated against the "right" or the most sympathetic victims because they were considered matters of intimate relations or of the home.[180] The cornering of violence against women into the private sphere is perhaps why rape law slowly emerged through local regulations and has traditionally been the province of state law. In this way, rape law's youth is in part its downfall, as the thought of federal regulation battles against longstanding and archaic notions of the private sphere and of rape's historic place in state law.

Second, in creating a double standard among extortion, mail fraud, and rape, with regard to their jurisdictional nexus requirements, the Court disregards the advantage afforded to extortion and mail fraud because of their longstanding presence in federal criminal law. The ancestor of the Hobbs Act, the Anti-Racketeering Act, was enacted in 1934.[181] The Mail Fraud Statute dates back to the nineteenth century.[182] Meanwhile, VAWA was first enacted in 1994.[183] It is no surprise that rendering longstanding federal criminal laws unconstitutional is unlikely, particularly as such statutory crimes lived through the *Wickard* era and the Court's plenary view of congressional commerce authority.[184] Accordingly, the juxtaposition of extortion, mail fraud, and rape law reveals a kind of constitutional entitlement or legal nepotism that maintains old statutes that are well connected to the country's history, and penalizes new federal laws that aim to confront more recently recognized crimes.

The Supreme Court has advanced incongruent justifications to allow for the federal criminalization of the crimes of extortion and mail fraud and to deny federal action against rape through fictional and inconsistent bars to congressional authority under the Commerce Clause. By distinguishing rape

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[178] *See, e.g.*, MACKINNON, *supra* note 30, at 194; CAROLE PATEMAN, THE SEXUAL CONTRACT 3, 11, 17 (1988).

[179] *See, e.g.*, ESTELLE B. FREEDMAN, NO TURNING BACK: THE HISTORY OF FEMINISM AND THE FUTURE OF WOMEN 293–94 (2002) (discussing the "stitch" rule and the toleration of violence against women and children); ANN JONES, NEXT TIME, SHE'LL BE DEAD: BATTERING AND HOW TO STOP IT 19–20 (2000) ("[T]he law distinguished between public matters and private family matters, leaving the family under the governance of the husband and father. . . . The law gave him the right—even the obligation—to 'chastise' *his* women and *his* children and *his* servants."); MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 272 (1990) ("Violence against wives remained for the most part a hidden issue . . . off limits for the state.").

[180] *See supra* note 179 and accompanying text; *see also* Kim, *supra* note 33, at 498 n.315.

[181] Anti-Racketeering Act of 1934, ch. 569, 48 Stat. 979 (1934) (amended 1946).

[182] Durland v. United States, 161 U.S. 306, 307–08 (1896).

[183] Violence Against Women Act of 1994 (VAWA), Pub. L. No. 103-322, 108 Stat. 1902 (1994) (codified as amended in scattered sections of 16, 18, and 42 U.S.C.).

[184] *See generally* Wickard v. Filburn, 317 U.S. 111 (1942) (discussing the Court's "plenary" view of Congress's commerce power).

from other federal crimes, like extortion and mail fraud, as outside the bounds of Congress's commerce power, the Court renders rape a local problem rather than a national concern. At best, the lines drawn by the Court to determine what constitutes a federal crime and what constitutes constitutional congressional authority are ambiguous; at worst, they are a constructed zigzag around crimes of violence against women. Given the Court's rejection of the substantial aggregate effects of violence against women, the next Part discusses an alternative path toward federal rape law.

III. Rape as Slavery Under the Thirteenth Amendment

While constitutional purchase under the Commerce Clause may not be possible after *Morrison*, a federal anti-rape law regime is still constitutionally possible under the Thirteenth Amendment's prohibition against slavery.[185] The Thirteenth Amendment is "a powerful tool that enables us to see [rape] in a new light,"[186] affording Congress with the constitutional authority to criminalize rape as a federal crime.[187] While some may interpret the Thirteenth Amendment as applying only to situations of forced labor analogous to race-based chattel slavery,[188] the scope of the Thirteenth Amendment remains ambiguous.[189] Ultimately, Congress's hesitancy to advance federal anti-rape law under the Thirteenth Amendment evidences a form of *rape tolerance* in that Congress has recognized the need for federal action against violence against women, but has failed to maneuver around the Court's constructed obstacles to such regulation under the Commerce Clause. In order to take rape seriously and to align our purported social condemnation of rape as a serious crime with the prosecution and conviction of rapists, a federal rape regime under the Thirteenth Amendment's prohibition against slavery would create one avenue for federal action.

Thinking of rape as a form of slavery may strike some readers as incredible or farfetched; this Part discusses the real possibility of federal rape law under the authority of the Thirteenth Amendment. Section A discusses the broad intentions, history, judicial interpretation, and application of the Thirteenth Amendment to "any other kind of slavery, now or hereafter"[190] to

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[185] *See* U.S. Const. amend. XIII, §§ 1–2 ("Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. Congress shall have power to enforce this article by appropriate legislation.").

[186] *See* Amar & Widawsky, *supra* note 18, at 1365 (arguing that child abuse constitutes slavery and is therefore actionable under the Thirtheenth Amendment's prohibition against slavery). In this Article, I argue that rape is a form of slavery and is, therefore, similarly actionable under the Thirteenth Amendment.

[187] U.S. Const. amend. XIII, § 2.

[188] Hearn, *supra* note 17, at 1142 (citing Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 Harv. C.R.-C.L. L. Rev. 1, 28 (1995)).

[189] William M. Carter, Jr., *Race, Rights, and the Thirteenth Amendment: Defining the Badges and Incidents of Slavery*, 40 U.C. Davis L. Rev. 1311, 1314 (2007).

[190] The Slaughter-House Cases, 83 U.S. 36, 72 (1873).

reveal that the Thirteenth Amendment holds promise in prohibiting and criminalizing rape as slavery.[191] Section B argues that rape crimes should be afforded federal protection under the Thirteenth Amendment, examining the elements of slavery and rape as slavery. Section C examines potential civil rights applications of congressional regulation of rape under the authority of the Thirteenth Amendment. Section D discusses the necessity, practical advantages, and challenges involved in the prospective implementation of federal rape law.

A. The Thirteenth Amendment's Broad Intent and Broad Application

"In a single stroke, the [Thirteenth] Amendment outlawed the 'peculiar institution' of southern chattel slavery—auction blocks, overseers, iron chairs, and all."[192] "The Thirteenth Amendment is an absolute declaration that neither slavery nor involuntary servitude shall exist in the United States."[193] As such, the promise of the Thirteenth Amendment extends beyond a "peculiar time and place" to universally prohibiting slavery and involuntary servitude *in all places* and *in all of its forms*.[194] The Amendment's drafters aimed to abolish the institution of African slavery as it existed in the United States at the time of the Civil War, to end slavery—"an evolving, enlarging matrix of both formal and customary relationships rather than a static catalog"—in all of its forms, and to obliterate the last vestiges of slavery in United States.[195]

Intended to have an "evolving and dynamic interpretation,"[196] the Thirteenth Amendment's "sweeping words and vision" outlawed *de facto* conditions of slavery and involuntary servitude, regardless of "whether the ultimate motive for such domination, degradation, and dehumanization was greed . . . or sadism."[197] The breadth of the Thirteenth Amendment's protections is also evidenced by Congress's amendment of the original slave trade

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[191] Please note that this Article does not examine the meaning of the "badges of incidents of slavery," but rather, focuses on slavery and involuntary servitude themselves. For a discussion on the meaning of the "badges of incidents of slavery," see Carter, *supra* note 189, at 1360–61.

[192] Amar & Widawsky, *supra* note 18, at 1359.

[193] Carter, *supra* note 189, at 1321.

[194] Amar & Widawsky, *supra* note 18, at 1359; *see also* United States v. Kozminski, 487 U.S. 931, 952 (1988) (upholding Thirteenth Amendment protections outside of the context of chattel slavery and holding that the term "'involuntary servitude' necessarily means a condition of servitude in which the victim is forced to work for the defendant by the use or threat of physical restraint or physical injury, or by the use or threat of coercion through law or the legal process.").

[195] Carter, *supra* note 189, at 1331–32 (quoting HAROLD M. HYMAN & WILLIAM M. WIECK, EQUAL JUSTICE UNDER LAW: CONSTITUTIONAL DEVELOPMENT 1835–1875, at 391–92 (1982)).

[196] *Id.* at 1331 (referring to the drafters of the Thirteenth Amendment).

[197] Amar & Widawsky, *supra* note 18, at 1359.

statute in 1909, which removed racial restrictions and extended the statute to protect "*any person* as a slave."[198]

Indeed, the Supreme Court, federal circuit courts, and Congress have upheld the broad intent of the Thirteenth Amendment's underlying vision, effectively applying the Thirteenth Amendment's prohibition of slavery and involuntary servitude across contexts. "When Congress passes a law to enforce the Thirteenth Amendment, the courts review it according to an idea of what slavery is and what is required to achieve its opposite, *freedom*."[199] For example, the Court has asserted that the Thirteenth Amendment is race-neutral. In the *Slaughter-House Cases* of 1872, the Supreme Court considered the Thirteenth Amendment for the first time and held that it prohibits more than antebellum slavery.[200] The Court explained:

> [W]hile negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery . . . . If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void.[201]

Also asserting that the Thirteenth Amendment's prohibition of slavery and involuntary servitude is race neutral, in *United States v. Nelson*, the Second Circuit found that Jewish persons, even if they are not currently considered to constitute a distinctive race, are still afforded shelter under the Thirteenth Amendment.[202]

Additionally, courts, including the Supreme Court, have found that slavery and involuntary servitude do not need to resemble the conditions in which slaves were held before the Civil War,[203] realizing that any person can be subject to actual enslavement or involuntary servitude through coer-

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[198] Act of Apr. 20, 1818, ch. 91 § 6, 3 Stat. 452 and 1909 amend., 42 CONG. REC. 1114 (1908) (removing the racial restriction within the 1909 amended Act). Accordingly, Congressional awareness of the private-public nature of slavery explains why the Thirteenth Amendment extends to "private" enslavement and private actors and it is thus particularly powerful, unlike § 5 of the Fourteenth Amendment. *See supra* note 94 and accompanying text (discussing the Fourteenth Amendment); *see also* U.S. CONST. amend. XIII, § 2 (enshrining congressional enforcement power in abolishing slavery); Amar & Widawsky, *supra* note 18, at 1368 ("To end slavery was thus to radically restructure this 'private' sphere, and to reorder not simply the political and economic system but the social fabric as well. Accordingly, unlike virtually every earlier provision of the Constitution, the Thirteenth Amendment contained no state action requirement.").

[199] Jennifer S. Hendricks, *Women and the Promise of Equal Citizenship*, 8 TEX. J. WOMEN & L. 51, 76 (1998) (emphasis added).

[200] The Slaughter-House Cases, 83 U.S. 36, 72 (1873).

[201] *Id.*

[202] United States v. Nelson, 277 F.3d 164, 177–79 (2d Cir. 2002); *see also* United States v. Kozminski, 487 U.S. 931, 947 (1988) (discussing the Padrone Statute of 1874 that prevented the practice of exploiting Italian children in the United States by putting them to work as street musicians or beggars).

[203] *See Kozminski*, 487 U.S. at 952 (upholding Thirteenth Amendment protections in a context divergent from pre-Civil War slavery).

cion.[204] For example, in *United States v. Bradley*, the First Circuit found that involuntary servitude could exist where the traditional emblems of antebellum slavery did not exist.[205] In *Bradley*, the victims of involuntary servitude, unlike African-American slaves in pre-Civil War United States, were not born into slave status, did not serve for their lifetime or even for long periods of time, were able to freely move around the town in which they lived, and were sometimes paid.[206] In this vein, in *United States v. Bibbs*, the Fifth Circuit, noting that criminal involuntary servitude does not require that the victim to be completely unable to leave, held that it was irrelevant to an involuntary servitude conviction that the victim may have had opportunities to leave if the victim so feared for her safety and was afraid to leave.[207]

Congress, the Executive Branch, and the international community have also affirmed that slavery need not resemble the conditions of pre-Civil War slavery. For instance, at the start of the twentieth century, the United States government referred to coerced prostitution as "white slavery."[208] Taking sexual violence seriously, Congress passed the Trafficking Victims Protection Act of 2000, recognizing that trafficking is a "modern form of slavery."[209] Trafficking is also recognized as a form of "enslavement" by the International Criminal Court[210] and by the international community.[211] Under the U.S. and international definitions of trafficking, there is no requirement that trafficked persons resemble the characteristics of pre-Civil War African-American slaves.[212] Similar to the characteristics of involun-

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[204] *See generally* United States v. Bradley, 390 F.3d 145 (1st Cir. 2004) (vacated on other grounds).

[205] *Id.* at 148–51.

[206] *Id.*; *see also* Trafficking Victims Protection Act of 2000 (TVPA), Pub. L. No. 106-386, 114 Stat. 1464, (2000) (codified as amended in scattered sections of 8, 18, and 22 U.S.C.).

[207] *See* United States v. Bibbs, 564 F.2d 1165, 1168 (5th Cir. 1977); *see also* Hearn, *supra* note 17, at 1160 (citing *Bibbs*) ("[C]riminal involuntary servitude does not require that the victim be completely unable to leave.").

[208] Katyal, *supra* note 19, at 791 (citing White-Slave Traffic (Mann) Act of 1910, ch. 395, 36 Stat. 825 (current version at 18 U.S.C. §§ 2421–2424 (2006))).

[209] TVPA, 22 U.S.C. § 7101(b)(1) (2006).

[210] *See* Rome Statute of the International Criminal Court, arts. 7(1), 7(2)(c), July 17, 1998, 2187 U.N.T.S 90 (entered into force July 1, 2002) [hereinafter Rome Statute] (providing that enslavement constitutes a crime against humanity when it is committed "as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack"). Article 7(2)(c) defines "enslavement" as "the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such powers in the course of *trafficking in persons*, in particular women and children." *Id.*, art. 7(2)(c) (emphasis added). One hundred and nineteen countries are States Parties to the Rome Statute of the International Criminal Court. The United States is not a party to the Rome Statute. *The States Parties to the Rome Statute*, INTERNATIONAL CRIMINAL COURT, http://www.icc-cpi.int/Menus/ASP/states+parties/ (last visited Nov. 6, 2011).

[211] *See* U.N. Convention Against Transnational Organized Crime, Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, art. 3(a), Nov. 15, 2000, T.I.A.S. No. 13127 [hereinafter Trafficking Protocol].

[212] TVPA, 22 U.S.C. §§ 7101–02 (2006); Trafficking Protocol, *supra* note 211.

tary servitude in *Bradley*, trafficked persons do not have to be born into slave status, do not need to serve for their lifetime or for a requisite period of time, can have free movement, and can even be paid.[213] In this way, Congress and the international community have already begun to conceptualize violence against women in a more accurate way, rejecting the historic minimization of sexual violence by affirming that trafficking is a form of enslavement. Thus, the Thirteenth Amendment "must be read not only to render criminal the evil Congress sought to eradicate so long again, but, as well, its Twentieth Century counterpart."[214]

B. Rape as Slavery

In viewing slavery and involuntary servitude as independent of African-Americanness, race, biological otherness, chattel slavery, slave status, temporal mandates, forced labor, payment, state action, age, greed, or sadism,[215] slavery thus becomes "a power relation of domination, degradation, and subservience," often on a personal scale, where human beings are reduced to objects.[216] Control, "power, domination, and dehumanization" are thus the "essence of slavery."[217] Using this view of slavery, courts and legal scholars have identified less intuitive forms of violence as constituting slavery or involuntary servitude, such as: domestic violence,[218] abusive "mail-order

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[213] TVPA, 22 U.S.C. §§ 7101–02 (2006); Trafficking Protocol, *supra* note 211.

[214] United States v. Booker, 655 F.2d 562, 566 (4th Cir. 1981) (upholding a conviction under 18 U.S.C. § 1584 where the defendant had coerced people into migrant labor).

[215] *See supra* Part III.A.

[216] Amar & Widawsky, *supra* note 18, at 1365.

[217] *Id.* at 1378; *see also id.* at 1371 (discussing the words of former slave, Allen V. Manning, *from* LAY MY BURDEN DOWN: A FOLK HISTORY OF SLAVERY 93 (Benjamin A. Botkn ed., 1945)). Many antebellum legal thinkers shared the view that a "slave was subject to the near-absolute control of another." *Id.* For example, in 1829, Judge Ruffin of the North Carolina Supreme Court wrote: "Such obedience [of a slave to a master] is the consequence only of uncontrolled authority over the body . . . . The power of the master must be absolute, to render the submission of the slave perfect." *Id.* at 1370 (quoting State v. Mann, 13 N.C. (2 Dev.) 263, 266 (1829)).

[218] *See, e.g.*, Shima Baradaran-Robison, *Tipping the Balance in Favor of Justice: Due Process and the Thirteenth And Nineteenth Amendments in Child Removal from Battered Mothers*, 2003 BYU L. REV. 227 (2003); Sally F. Goldfarb, *"No Civilized System of Justice:" The Fate of the Violence Against Women Act*, 102 W. VA. L. REV. 499, 527–37 (2000); Jennifer R. Hagan, *Can We Lose the Battle and Still Win the War?: The Fight Against Domestic Violence After the Death of Title III of the Violence Against Women Act*, 50 DEPAUL L. REV. 919, 959–68 (2001); Joyce E. McConnell, *Beyond Metaphor: Battered Women, Involuntary Servitude and the Thirteenth Amendment*, 4 YALE J. L. & FEMINISM 207, 239–43 (1992); Angie Perone, *Unchain My Heart: Slavery as a Defense to the Dismantling of the Violence Against Women Act*, 17 HASTINGS WOMEN'S L.J. 115 (2006).

bride" marriages,[219] forced prostitution,[220] prohibited abortions,[221] sexual harassment in housing,[222] the exploitation of child soldiers,[223] and child abuse.[224]

Rape too could—and should—be protected against and abolished under the Thirteenth Amendment as slavery, as rape victim-survivors, at the time of their assault and perhaps forward, are subject to domination and degradation by another person.[225] Rape survivors should be protected, and are entitled to protection, under the Thirteenth Amendment. Rape is about power: conquest, supremacy, domination, control, objectification, violation, terrorization, a power enforced over another person, a reduction of the dominated.[226] In rape, the rapist assumes control and power over the rape victim's objectified body, exploiting the victim as an object for the rapist's gain. The rapist's interests and reasons for perpetrating the rape include his want to dominate, his want for nonconsensual penetration, his want to exploit and dehumanize another. Additionally, "[r]ape is to women as lynching was to blacks: the ultimate physical threat by which all men keep all women in a state of psychological intimidation."[227] Held against her (or his) will, dominated, dehumanized, degraded, and used as an object to service another, rape is a form of slavery, and making every effort to prohibit rape as slavery is authorized through the powers enshrined in the Thirteenth Amendment.[228]

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[219] *See* Vanessa B.M. Vergara, Comment, *Abusive Mail-Order Bride Marriage and the Thirteenth Amendment*, 94 Nw. U. L. Rev. 1547 (2000).

[220] *See, e.g.*, United States v. Harris, 534 F.2d 207, 214 (10th Cir. 1976) (affirming convictions for involuntary servitude arising out of a forced prostitution operation); Pierce v. United States, 146 F.2d 84 (5th Cir. 1944) (upholding defendant's conviction for involuntary servitude when defendant bought clothing for women and forced them into prostitution to pay him back); Bernal v. United States, 241 F. 339 (5th Cir. 1917) (upholding the conviction of a defendant charged with holding three women in involuntary servitude where defendant recruited women to work in a hotel and, upon arrival, forced them into prostitution with threats of deportation).

[221] *See, e.g.*, Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 Nw. U. L. Rev. 480 (1990).

[222] *See* Aric K. Short, *Slaves for Rent: Sexual Harassment in Housing as Involuntary Servitude*, 86 Neb. L. Rev. 838 (2008).

[223] *See* U.S. Dep't of State, Trafficking in Persons Report 10–11 (10th ed. 2010), *available at* http://state.gov/documents/organization/142979.pdf.

[224] *See* Amar & Widawsky, *supra* note 18.

[225] *See id.* at 1364 (discussing child abuse rather than rape).

[226] Brownmiller, *supra* note 45, at 5 ("[R]ape became not only a male prerogative, but man's basic weapon of force against woman, the principal agent of his will and her fear. His forcible entry into her body, despite her physical protestations and struggle, became the vehicle of his victorious conquest over her being, the ultimate test of his superior strength, the triumph of his manhood."); Susan Edwards, Gender, Sex, and the Law 180 (1985) ("Male violence against women is an expression of the will to power, of supremacy and domination by brute force."); MacKinnon, *supra* note 30, at 172 ("[A] rape is not an isolated event or moral transgression or individual interchange gone wrong but an act of terrorism and torture within a systemic context of group subjection, like lynching."); Charlene L. Muehlenhard, Sharon Danoff-Burg & Irene G. Powch, *Is Rape Sex or Violence? Conceptual Issues and Implications*, *in* Sex, Power, Conflict: Evolutionary and Feminist Perspectives, *supra* note 47, at 119, 127.

[227] Brownmiller, *supra* note 45, at 281.

[228] *See* U.S. Const. amend. XIII.

Applying the elements of slavery to the facts of Christy Brzonkala's rape—the crime underlying *United States v. Morrison*—affirms that rape constitutes slavery under the Thirteenth Amendment. In a dissenting opinion, Judge Motz of the Fourth Circuit described how although Brzonkala repeatedly stated that she did not want to have sexual intercourse with Antonio Morrison, Morrison was not deterred:

> As Brzonkala got up to leave the room Morrison grabbed her, and threw her, face-up, on a bed. He pushed her down by the shoulders and disrobed her. Morrison turned off the light, used his arms to pin down her elbows and pressed his knees against her legs. Brzonkala struggled and attempted to push Morrison off, but to no avail. Without using a condom, Morrison forcibly raped her. Before Brzonkala could recover, [James] Crawford came into the room and exchanged places with Morrison. Crawford also raped Brzonkala by holding down her arms and using his knees to pin her legs open. He, too, used no condom. When Crawford was finished, Morrison raped her for a third time, again holding her down and again without a condom. When Morrison had finished with Brzonkala, he warned her "You better not have any fucking diseases." In the months following the rape, Morrison announced publicly in the dormitory's dining room that he "like[d] to get girls drunk and fuck the shit out of them."[229]

In raping Christy Brzonkala, Morrison and Crawford reduced her body to an object, taking away her freedom, and dehumanizing and exploiting her person for their gains, interests, want for domination, power, sadistic pleasure, and reputation. The duration of Brzonkala's enslavement could have lasted for twenty minutes or for twenty days, but its exploitative purpose and form remain regardless of duration. Additionally, following the assault, Brzonkala's behavior changed radically: she became depressed, avoided contact with her classmates, changed her appearance, cut her hair, attempted suicide, and later withdrew from Virginia Tech because of her trauma.[230] Indeed, rape and the threat of rape profoundly impact the daily lives and health of women as a class.[231]

The two primary challenges to rape as a form of slavery entitled to Thirteenth Amendment protection reveal archaic and minimizing conceptualizations of rape that render rape victim-survivors as second-class citizens in the United States.[232] First, skeptics of rape as slavery will likely argue that

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[229] Brzonkala v. Va. Polytechnic Inst. & State Univ., 169 F.3d 820, 906 (4th Cir. 1999), *aff'd sub nom*, United States v. Morrison, 529 U.S. 598 (2000) (Motz, J., dissenting).

[230] *Id.* at 906–07 (Motz, J., dissenting).

[231] *See supra* Part II.A.

[232] There are of course additional challenges to rape as a form of slavery. From the victim-survivor's perspective, classifying rape as slavery consequently labels the victim

rape is conceptually too far from the pre-Civil War African-American chattel slavery that the Thirteenth Amendment sought to outlaw.[233] More specifically, referring to traditional characteristics of chattel slavery and the fact patterns of most rapes, challenges to rape as slavery will likely highlight the short temporal term of the enslavement in question, noting that a rape may be completed within minutes, and noting that a rape victim may be able to leave during or before her alleged enslavement. Curiously, temporal arguments against rape as slavery penalize rape victim-survivors for the duration of their enslavement, the length of which depends on the virility of the rapist and is clearly beyond the victim-survivor's control. Temporal challenges to rape as slavery again grade rape, finding that some rapes—those that are perpetrated for a longer period of time—are more legitimate, dancing around rape's core harm, the fundamental point that all rapes constitute enslavement, and that all enslavement, regardless of duration, constitutes a taking of freedom. Should a rape victim be penalized and blamed for the length of enslavement determined by his or her enslaver?

Ultimately, critics will likely be unable to get beyond the initial surprise of conceptualizing rape as slavery, questioning why, if rape is a form of slavery, it was not expressly incorporated or envisioned in the Thirteenth Amendment, despite rape's historic pervasiveness. Unlike trafficking, such critics will likely assert that rape cannot be construed as a "modern form of slavery."[234] Comparing rape to trafficking or to "sexual slavery," an international crime prohibited by the Rome Statute of the International Criminal Court and often consisting of a system of repeated rapes,[235] critics of rape as slavery will likely explain that a single instance of rape is *simply not enough* to amount to slavery.

Second, and interrelated with the first challenge, skeptics of rape as slavery are likely to argue that extending the Thirteenth Amendment to rape will "weaken the Amendment's potential as an effective legal remedy."[236]

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as a slave, evoking the connotations of slavery with which some victim-survivors may not identify. The response to this challenge lies in promoting the view of slavery as an "evolving and dynamic" crime. Carter, *supra* note 189, at 1331.

[233] *See e.g.*, Carter, *supra* note 189, at 1320 ("The first view [of the Thirteenth Amendment] is that the Amendment prohibits only chattel slavery, involuntary, labor, or other conditions amounting to actual compelled service."); Hearn, *supra* note 17, at 1142 (citing Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 28 (1995)) ("The settled interpretation of the Thirteenth Amendment is that it applies only to situations of forced labor analogous to chattel slavery and that its implementing statutes reach only discrimination based on race.").

[234] TVPA, 22 U.S.C. § 7101(b)(1) (2006).

[235] *See* Rome Statute, *supra* note 210, art. 7(1)(c) (Enslavement), (g) (Sexual Slavery); GERHARD WERLE, PRINCIPLES OF INTERNATIONAL CRIMINAL LAW 250–51 (2005) ("Sexual slavery is, in substance, a specific manifestation of enslavement."); Special Rapporteur, *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery, and Slavery-like Practices During Armed Conflict*, ¶ 30, UN Doc. E/CN.4/Sub.2/1998/13 (June 22, 1998) (by Gay J. McDougall) ("The term 'sexual' is used . . . as an adjective to describe a form of slavery, not to denote a separate crime.").

[236] Carter, *supra* note 189, at 1317.

In other words, this challenge claims that prosecuting rape as slavery will result in "diluted efforts that could have been better spent addressing the much wider problem of human enslavement."[237] Finally, last comes the slippery slope argument: the critique that if the door to the Thirteenth Amendment is left open for rape, the "parade of horribles"[238] will ensue, affording nearly any violent crime with Thirteenth Amendment protection as most violent crimes involve power over another, even if instantaneous.

What such critics likely mean to say is that a single instance of rape is *simply not enough* to amount to a crime *as grave* as slavery. Simply put, the first challenge to rape as slavery stems from *rape tolerance* and a difficulty in reconciling rape as serious,[239] but not so serious that it falls within the category of slavery. This first challenge cries for another element accompanying the rape; the rape needs a plus to reach the requisite level of gravity and legitimacy.[240] The need for *rape-and,* before even entering the realm that slavery inhabits, stems from underlying norms that question whether rape is real, whether it happens, whether rape is a misunderstanding, and from a refusal to call perpetrators of rape what they are: rapists or slaveholders. However, while critics may be wary of rape as slavery because of a hesitance in incorporating *rape-alone* crimes as slavery, here again, *both rape-alone* and *rape-and* crimes would be denied entry by such critics into the protections of the Thirteenth Amendment.[241] Again, the difficulty in distinguishing between sex and rape drives this argument.[242] Round and round, such circular and unpersuasive obstacles to rape as slavery essentially claim that gender-based slavery or violence should take a second seat to crimes that are perceived as more legitimate or more serious, affording second-class citizenship protections to victims of rape.

Luckily, this is where the law does the heavy lifting. First, the drafters of the Thirteenth Amendment, the Supreme Court, Congress, and the Executive Branch have already established that the Thirteenth Amendment prohibition of slavery is not limited to protecting against pre-Civil War, race-based, chattel slavery.[243] Rather, the laws of the United States affirm that

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[237] *See* Anne T. Gallagher, *Human Rights and Human Trafficking: Quagmire or Firm Ground? A Response to James Hathaway*, 49 VA. J. INT'L L. 789, 794 (2009) (responding to James C. Hathaway, *The Human Rights Quagmire of "Human Trafficking,"* 49 VA. J. INT'L L. 1 (2008)) (discussing Hathaway's "question[ing] whether the elimination of trafficking is a worthy objective and an appropriate focus for international law").

[238] Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 CASE W. RES. L. REV. 581, 590–93 (1990) (discussing the "parade of horribles" argument "that the principle embraced by the other side will produce certain specified undesirable consequences").

[239] *See supra* Part I (discussing rape tolerance).

[240] *See supra* Part I.A (discussing *rape-and* and *rape-alone* grading of rape).

[241] *See supra* Part I.B (discussing inadequate investigation and prosecution of both *rape-alone* and *rape-and* crimes).

[242] *See supra* notes 47–51 and accompanying text (discussing the difficulty in distinguishing between rape and sex).

[243] *See supra* Part III.A.

slavery can occur in initially surprising forms that may be wildly different than chattel slavery, as evidenced by trafficking as a "modern form of slavery."[244] Slavery can occur without slave status, without lifetime servitude or a temporal mandate, without full prohibitions on free movement, and without unpaid labor.[245] Trafficking, a form of slavery, can involve single acts of rape or sex exploitation.[246] Thus, despite the practice of *rape tolerance*, rape as domination, degradation, and dehumanization could constitute slavery under the Thirteenth Amendment.

In addition, the fact that rape has not been identified as a form of slavery despite its historic pervasiveness is both understandable and an unpersuasive challenge to rape as slavery. Many longstanding injuries, particularly those involving underrepresented or marginalized groups, have only recently been codified as legally cognizable harms, including: sexual harassment, prostitution, the rebranding of trafficking as modern day slavery, marital rape, and even rape laws more broadly.[247] With regard to the nonrecognition of rape as slavery, "[r]ace and sex blinders may be partly responsible for this oversight."[248] The Thirteenth Amendment's "special association with the liberation of blacks" and "subconscious sexism" may have infected the mainstream analysis, such that slavery tends to think more about slave men than slave women.[249] In fact, "until recently, the female slave has escaped scholarly attention."[250]

Moreover, the intersectionalities of race and gender force women of color to choose between a Thirteenth Amendment or Equal Protection approach that often obscures the complex interplay of racial and sexual discrimination.[251] Accordingly, continued focus on the enslavement and the slave experiences of black males wrongfully splits the promise of the Thirteenth Amendment down race and gender lines.[252] Such inaccurate and wrongful focus, however, is subject to change.

Second, while extending the Thirteenth Amendment protections to rape may reduce the resources available to prosecute non-rape forms of slavery, such challenges to rape as slavery highlight the creation of two classes of

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[244] TVPA, 22 U.S.C. § 7101 (2006). *See supra* notes 208–214 and accompanying text.

[245] United States v. Bradley, 390 F.3d 145, 148–51 (1st Cir. 2004); *see also* TVPA, 22 U.S.C. §§ 7101–02 (2006).

[246] TVPA, 22 U.S.C. § 7101(b)(6) (2006).

[247] *See supra* notes 18–19 and accompanying text.

[248] Amar & Widawsky, *supra* note 18, at 1384 n.106.

[249] *Id.*; *see also* Hearn, *supra* note 17, at 1143 ("Women fit into this narrative, if at all, as freed slaves or as the beneficiaries of a lesser form of equal protection.").

[250] Katyal, *supra* note 19, at 796.

[251] Hearn, *supra* note 17, at 1143 n.297 (citing Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, U. CHI. LEGAL. F. 139, 151 (1989) (arguing that black women are forced to fit their claims into either a race or a sex discrimination model that obscures the effect of combined discrimination)).

[252] *Id.*

groups, protecting race and race-based violence and rendering gender and gender-based violence as unprotected.[253] Third and finally, recognizing rape as slavery under the Thirteenth Amendment may open the door for other violent crimes to also claim Thirteenth Amendment protection. This argument suggests that a robbery victim or a hostage may claim that their experience constitutes slavery. Oddly enough, however, most other violent crimes—virtually all robberies, extortion, drug trafficking—are already prosecuted under federal law through Congress's Commerce Clause Power.[254] Federal kidnapping and hostage-taking statutes already exist.[255] Thus, such situations would likely have no reason to claim a characterization of enslavement. Additionally, such situations can be easily distinguished from the type of domination, dehumanization, objectification, and exploitative use of a human's body and personhood that constitutes rape—a use that is not similarly perpetrated in instances of robbery or hostage-taking where bodies may be bartered or exchanged for the value of individual lives, but the bodies themselves are not violated or put to work. Moreover, the slippery slope argument essentially expects and requires the crime of rape and its victims to stand as the shield between the Thirteenth Amendment and the parade of perhaps illusionary horribles,[256] absurdly sacrificing the criminalization of rape for a fictional nightmare.

Ultimately, the scope of the Thirteenth Amendment remains somewhat ambiguous.[257] However, the intent behind the prohibition of slavery was to "radically restructure [the] 'private sphere' and to reorder not simply the political and economic system, but also, the social fabric" of the United States.[258] In fact, the Thirteenth, Fourteenth, and Fifteenth Amendments built upon one another with the intent to eradicate unequal status and treatment—an eradication that evolved over time. The Fourteenth Amendment was in some ways an extension of the Thirteenth Amendment's prohibition of slavery; and, conversely, without the Thirteenth Amendment, the Fourteenth Amendment would likely have been sufficient to outlaw slavery.[259] In this way, the Amendments are part of a common movement of intertwined and overlapping aims, within which the abolition of gender subordination progressed more gradually than the abolition of slavery.[260] Like lynching at one time, rape is currently socially permitted, though formally illegal.[261]

Recognizing rape as a form of slavery and affording rape victims the protections of the Thirteenth Amendment would up the ante against rape, allowing Congress to regulate and criminalize rape under the powers of the

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[253] *See infra* Part III.C.
[254] Jeffries & Gleeson, *supra* note 152, at 1095–97.
[255] 18 U.S.C. §§ 1201–04 (2006).
[256] Scalia, *supra* note 238, at 590–93.
[257] Carter, *supra* note 189, at 1314.
[258] Amar & Widawsky, *supra* note 18, at 1368.
[259] *See id.*
[260] *See id.*
[261] MacKinnon, *supra* note 30, at 245.

Amendment, and legitimizing rape as a grave crime. Subsequently, rape would also be recognized as a "purpose of exploitation," under the TVPA, enabling the prosecution of rape as it is perpetrated in human trafficking contexts.[262] Such legitimacy may bridge current rifts between the widespread perpetration of rape in the United States and the minimal prosecution and conviction of rapists. Such legitimacy may also fill currently open questions regarding the reality and gravity of rape that endorse *rape tolerance.* In aiming to eliminate rape crimes, advancing rape as slavery would thus certainly radically restructure and reimagine the social fabric of the United States.

C. First-Class Citizenship: Incorporating Rape as Slavery into U.S. Civil Rights Legislation

Under the constitutional authority of the Thirteenth Amendment, Congress could federally criminalize and regulate rape and gender-motivated violence through an independent regime, and by incorporating rape crimes into existing federal civil rights legislation. This Section discusses how Thirteenth Amendment purchase and the incorporation of rape as slavery could seamlessly afford legal remedies to rape victim-survivors and first-class citizenship to women through three pieces of legislation: (1) Section 13981 of the Violence Against Women Act of 1994,[263] (2) Sections 241 and 242 of the Civil Rights Conspiracy Statute,[264] and (3) the Matthew Shepard Hate Crimes Prevention Act of 2009 ("HCPA").[265] Oddly, at present, these pieces of civil rights legislation do not provide legal remedies for victim-survivors of rape, highlighting a gap in remedy and citizenship and emphasizing the

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[262] The TVPA, unlike the international definition of trafficking advanced by the Trafficking Protocol, *supra* note 211, provides an exclusive list of "purposes of exploitation" that may limit the extent to which uncommon or unrecognized forms of exploitation may be recognized by the Act. TVPA, 22 U.S.C. §§ 7101–12 (2006). While rape is currently not included in the TVPA, the purpose of exploitation of slavery is. *Id.* at § 7101(b)(2)–(8); *see also*, Kim, *supra* note 33, at 448 (discussing the elements of trafficking under U.S. and international law). Thus, if rape constituted slavery under the Thirteenth Amendment, rape as perpetrated in human trafficking contexts could be prosecuted under the TVPA as a purpose of exploitation.

[263] VAWA, 42 U.S.C. § 13981 (2006), *invalidated by* United States v. Morrison, 529 U.S. 598 (2000).

[264] 18 U.S.C. §§ 241–242 (2006).

[265] Matthew Shephard and James Byrd, Jr. Hate Crimes Prevention Act of 2009 (HCPA), Pub. L. No. 11-84, 123 Stat. 2835 (codified as amended in scattered sections of 42 and 18 U.S.C.). Sections 241 and 242 and the HCPA protect against criminal violations of constitutional rights and are enforced by the United States Attorney's Office and the Criminal Section of the Civil Rights Division of the U.S. Department of Justice. *Civil Rights Division Criminal Section*, U.S. DEP'T OF JUSTICE, www.justice.gov/crt/about/crm/overview.php (last visited Oct. 29, 2011). It should be noted, however, that only a handful of cases are prosecuted under § 241, § 242, and § 249 by the Civil Rights Section of the United States Department of Justice's Criminal Division. RICHMAN, STITH & STUNTZ, *supra* note 113, at 454 (noting that in 2009, there were only seven new prosecutions under § 241 and 56 prosecutions under § 242).

need for Thirteenth Amendment protection against rape and gender-motivated crimes.

First and foremost, congressional authority under the Thirteenth Amendment would validate § 13981 of VAWA, affording rape victim-survivors with a federal civil remedy and a right to be free from crimes of violence motivated by gender.[266]

Second, the incorporation of Thirteenth Amendment authority could extend civil rights protections to victim-survivors of rape and gender-based violence through §§ 241 and 242 of the Civil Rights Conspiracy Statute. Section 241 prohibits acts whereby: "two or more persons conspire to injure, oppress, threaten, or intimidate any person . . . in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States."[267] Section 241 is authorized by the Thirteenth Amendment,[268] and has been employed to combat race-based rights violations, including those perpetrated by private actors.[269]

Section 242 is nearly identical to § 241, save for its constitutional congressional authority and subsequent reach. Section 242 currently derives its constitutional authority from the Fourteenth Amendment, and thus applies solely to situations where state actors are acting "under color of law."[270] Under § 242, even though sexual abuse perpetrated by a state actor can constitute a criminal civil rights violation,[271] § 241 does not protect against sexual assault or rape when perpetrated by a private actor. To-date, no cases of gender-motivated violence have or likely will be brought under § 241; without Thirteenth Amendment authority, § 241 claims will likely be dismissed as unconstitutional congressional reach.[272] The distinction between § 241

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[266] VAWA, 42 U.S.C. § 13981 (2006), *invalidated by* United States v. Morrison, 529 U.S. 598 (2000); *see supra* Part II.A.

[267] 18 U.S.C. § 241 (2006).

[268] "Congress's power to enforce the Thirteenth Amendment by enacting § 241 . . . is clear and undisputed." United States v. Kozminski, 487 U.S. 931, 939 (1988) (citing U.S. CONST. amend. XIII, § 2 ("Congress shall have power to enforce this article by appropriate legislation.")).

[269] *See* United States v. Allen, 341 F.3d 870, 876–78 (9th Cir. 2003) (race-based interference with rights to public accommodations); United States v. Magleby, 241 F.3d 1306, 1314–15 (10th Cir. 2001) (race-based interference with property rights); RICHMAN, STITH & STUNTZ, *supra* note 113, at 454.

[270] 18 U.S.C. § 242 (2006).

[271] *See* United States v. Lanier, 520 U.S. 259, 262 (1997) (noting that the district court's jury instructions recognized a Fourteenth Amendment constitutional right to liberty that included the right to be free from sexually motivated physical assaults and coerced sexual battery by state officials); United States v. Giordano, 442 F.3d 30, 47 (2d Cir. 2006) (holding that the right to be free from sexual abuse, perpetrated by a state actor under color of law, is protected under the Fourteenth Amendment). *See also supra* note 174 and accompanying text (discussing the Fourteenth Amendment's "right to be free from sexual abuse by a state actor").

[272] *See* United States v. Morrison, 529 U.S. 598, 627 (2000) (finding federal regulation of violence against women was an unconstitutional exercise of Congress's Commerce Clause Powers); *see also* Screws v. United States, 325 U.S. 91, 96–7 (1945) (concerned that § 242's predecessor would open the door to broad application of federal criminal law to actions by state and local officials); RICHMAN, STITH & STUNTZ, *supra*

and § 242 therefore traps rape in the "private" sphere and minimizes rape through localization by forcing the regulation of private acts of rape in the realm of local rather than federal law. Such a distinction also creates two classes of protected groups: race-based groups, which are currently afforded full protection through the Thirteenth Amendment; and gender-based groups, which are afforded second-class protection and citizenship.

Comparing § 241 and § 242 reveals the power of the Thirteenth Amendment in authorizing the constitutional congressional regulation of private violations of civil rights and the potential national impact of Thirteenth Amendment protection against rape as slavery. With Thirteenth Amendment authority, § 241 could extend to protect against rape and gender-based crimes, expanding the protections of the United States' current civil rights regime.

Third, congressional authority to regulate rape under the Thirteenth Amendment could also expand the protections afforded in the HCPA.[273] The HCPA was celebrated for its inclusion of protections based on actual or perceived gender, sexual orientation, gender identity, or disability,[274] in addition to protections based on race, color, religion, and national origin.[275] Much like §§ 241 and 242, the HCPA creates two classes of protected groups: race-based groups, who are afforded protection through the Thirteenth Amendment, and gender-based groups, who must prove an additional jurisdictional nexus to interstate commerce in order to establish a gender-based hate crime.[276] The HCPA enumerates contexts that would create a jurisdictional nexus to interstate commerce.[277] For example, the conduct may occur during the course of, or as the result of, travel of the defendant or victim

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note 113, at 443 (asking why, if sexual offense is a state law crime, the offense in *Lanier* under § 242 is governed by federal law).

It should be noted, however, that in the United States, rape and lynching or gender-based violence and race-based violence have often converged. "Allegations of rape of white women . . . have often served as a pretext or rationalization for lynching Black men, although only a small percentage of victims of lynching were accused of rape or attempted rape." MACKINNON, *supra* note 6, at 745 (citing, e.g., JACQUELYN DOWD HALL, REVOLT AGAINST CHIVALRY: JESSIE DANIEL AMES AND THE WOMEN'S CAMPAIGN AGAINST LYNCHING 151 (1979); Jacquelyn Dowd Hall, "*The Mind That Burns in Each Body": Women, Rape, and Racial Violence*, *in* POWERS OF DESIRE: THE POLITICS OF SEXUALITY 328, 331–32 (Ann Snitow et al., eds. 1983)).

[273] HCPA, 18 U.S.C.A § 249 (West Supp. 2011). It should be noted that several states have also passed hate crime laws. *See* Helia Garrido Hull, *The Not-So-Golden Years: Why Hate Crime Legislation is Failing a Vulnerable Aging Population*, 2009 MICH. ST. L. REV. 387, 409 (2009) (citing *Anti-Defamation League State Hate Crime Statutory Provisions*, ANTI-DEFAMATION LEAGUE (Aug. 2008), http://www.adl.org/99hatecrime/state_hate_crime_laws.pdf) (finding that all but five states have enacted hate crime legislation to address crimes motivated by the victim's race, religion, or ethnicity; thirty-one states have statutes that address sexual orientation; thirty-one states have statutes that address disability; twenty-seven address gender; eleven address transgender/gender-identity; and five address political affiliation).

[274] HCPA, 18 U.S.C.A § 249(a)(2) (West Supp. 2011).

[275] *Id.* at § 249(a)(1).

[276] *Id.* at § 249(a)(2)(B)(i)–(iv).

[277] *Id.*

across a state line or national border,[278] the defendant may employ a dangerous weapon that has traveled in interstate or foreign commerce,[279] or the conduct may otherwise interfere with commercial activity or affect interstate or foreign commerce.[280]

In effect, even assuming that rape is an offense motivated by gender,[281] the burden of proving that a rape motivated by gender involved an element of interstate commerce continues to limit the federal prosecution of gender-motivated hate crimes. Presently, to meet the burden of proving gender-based animus under the HCPA,[282] rape crimes will have to have occurred in, for example, the back of a truck moving across state or national lines, or with a gun that was purchased in another state.[283] And even if a jurisdictional nexus is presented, it is possible that the Supreme Court will still find that nexus is insufficient and that this portion of the HCPA is unconstitutional because it is beyond Congress's authority under the Commerce Clause.[284] With regard to federal prosecutions of rape, it is thus unlikely—absent very specific facts, a departure from *United States v. Morrison*, or a rewriting of the HCPA—that the 2009 HCPA will affect or increase federal prosecutions of rape. Instead, such prosecutions will likely continue to be limited to rapes that are committed against individuals solely because of

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[278] *Id.* at § 249(a)(2)(B)(i)(I).

[279] *Id.* at § 249(a)(2)(B)(iii).

[280] *Id.* at § 249(a)(2)(B)(iv).

[281] That rape is gender-based has been established by Congress under VAWA. Pub. L. No. 103-322, 108 Stat. 1902 (1994) (codified as amended in scattered sections of 16, 18, and 42 U.S.C.). There is much discussion on this topic, but it is beyond the scope of this Article. *See e.g.*, MACKINNON, *supra* note 30, at 178 ("To be rapable, a position that is social not biological, defines what a woman is."); Marguerite Angelari, *Hate Crimes Statutes: A Promising Tool for Fighting Violence Against Women*, 2 AM. U. J. GENDER & L. 63, 64–66 (1994) (identifying the similarities between violent crimes motivated by racial and ethnic hatred and violent crimes motivated by gender (rape), and referencing Susan Brownmiller, who argued that rape is not a crime of sex, but rather a crime of violence that preserves male dominance and keeps all women in a state of terror); Franke, *supra* note 47, at 740 n.249 (1997); James B. Jacobs & Kimberly A. Potter, *Hate Crimes: A Critical Perspective*, 22 CRIME & JUST. 1, 28 (1997) (suggesting that rape is motivated at least in part by antifemale bias and is thus the most common violent hate crime); Elizabeth A. Pendo, *Recognizing Violence Against Women: Gender and the Hate Crimes Statistics Act*, 17 HARV. WOMEN'S L.J. 157, 163–64 (1994) (arguing that gender-based violence should be recognized as a hate crime); Kathryn M. Carney, Note, *Rape: The Paradigmatic Hate Crime*, 75 ST. JOHN'S L. REV. 315, 338 (2001) (arguing that rape is a hate crime because women are targeted on the basis of their gender, an immutable characteristic, and because rape increases fear and impacts the target group); *Women's Lives Controlled by Fear, Congress Told in Look Into Domestic Violence*, L.A. TIMES, Oct. 4, 1992, at A13 (quoting Senator Joseph Biden: "[rape] is a hate crime.").

[282] HCPA, 18 U.S.C.A § 249(a)(2)(A) (West Supp. 2011).

[283] *Id.* at § 249(a)(2)(B)(i)–(iv).

[284] *See* United States v. Morrison, 529 U.S. 598, 627 (2000) (finding federal regulation of violence against women was an unconstitutional exercise of Congress's Commerce Clause Powers); *but see* Memorandum Opinion from Martin S. Lederman, Deputy Assistant Attorney General to the Assistant Attorney General (June 16, 2009) (on file with author) (arguing for the constitutionality of HCPA).

their race.[285] Thus, the HCPA will likely apply, or at least most zealously be applied to, crimes of rape *and* racial animus.

The Thirteenth Amendment prohibition of slavery currently authorizes considerable and often undisputable congressional power in regulating race-based crimes. Close examination of the Civil Rights Conspiracy Statutes and the HCPA reveals that both protections are currently limited in their application, either on their face or *de facto*, to rape and gender-based violence. Incorporating rape as slavery into existing federal civil rights legislation could thus seamlessly afford legal remedies to rape victim-survivors and first-class citizenship to women. In fact, given the current gaps in remedy and citizenship for victims of rape and gender-motivated crimes across federal civil rights law, Congress's failure to pursue Thirteenth Amendment purchase may prove to be an additional facet of federal *rape tolerance*.

D. The Advantages and Challenges of Federal Rape Law

Even if rape is afforded Thirteenth Amendment protection as a form of slavery, should Congress pass federal criminal rape laws? Is a federal regime appropriate, would a federal regime fix the problem of *rape tolerance*, or would the problem of local *rape tolerance* be better confronted with new local rape law reform? While the prospective successes of a federal rape law regime may not be predictable, this Section discusses the advantages and challenges of the federal criminalization of rape, ultimately reaching the conclusion that federal criminalization would offer greater benefits than harms in minimizing *rape tolerance* and combating rape impunity.

At first glance, the federal criminalization of rape may seem like an outlandish idea. However, Congress has already recognized the grave need for federal action against violence against women,[286] and the benefits of federal criminalization are undeniable.[287] Federal involvement targeting drug

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[285] Eric Rothschild, *Recognizing Another Face of Hate Crimes: Rape as a Gender-Bias Crime*, 4 MD. J. CONTEMP. LEGAL ISSUES 231, 262 (1993) ("Experience has revealed that rape is one form of hate crime which can be committed against individuals solely because of race . . . . [T]he strongest argument that the rapes of Bosnian women are not hate crimes against women is that they are instead hate crimes against Muslims or Bosnians.").

Moreover, in 1995, the DOJ found that in about eighty-eight percent of forcible rape cases, the victim and offender were of the same race. *See* GREENFELD, *supra* note 27, at 11.

[286] *See Morrison*, 529 U.S. at 653 (Souter, J., dissenting); S. REP. NO. 103-138, at 50 (1993); *see also supra* note 96 and accompanying text.

[287] *See* Jeffries & Gleeson, *supra* note 152, at 1095 (discussing the benefits of federal prosecution in the context of organized crime); Daniel C. Richman, Federal Criminal Law, Congressional Delegation, and Enforcement Discretion, 46 UCLA L. REV. 757, 783–84 (1999) (discussing the benefits of federal prosecution, including: federal funds and equipment, jurisdictional advantages, generally higher sentences, ease of state prosecutors in extracting guilty pleas by leveraging federal charges, interjurisdictional coordination).

crimes and organized crime have been enormously successful.[288] Tactically, the benefits of federal involvement include: increased resources, investigatory and prosecutorial expertise and specialization, uniform law and more uniform application of the law, and legislative tools (if devised).[289] Specific to rape crimes, federal criminalization would afford rape victims with a legal remedy when and if local criminal justice systems fail to investigate and prosecute their rapes.

In addition, and perhaps most importantly, making rape a federal crime brightens the national spotlight on rape, prioritizing and legitimating rape as a crime serious and worthy enough to entail federal action. Such recognition would define rape as an epidemic deserving national attention. The social meaning of the federal criminalization of rape may also produce several advantageous effects.[290] The possibility of federal rape prosecutions may create a prospective deterrent effect, as well as increased local investigation and prosecution among local officials who do not want to lose face or jurisdiction to federal authorities.[291] Additionally, prioritizing rape as a national crime may lead to cultural transformation and norm-shifting, within law enforcement agencies, juries, and for both perpetrators and victims, to recognize the core harms of rape, the importance of reporting, and the need for adequate investigation and prosecution. For victims especially, federal rape law would send the message that rape is a crime warranting prosecution, that rape victim-survivors are "full members of society" entitled to equal protection, and that the larger community is committed to the value of human dignity equality.[292]

The three main arguments against the federal criminalization of rape are likely administrability, efficacy, and federalism. First, regarding administrability, critics of rape as a federal crime may contend that it would be impossible for federal investigators, prosecutors, and courts to handle the sheer quantity of rape crimes. Critics may point to the infrequent litigation of the Criminal Section of the U.S. Department of Justice Civil Rights Division (the Section responsible for prosecuting hate crimes and trafficking),[293] and to the fact that in 2009, U.S. federal prosecutors charged only 114 indi-

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[288] *See supra* note 10 and accompanying text (noting high conviction rates for federal crimes).

[289] Jeffries & Gleeson, *supra* note 152, at 1095.

[290] Dan M. Kahan, *What's* Really *Wrong With Shaming Sanctions*, 84 TEX. L. REV. 2075, 2075–76 (2006) (discussing social meaning and expressive theory in the context of punishment); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 463–67 (1999) (discussing social meaning and expressive theory in the context of hate crimes).

[291] Kate Stith, *The Art of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1424 (2007–2008) (discussing the competition between local and federal law enforcement).

[292] Kahan, *The Secret Ambition of Deterrence*, *supra* note 290, at 464.

[293] RICHMAN, STITH & STUNTZ, *supra* note 113, at 431 (referring to 18 U.S.C. §§ 241 and 242).

viduals, and obtained 47 convictions in 43 human trafficking cases under the TVPA.[294]

While it is true that federalizing rape would produce an exorbitant number of new federal cases that could perhaps exhaust resources as they are currently distributed, not all rapes would require federal prosecution. For one, federal prosecutors could intervene only when local prosecutors are unable or unwilling to pursue claims of rape.[295] For instance, the HCPA has a "certification requirement," which requires federal prosecution only where the Attorney General confirms that: the State does not have jurisdiction, the State has requested that the federal government assume jurisdiction, the verdict or sentence leaves federal interests demonstratively unvindicated, or a federal prosecution is in the public interest and necessary to secure substantial justice.[296] Thus, similar to the HCPA's certification requirement, a jurisdictional stipulation would enable federal and local prosecutors to discuss cases, share resources and expertise, and ensure that rape crimes are prosecuted in the most appropriate venue. In other contexts, such as combating urban crime, federal and local collaboration has proved positive.[297] Federal intervention could thus be seen "not as an intrusion, but as a form of aid-in-kind to state enforcers."[298] Furthermore, despite the comparative low number of human trafficking prosecutions in the United States, it seems unlikely that the TVPA will be repealed; rather, it is more likely that with time, the number of prosecutions will increase as investigators and prosecutors develop their practice.[299]

Additionally, the federal government could reorganize its budget and its criminal justice actors. The federal government spends over $58 billion dollars on grants to state and local governments, $225 million of which is earmarked for violence against women prevention and prosecution pro-

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[294] *See* U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 10–11 (10th ed. 2010), *available at* http://state.gov/documents/organization/142979.pdf.

[295] *See* United States v. Culbert, 435 U.S 371, 379–80 (1978) ("With regard to the concern about disturbing the federal-state balance [under the Hobbs Act] . . . there is no question that Congress intended to define as a federal crime conduct that it knew was punishable under state law. . . . Congress apparently believed, however, that the States had not been effectively prosecuting robbery and extortion affecting interstate commerce and that the Federal Government had an obligation to do so."); RICHMAN, STITH & STUNTZ, *supra* note 113, at 418 (Both § 241 and § 242 were enacted right after the Civil War and appear to "promise a broad federal commitment to protecting [rights] . . . if state authorities were unable or unwilling to prevent the deprivation of a constitutional right and violence resulted.") (citing Eugene Gressman, The Unhappy History of Civil Rights Legislation, 50 MICH. L. REV. 1323, 1334 (1952).

[296] HCPA, 18 U.S.C.A. § 249(b) (West Supp. 2011).

[297] NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, FIGHTING URBAN CRIME: THE EVOLUTION OF FEDERAL-LOCAL COLLABORATION 11 (Dec. 2003), *available at* https://www.ncjrs.gov/pdffiles1/nij/197040.pdf (discussing the successes of interjurisdictional collaboration in combating urban crime).

[298] Richman, *supra* note 287, at 786.

[299] *Cf.* RICHMAN, STITH & STUNTZ, *supra* note 113, at 418–22 (discussing the history and growth of the criminal enforcement of civil rights).

grams.[300] Some of these funds could be redistributed to federal rape prosecutions. Additionally, the Department of Justice could reorganize to create a separate section for rape crimes. Such reorganization is not unheard of; in 1957, DOJ reorganized, moving the Civil Rights Criminal Section from the Criminal Division to the Civil Rights Division.[301] And as recently as March 2010, DOJ created the Human Rights and Special Prosecutions Section, combining two existing sections, to enhance federal law enforcement efforts in the area of human rights law.[302] As such, the administrability argument is unpersuasive.

Second, even if the administrability hurdle is overcome, critics of federal rape law may argue that efficacy is not guaranteed and that federal rape law might make rape law prosecutions even *less* effective. Like their state and local counterparts, federal prosecutors may also minimize and inadequately investigate and prosecute rape.[303] The public, victims, legislators, and courts have little to no control over prosecutorial discretion.[304] Local and state officials, furthermore, may respond to federal rape law by even further tolerating rape, by marginalizing even more rape cases, and failing to investigate and prosecute.

Likewise, federal legislators may continue to grade rape as *rape-and* and *rape-lite*.[305] Indeed, in January of 2011, 173 co-sponsoring members of Congress introduced the "No Taxpayer Funding for Abortion Act," restricting federal abortion funding for victims of incest under the age of 18 and to victims of "forcible rape."[306] This timely attempt by federal legislators to grade rape evidences the possibility that federal rape law may be steered in the wrong direction. However, in February of 2011, the bill's co-sponsors succumbed to pressures from the public, the media, and from congressional critiques, removing the "forcible" language from the bill.[307] Such federal

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[300] Michael Grabel & Christopher Weaver, *The Stimulus Plan: A Detailed List of Spending*, PRO PUBLICA: JOURNALISM IN THE PUBLIC INTEREST (February 13, 2009), http://www.propublica.org/special/the-stimulus-plan-a-detailed-list-of-spending.

[301] RICHMAN, STITH & STUNTZ, *supra* note 113, at 443.

[302] *Assistant Attorney General Larry A. Breuer Announces New Human Rights and Special Prosecutions Section in Criminal Division*, U.S. DEP'T OF JUSTICE (MAR. 30, 2010), http://www.justice.gov/opa/pr/2010/March/10-crm-347.html.

[303] *See supra* Part I.B. Also, it should be noted that even §§ 241 and 242 of the Civil Rights Statute are "largely ignored;" in 2009, there were only seven new § 241 prosecutions and 56 prosecutions under § 242. RICHMAN, STITH & STUNTZ, *supra* note 113, at 454.

[304] *See* Inmates of Attica Corr. Facility v. Rockefeller, 477 F.2d 375, 380 (2d Cir. 1973) (upholding prosecutorial discretion and rejecting petitioners' argument that United States Attorneys were required to institute prosecutions against all persons violating 18 U.S.C. §§ 241–42).

[305] *See supra* Part I.A.

[306] No Taxpayer Funding for Abortion Act, H.R. 3, 112th Cong. § 309 (2011) (introduced Jan. 20, 2011).

[307] H.R. REP. NO. 112-38(I), at 2–3 (2011); Nick Bauman, *The House GOP's Plan to Redefine Rape*, MOTHER JONES (Jan. 28, 2011), http://motherjones.com/politics/2011/01/republican-plan-redefine-rape-abortion.

legislative revisions thus suggest U.S. Congress's heightened accountability and the potential benefits of federal rape law.

Moreover, while there is no way to predict the effects of a federal rape law regime, and while much of the federal investigation and prosecution of rape under prospective federal law would turn on directives from the Executive and the priorities of each federal and local prosecutor's office, federal rape law would offer an enormous additional resource to rape victims should local police and prosecutors fail to pursue their claims. It is further possible that if rape is enacted as a federal law and there is enough political will to reorganize the Department of Justice, there would also be great impetus to meet the expectations of such rape law reform.

It may be equally likely that the federal criminalization of rape may perhaps motivate local prosecutors to combat rape impunity for two reasons. First, due to the often competitive dynamics between local and federal prosecutors,[308] local prosecutors may more aggressively investigate and prosecute rape in order to save face and not lose jurisdiction to federal actors. Second, as local prosecutors are elected and as succeeding local jurisdiction to federal actors may be viewed as a failing or weakness, the fear of being labeled as the candidate who does not prosecute rape may compel local prosecutors to more aggressively combat rape impunity.

The third challenge to the federal criminalization of rape is federalism. While it is true that states have traditionally held exclusive authority over crimes of violence against women,[309] "[t]he assertion . . . that federalism required that the states have exclusive authority over some types of criminal conduct is flawed"[310] for a few reasons. For one, federal and state law overlap and will continue to overlap in areas of law apart from rape.[311] "[W]here federal criminal laws regulate conduct already regulated by the states, such federal legislation does not displace the state criminal justice system, but rather supplements it with concurrent jurisdiction."[312] The certification requirement of the HCPA demonstrates how local and federal prosecutors can work together to ensure federal intervention as needed.[313] Second, federal actors may only intervene when state authorities are unable or unwilling to prevent the crime.[314] Such a requirement, often referred to in

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[308] Stith, *supra* note 291, at 1424.

[309] *See supra* notes 21–39 and accompanying text.

[310] Henning, *supra* note 125, at 411.

[311] *See* Jeffries & Gleeson, *supra* note 152, at 1095–97 ("[F]ederal law reached virtually all robberies, most schemes to defraud, many firearms offenses, all loan sharking, most illegal gambling operations, most briberies, and every drug deal, no matter how small, even the simple possession of user-amounts of controlled substances.").

[312] Susan R. Klein, *Independent-Norm Federalism in Criminal Law*, 90 CAL. L. REV. 1541, 1553 (2002).

[313] HCPA, 18 U.S.C.A § 249(b) (West Supp. 2011); *see supra* note 296 and accompanying text.

[314] *Cf.* RICHMAN, STITH & STUNTZ, *supra* note 113, at 418.

international customary law as the "exhaustion of local remedies,"[315] essentially requires that parties must first attempt to find remedy and recourse at local tribunals before seeking relief from international tribunals,[316] although nation-states may waive such requirements.[317]

Finally, the states have failed in the prosecution of rape as a local crime.[318] Two of the justifications for federalism—the states should be free to operate as laboratories for experimentation and that federalism creates healthy competition between states[319]—have proven inapplicable and unpersuasive with regard to rape crimes. How much longer must federal legislators wait—and how many more rapes must go unpunished—before federal action is warranted? In their continued inadequate construction, investigation, and prosecution of rape, the states have arguably lost their right to prosecute—or fail to prosecute—rape as an exclusively local crime.

Conclusion

Rape is—and continues to be—a profound, global concern. Despite the purported severity of rape crimes, rape continues to struggle against minimization, delegitimation, and deprioritization. On the local level, the inadequate construction, investigation, and prosecution of rape produces rare justice and rampant impunity for rape crimes. On the national level, the Court minimizes rape through incongruently constructing rape as a local crime of discrete, noncommercial acts that are not entitled to constitutional congressional regulation under the commerce power. Meanwhile, welcomed, longstanding members of the federal criminal law tradition—the crimes of mail fraud and extortion—continue to enjoy the Court's favor, passing the commerce clause threshold with *de minimis* scrutiny. Local and federal *rape tolerance* thus constructs and prosecutes rape in a manner disjointed from the purported gravity of rape crimes.

To take rape seriously—to construct and prosecute rape in a manner consistent with its purported gravity—rape should be afforded the protections of the Thirteenth Amendment. Interminable state failure in combating rape impunity warrants federal action. In fact, inaction at this critical junc-

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[315] International Covenant on Civil and Political Rights, art. 41(1)(c), *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976); *see also* American Convention on Human Rights, art. 46(1)(a), *opened for signature* Nov. 22, 1969, 1144 U.N.T.S. 143 (entered into force July 18, 1978); African Charter on Human and People's Rights, art. 50, 56(5), *adopted* June 27, 1981, 21 I.L.M. 58 (entered into force Oct. 21, 1986); Interhandel Case (Switz. v. U.S.), 1959 I.C.J. 6 (March 21).

[316] *See id.*

[317] De Wilde, Ooms, and Versyp v. Belgium, App. Nos. 2932/66, 2935/66, 2899/66, 1 Eur. H.R. Rep. 373 (1979–80).

[318] *See supra* Part I and *supra* notes 3–11 and accompanying text.

[319] Henning, *supra* note 114, at 147; Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 Yale L. J. 1425, 1428 (1987) (arguing that a healthy competition among limited governments can spur a race to greater constitutional remedies).

ture of post-1980s reform-reflection is a form of *rape tolerance* that accepts rape as a given, as not that bad, or that believes that the alleged prevalence of rape must be inaccurate. Accordingly, continued federal inaction in compelling rape non-impunity stems from an unwillingness rather than an inability to intervene, and will signify continued federal *rape tolerance*. Action remains a choice, not an impossibility.