DECOMMISSIONING RAPE LAW

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Abstract

What if rape law should not exist? For over half a century, lawmakers, legal theorists, and activists have worked to reform modern criminal rape law so it might better remedy sexual violence and better meet the needs of sexual violence survivors. And yet, enacted reforms have failed to deliver on the promise of a safer sexual world.

This Article argues, by contrast, that the better—and more feminist—legal approach for redressing rape and sexual assault may be to decommission rape law, and to deploy in its stead a constellation of criminal laws, civil actions, torts, and contract law. The Article builds out its decommission hypothesis alongside and against two earlier but under-elaborated proposals that sought to pare down rape law's remit to acts of force or violence. Throughout, the Article draws upon three cultural artifacts of the early 2020s, and for two reasons: first and instrumentally, to substantiate various components of the decommission hypothesis; but second and intrinsically, to remind readers that the feminist, egalitarian, and democratically hedonic transformation of sexual culture will come not from law but from art and activism.

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** J.D., Yale Law School. The authors wish to thank the following colleagues, friends and family for their excellent feedback: Tai Davidson Bajandas, Brenda Cossman, Kieron Cindric, Michaele Ferguson, Shelley Fischel, Rachel Goodman, Rana Jaleel, Zoe Moss, Maggie O'Grady, Emily Poor, Dylan Rispoli, and Bhavik Singh. Thank you to Luisa Graden, Camila Castellanos Forero, Rachel Olick-Gibson, Lucy Cheskin, and Jasmine Park for their editorial care and attention. Our deep gratitude to Ali Miller.

Prologue

An Incomplete History of Rape Law Reform to Anchor Our Conceptual, Normative, Statutory, and Feminist Scheme for Decommissioning Rape Law

What should be the gravamen of rape law in the United States? From the colonial period well into the 20th century, the gravamen was a lot of force met with a lot of resistance.[1]

"As in England, early American law defined rape as the *carnal knowledge of a woman when achieved by force and against her will by a man other than her husband*,"[2] language adopted from Sir William Blackstone's *Commentaries on the Laws of England*.[3] Rape law was considered a property crime against white fathers or white husbands. Racialized from the outset in enforcement and sometimes explicitly in codification, rape law in the United States "heightened white men's sexual privileges."[4] Rape law was weaponized against Native and Black men and largely unavailable as an avenue of redress for enslaved women, "unchaste" women, and single women—"with the notable exception of black men convicted of assaults on single women."[5] Meanwhile, to secure conviction, *inter alia*, prosecutors had to provide corroborating evidence "that the victim had resisted to the utmost" or something close to it.[6]

While nineteenth century women's rights groups and other social movements challenged, sometimes successfully, an array of marriage and sex laws that preserved the heretofore gendered and racialized status quo,[7] the stringent force and nonconsent requirements of rape law mostly held fast until the middle of the twentieth century, reflecting and reiterating a primary political purpose of U.S. rape law: transferring white virgin girls "intact" from their fathers to their husbands.[8]

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[1] Stephen J. Schulhofer, *Reforming the Law of Rape*, 35 Law & Ineq. 335, 335–37 (2017) [hereinafter Schulhofer, *Rape Reform*]; Stephen J. Schulhofer, Unwanted Sex: The Culture of Intimidation and the Failure of Law 4 (1998) ("In nearly all states, rape laws continue to require proof of physical force. And the law's conception of what counts as physical force remains extremely demanding.") [hereinafter Schulhofer, Unwanted Sex].

[2] Estelle B. Freedman, Redefining Rape: Sexual Violence in the Era of Suffrage and Segregation 4 (2015) (emphasis added).

[3] 4 William Blackstone, Commentaries *210.

[4] Freedman, *supra* note 2, at 12 (discussing how rape was condemned widely but not prosecuted fully when the accused were white men).

[5] *Id.* at 14.

[6] Schulhofer, Unwanted Sex, *supra* note 1, at 20.

[7] *See generally* Freedman, *supra* note 2 (chronicling Black and white women's egalitarian and antiracist efforts, from the colonial era into the twentieth century, to reform rape law, seduction law, age of consent statutes, and marriage law); Crystal N. Feimster, Southern Horrors: Women and the Politics of Rape and Lynching (2011) (historicizing postbellum antilynching, anti-sexual violence, and women's rights campaigns through the historical figures of Ida B. Wells and Rebecca Latimer Felton).

[8] *See* Patricia L. N. Donat & John D'Emilio, *A Feminist Redefinition of Rape and Sexual Assault: Historical Foundations and Change*, 48 J. Soc. Issues 9, 10 (1992)

In the 1950s and 1960s, the gravamen of rape law started to shift, requiring less force met with less resistance.[9]

Reformers of Model Penal Code (MPC), primarily concerned with "the difficulty of getting convictions in clear cases of forcible misconduct," targeted what they took to be the "three defects in the law—the stringent resistance requirement, the preoccupation with victim consent, and the inclusion of too broad a continuum of behavior within a single felony category."[10] The MPC proposals gradated degrees of sexual assault, abolished the resistance requirement, and "expanded Blackstone's narrow concept of force, so that it could include nonviolent duress . . . in cases where such a threat could prevent resistance by 'a woman of ordinary resolution.'"[11] By the 1960s, several states revised their rape and sexual assault statutes in partial alignment with the MPC proposals.[12]

Yet even relaxed force and lowered or abolished resistance requirements, insisted feminist activists and scholars, fail victims of sexual violence.[13] Rape convictions still proved elusive, women were "raped again" through ruthless cross-examinations meant to undermine their credibility and believability, and juries were reluctant to find "force" in all but the most violent of men's behavior.[14]

In the 1970s, feminist-led anti-rape campaigns targeted legal, cultural, institutional, and gendered norms broadly, emphasizing sexual violence not only as a wrong against a rights-bearing person, but also as a source and symptom of women's subordination. As Professor Catharine MacKinnon would put it several years later, "rape is a crime of gender inequality."[15] A critical component of the feminist movement against sexual violence was to shift societal attention away from the phantasmatic figure of the knife-brandishing stranger rapist who brutally forced himself upon women and to draw attention instead to those more familiar men—fathers, uncles, husbands, boyfriends, friends, employers, and teachers—who pressured, coerced, intimidated, or otherwise

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("A woman's value within [colonial] society was based on her ability to marry and to produce legitimate heirs. The ability to attract a spouse was influenced by the woman's perceived purity. The rape of a virgin was considered a crime against the father of the raped woman rather than against the woman herself.").

[9] Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 Law & Phil. 35, 38 (1992) [hereinafter Schulhofer, *Sexual Autonomy*].

[10] *Id*. at 37 (citing Model Penal Code § 213.1(2)(a) (Am. L. Inst., Proposed Official Draft 1962)).

[11] Schulhofer, *Rape Reform*, supra note 1, at 337.

[12] Schulhofer, Unwanted Sex, *supra* note 1, at 23.

[13] *See, e.g.*, *id*. at 25. *See generally* Susan Griffin, *Rape: The All American Crime*, 10 Ramparts 1, 4–5 (1971) (describing criminal rape case in which a woman's alleged sexual experience and sexual reputation neutralized the defendant's undeniable use of violent threats and force); Catharine A. MacKinnon, Toward a Feminist Theory of the State 173–74 (1989) (discussing force standard and issues with certain reforms of rape statutes).

[14] Schulhofer, Unwanted Sex, *supra* note 1, at 24–25. For accounts of women complainants in rape trials experiencing cross-examination as distinctly violative, see *infra* notes 173–80.

[15] Catharine A. MacKinnon, *Rape Redefined*, 10 Harv. L. & Pol'y Rev. 431, 431 (2016).

manipulated sex from their partners, dependents, and acquaintances.[16] These forms of pressure, coercion, intimidation and manipulation may not have looked like requisite force to judges and juries, observed feminists, and may not have reached the force threshold of criminal rape law statutes (e.g., physical violence or life-threatening coercion),[17] but it is these practices that make sexual violence ubiquitous, insidious, and unyielding. Indeed, in this feminist reconstruction, the *knife-brandishing stranger rapist* is a patriarchal ideological fiction, licensing men to wield all kinds of coercion, pressure, deceit, manipulation, and exploitation just short of what the law counts as force.[18] We are hovering over this ideological fiction because later on we will return to the vexed problem of force; we will propose that criminal and other bodies of law could and should be used to target forced sex *because it is forced*. Doing so might not undermine feminist declamations on the everydayness of sexual violence provided, first, that force be redefined to include nonconsensual penetration (just as when, if someone rams his fingers or a cigar into someone else's mouth, such behavior would qualify as assault or battery in many states),[19] and second, that other laws be harnessed to target sex procured through coercion, harassment, exploitation, breach of contract and, in some extremely limited cases, lies.

From the 1970s into the 2000s, the gravamen of rape law shifted once more, from force to nonconsent.[20] While many states still retain a force element—that is, prosecutors must show that the plaintiff used force or life-threatening coercion to subdue the victim—cultural and legal discourses centered nonconsent, politically shorthanded initially as *no means no* to relay that a simple *no*, rather than resistance against imposition, should be all that is needed to transform what would have been sex into rape.[21] (To reiterate,

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[16] *See* Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 Signs 635, 648–49 (1983).

[17] Schulhofer, Unwanted Sex, *supra* note 1, at 24.

[18] *See* MacKinnon, *supra* note 16, at 649.

[19] On the cigar-stuffing analogy to rape, see Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 Yale L.J. 1372, 1424 (2013) [hereinafter Rubenfeld, *Riddle*]. For our repurposing of the analogy, see *infra* notes 93–96 and accompanying text. As for criminal assault statutes, see, e.g., New Jersey's, which states that a person is guilty of simple assault if they attempt to cause bodily injury to another. N.J. Stat. Ann. § 2C:12-1 (West 2024). For non-criminal assault, a person is liable for assault if he acts "intending to cause a harmful or offensive contact . . . or an imminent apprehension of such a contact, and the other is thereby put in such imminent apprehension." Restatement (Second) of Torts § 21 (Am. L. Inst. 1965). For criminal battery, see California's, which states that a battery "is any willful and unlawful use of force or violence upon the person of another." Cal. Penal Code § 242 (West 2024). For non-criminal battery, "an actor is subject to liability to another for battery if (a) he acts intending to cause a harmful or offensive contact with the person of the other or a third person, or an imminent apprehension of such a contact, and (b) a harmful contact with the person of the other directly or indirectly results." Restatement (Second) of Torts § 13 (Am. L. Inst. 1965).

[20] *See* Schulhofer, *Sexual Autonomy*, *supra* note 9, at 39.

[21] *See, e.g.,* Lani Anne Remick, Comment, *Read Her Lips: An Argument for a Verbal Consent Standard in Rape*, 141 U. Pa. L. Rev. 1103, 1105 (arguing "for a new, clearer consent standard" in rape law under which "no" as well as "the lack of any verbal

and still to this day, many criminal laws require some proof of force.[22] On the other hand, in a well-known case from the early 1990s, a New Jersey trial court found that penile penetration alone, in the absence of consent, constituted requisite force to meet the statutory definition of rape, a holding whose promise we revive.[23])

Reforms notwithstanding, few if any contemporary anti-rape advocates, feminists, and progressive law scholars are pleased with rape law's disappointing returns. "The goals of justice and care for rape victims are still largely unfulfilled," summarizes political scientist Rose Corrigan, who chronicles the many failures of medical, police, and prosecutorial responses to allegations of sexual violence.[24] Meanwhile, "sexual assault is the most underreported violent crime in the criminal justice system,"[25] and rates of sexual violence remain stubbornly stagnant.[26] Dishearteningly, victims continue to relay experiences of "secondary victimization," whereby they are ignored, distrusted, or otherwise mistreated by medical and legal actors.[27]

From the 1990s and into the present, critics put forward other gravamina to replace or supplement force and nonconsent, in the hopes of making sexual violence more culturally legible, legally actionable, and less stigmatizing and burdensome to report.

In 1992, law professor Stephen Schulhofer proposed an affirmative consent standard for some forms of criminal sexual misconduct, foreshadowing and in no small part heralding such standards in university sexual misconduct codes and several state laws.[28] As of this writing, and spurred in part by college campus activism, almost one-quarter of U.S. states have adopted what is known as an affirmative consent standard into their criminal sexual assault

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communication" would presumptively indicate nonconsent); *see also* Lois Pineau, *Date Rape: A Feminist Analysis*, 8 Law & Phil. 217, 241 (1989) (arguing that "noncommunicative sex" ought to be the "primary indicator of coercive sex"). *But see* Schulhofer, *Sexual Autonomy*, *supra* note 9, at 41–43 (cataloging the limitations of "no means no" as a legal standard for impermissible sex).

[22] *See, e.g.*, Conn. Gen. Stat. § 53a-70 (2023); Mich. Comp. Laws § 750.520b(1)(d–f) (2024).

[23] State *ex rel.* M.T.S., 609 A.2d 1266, 1279 (N.J. 1992).

[24] Rose Corrigan, Up Against a Wall: Rape Reform and the Failure of Success 4 (2013).

[25] Rachel Lovell et al., *The Bureaucratic Burden of Identifying Your Rapist and Remaining "Cooperative": What the Sexual Assault Kit Initiative Tells Us About Sexual Assault Case Attrition and Outcomes*, 46 Am. J. Crim. Just. 528, 528 (2021).

[26] *Compare* Jennifer Truman et al., Bureau of Just. Stats., U.S. Dep't of Just., Criminal Victimization, 2012, at 2 (2013), https://bjs.ojp.gov/content/pub/pdf/cv12.pdf [https://perma.cc/5F2K-XZGG] (indicating incidence rate of rape/sexual assault at 1.4 per 1,000 persons ages 12 or older in 2003) *with* Alexandra Thompson & Susannah N. Tapp, Bureau of Just. Stats., U.S. Dep't of Just., Criminal Victimization, 2022, at 3 (2023), https://bjs.ojp.gov/document/cv22.pdf [https://perma.cc/Y36G-MLV7] (indicating incidence rate of rape/sexual assault at 1.9 per 1,000 persons ages 12 or older in 2022).

[27] Lovell et al., *supra* note 25, at 531.

[28] *See* Schulhofer, *Sexual Autonomy*; *supra* note 9, at 69–77; *see also* Stephen J. Schulhofer, *Consent: What It Means and Why It's Time to Require It*, 47 U. Pac. L. Rev. 665, 672 (2016) (describing increasing use of affirmative consent standards in college and university codes of conduct).

laws,[29] such that, for example, sexual penetration or contact without "positive cooperation in act or attitude pursuant to an exercise of free will" constitutes a crime.[30] While affirmative consent and its misleading but politically appealing shorthand, *yes means yes*, has proven attractive for anti-sexual violence activists aiming to foreground mutuality, reciprocity, enthusiasm, and so forth as normative aspirations for sexual encounters, feminist and feminist-adjacent legal scholars have continued to propose alternatives to consent as the touchstone for rape law. Such scholars, for sometimes contiguous and sometimes conflicting reasons, express caution with consent's ascension in U.S. sex laws and U.S. sexual politics.[31]

For example, and cataloging the "empirical failure of consent,"[32] Professor Michal Buchhander-Raphael advocates "that rape be defined as an act of abuse of power and as an exploitation of dominance and control,"[33] which, she argues, would better track the phenomenological experience of sexual violation and better capture as well perpetrators' impermissible leveraging of their authority or control. More recently, Professor Ben McJunkin has innovatively suggested that *indignity* be rape law's touchstone rather than consent, force, or abuse of power.[34] His suggestion is spurred in part because "[e]ven with rape law's increasing focus on consent, conviction rates for reported rapes remain troublingly low . . . and the successful prosecutions continue to be those that

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[29] Cal. Penal Code § 261.6 (West 2024); D.C. Mun. Regs. tit. 22, § 3001(4) (2025); Fla. Stat. § 794.011 (2024); 720 Ill. Comp. Stat. 5/11 (2024); Minn. Stat. § 609.341(4) (2024); Mont. Code Ann. § 45-5-501(1)(a) (2023); N.H. Rev. Stat. Ann. § 632-A:2(I)(m) (2025) (establishing an affirmative consent standard for some crimes); N.J. Rev. Stat. § 2C:2-10 (West 2025); Okla. Stat. tit. 21, § 113 (2024); Wash Rev. Code § 9A.44.010(2) (2024); Wis. Stat. § 940.225(4) (2025); *Report Generator, Consent Laws*, RAINN, Rape, Abuse & Incest Nat'l Network (Apr. 2023) https://apps.rainn.org/policy/compare/consent-laws.cfm [https://perma.cc/6W5G-98KD]. Additionally, some states mandate "affirmative consent" standards for college and university sexual misconduct codes. Andrew Ehler et al., Vt. Legis. Rsch. Serv., Affirmative Consent Policies at the Federal, State, and University Levels 1, 3–7 (2019), https://www.uvm.edu/sites/default/files/Department-of-Political-Science/vlrs/New%20folder/Affirmative_Consent.pdf [https://perma.cc/ZHT4-Z57W].

[30] Cal. Penal Code § 261.6 (2024).

[31] For criticisms on the normative centrality of *consent* in contemporary sexual politics, see Joseph J. Fischel, Screw Consent: A Better Politics of Sexual Justice 22–27 (2019) (arguing that consent is insufficient, inapposite, and riddled with scope contradictions for regulating and imagining sex); Robin West, *Consensual Sexual Dysphoria: A Challenge for Campus Life*, 66 J. Legal Educ. 804, 807–08 (2017) (cataloging various harms women and others endure from unwanted but consented to sex). *See generally* Amia Srinivasan, The Right to Sex: Feminism in the Twenty-First Century (2021) (discussing the insufficiency of consent as a paradigm for modern sexual ethical challenges); Christine Emba, Rethinking Sex (2022) (identifying and challenging cultural assumptions underlying sexual norms). For criticisms of *consent* in contemporary sexual assault law see *infra* notes 32–44, 72–76, and accompanying text.

[32] Michal Buchhander-Raphael, *The Failure of Consent: Re-Conceptualizing Rape as Sexual Abuse of Power*, 18 Mich. J. Gender & L. 147, 155–75 (2011).

[33] *Id.* at 154.

[34] Ben A. McJunkin, *Rape as Indignity*, 109 Cornell L. Rev. 385, 389–92 (2024) (proposing a framework for punishing as rape the infliction of indignity through certain means of compelling sex).

most resemble the traditional common-law understanding of a violent attack by a stranger."[35] Looking, like Buchhandler-Raphael, beyond "the failings of consent," McJunkin speculates that "rape as a failure to respect another person's human dignity,"[36] might shift legal focus away from the conduct and comportment of the complainant and onto "the forceful, fraudulent, coercive, or otherwise dehumanizing means by which sex was compelled."[37]

If Buchhandler-Raphael, McJunkin, and others criticized nonconsent and even affirmative consent standards of criminal rape law for underperforming, Professor Jed Rubenfeld attacked consent for its potential overreach.[38] If consent legally indexes a right to sexual autonomy, which in turn is understood as a right to uncontaminated sexual decision-making,[39] then states should criminalize all sorts of deceptions deployed for the purposes of procuring sex, for example, someone pretending to be Jewish,[40] a Yale graduate,[41] or a peacenik[42] to win over a partner. Rubenfeld, wary of the criminalization-blackhole consent allegedly opens, advises—to the dismay of many[43]—a return to a force standard, reconstructed as self-dispossession.[44] Only sex obtained through force, violence, and threats of violence dispossesses persons, and only such conduct should be criminalized as *rape*. A few years after Professor Rubenfeld reverted to force, Professor Catharine MacKinnon proposed the substitution of consent with force too.[45] Under MacKinnon's statutory scheme though, and in sharp contrast[46] to Rubenfeld's, force would be expansively redefined to include any sort of leveraged inequality.[47] On this model, agreed-upon sex, say, between an employer and an employee that was not wanted by the employee for its own sake would be considered not just a civil rights violation of *sexual harassment* but a crime of *rape*.[48]

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[35] *Id*. at 388.
[36] *Id*. at 389.
[37] *Id*. at 390–91.
[38] Rubenfeld, *Riddle*, *supra* note 19, at 1403.
[39] *Id.* at 1392–94. *But see* Joseph J. Fischel & Hilary R. O'Connell, *Disabling Consent, or Reconstructing Sexual Autonomy*, 30 Colum. J. Gender & L. 428, 524 (2015) (challenging the conflation of sexual autonomy with sexual consent).
[40] Rubenfeld, *Riddle*, *supra* note 19, at 1375; *see also* Alexandra Brodsky, *"Rape Adjacent": Imagining Legal Responses to Nonconsensual Condom Removal*, 32 Colum. J. Gender & L. 183, 194 (2017) (discussing courts' treatment of "rape by deception"). *But see* Aeyal Gross, *Rape by Deception and the Policing of Gender and Nationality Borders*, 24 Tul. J.L. & Sex. 1, 19 (2015) (countervailing the dominant narrative of the *Kashur* case as forcible rape rather than rape-by-deception).
[41] Tom Dougherty, *No Way Around Consent: A Reply to Rubenfeld on "Rape-by-Deception*," 123 Yale L.J. Online 321, 322 (2013).
[42] Tom Dougherty, *Sex, Lies and Deception*, 123 Ethics 717, 727–28 (2013).
[43] *See infra* notes 85–90 and accompanying text.
[44] Rubenfeld, *Riddle*, *supra* note 19, at 1425.
[45] MacKinnon, *supra* note 15, at 469.
[46] But maybe not as sharp as one might initially perceive. *See infra* notes 93–124 and accompanying text.
[47] MacKinnon, *supra* note 15, at 474 (proposing a definition of rape as "a physical invasion of a sexual nature under circumstances of threat or use of force, fraud, coercion, abduction, or of the abuse of power, trust, or a position of dependency or vulnerability").
[48] *Id*. at 443, 474.

All such interventions to reform modern rape law—interventions spanning more than three decades—operate under the presumption that rape law should exist. On this baseline point, there is near total scholarly consensus. *Near* total, we qualify, as we situate our Article within what might be called feminist legalism rather than feminist abolitionism, even as the interventions herein may plausibly be considered intermediary steps toward the larger project of decarceration ("It's obvious that the system won't disappear overnight," reminds abolitionist scholar Ruth Wilson Gilmore).[49] We have tremendous respect for feminist abolitionist scholars and activists like Angela Davis, Beth Richie, Leigh Goodmark, Judith Levine and Erica Meiners, whose calls for the abolition of the criminal justice system *in toto* necessary and sometimes pointedly entail the abolition of criminal rape law.[50] While such scholars champion restorative and transformative justice programs to resolve social problems, we will concentrate in this Article on formal, legal avenues for redressing sexual violence in rape law's stead. As we further explain below, we retain criminal law—however ambivalently—as one of many possible avenues for prosecuting sexual misconduct. Indeed, Part III of this Article offers a constellation of criminal, civil, tort, and contract law alternatives to rape law—some extant, some propositional—for redressing sexual violations. We believe these alternatives, in the aggregate, would redress sexual violations better than rape law and sexual assault law currently do.

In any case, where feminist legalist scholars *disagree*, as we have seen, is over rape law's touchstone. Should it be the absence of affirmative consent? Abuse of power? Indignity? Or force, yet again, now reconstructed as self-dispossession? Or force, yet again, now reconstructed as leveraged inequality? But what if the scholarly consensus is wrong? What if the best way to address the myriad frustrations and failures of rape law is not to reform it, but abolish it?

What if rape law should not exist?

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[49] Rachel Kushner, *Is Prison Necessary? Ruth Wilson Gilmore Might Change Your Mind*, N.Y. Times Mag. (Apr. 17, 2019), https://www.nytimes.com/2019/04/17/magazine/prison-abolition-ruth-wilson-gilmore.html [https://perma.cc/44UD-F5FW]. Our decommission proposal thus synchronizes with law professor Brenda Cossman's project to "regulate" sexual harm "reparatively," a project that "displace[s] the centrality of the criminal law and its binary corollary—criminal law or no law, criminal harm or no harm . . . ." Brenda Cossman, The New Sex Wars 166 (2021). We thank Harvard Journal of Law & Gender editor Luisa Graden for helping us situate our Article, normatively and programmatically, in proximity to decarceration.

[50] *See generally* Angela Y. Davis et al., Abolition. Feminism. Now. (2022) (arguing that policing and incarceration undermine feminist commitments to ending sexual and intimate partner violence); Leigh Goodmark, Imperfect Victims: Criminalized Survivors and the Promise of Abolition Feminism (2023) (arguing that survivors of intimate partner violence are further victimized by criminal justice policies designed to address their circumstances); Judith Levine & Erica R. Meiners, The Feminist and the Sex Offender: Confronting Sexual Harm, Ending State Violence (2020) (arguing that contemporary sex offense laws, penalties, and regulations fail to protect communities from sexual violence).

More precisely, what if states decommissioned—*de facto* retired or *de jure* repealed—their laws of criminal rape and criminal sexual assault?

Introduction

This Article tackles that admittedly provocative question. What would a regulatory apparatus redressing sexual violence look like if rape law were excised from U.S. criminal codes? The Article countenances the costs and benefits of displacing criminal rape law in favor of a regulatory regime spanning criminal, civil, tort, and—somewhat fantastically—contract law. Attuned to and drawing upon feminist criticisms of rape law, our decommission hypothesis is likewise and unflinchingly feminist. We suspect the law can redress sexual violence against women and people of all genders more effectively than it currently does under the extant regime and with less carceral and racist collateral.

Feminist legalists referenced in the Prologue posit different "core wrongs" of sexual violence, say force or self-dispossession, sexual autonomy, coercion, abuse of power or gendered subordination. Our Article and its propositions operate from a simple if opposing normative and conceptual starting point: that there is not a "core wrong" underlying all sexual violations, that the wrongness of the violation depends, well, on the violation. Some sexual violations are wrong chiefly because the perpetrator used force; some are wrong primarily because the perpetrator, superordinated in status, coerced the victim; some violations, like stealthing (nonconsensual condom removal), are wrong chiefly because they contravene sexual autonomy. A client who refuses to pay a sex worker her fee post facto may commit two wrongs: a breach of (an unenforceable) contract and a violation of the sex worker's sexual autonomy.

There is no one gravamen of sexual violation. Our decommission hypothesis reflects this very fact: we propose harnessing different bodies of law to remedy different kinds of sexual wrongs, which of course plaintiffs already do, for example, through sexual harassment claims.

The interventions of this Article, even if they were perfectly codified and enforced by the most beneficent of governance feminist state actors,[51] would not end sexual violence. If law is a vehicle for social and sexual equality, it is rickety and unreliable, exceptions proving the rule.[52] Cognizant of law's limits

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[51] On governance feminism and its "heterogeneous elements," see generally Janet Halley et al., Governance Feminism: An Introduction (2018).

[52] S*ee* Linda Martín Alcoff, Rape and Resistance 14 (2018) ("[I]t is a mistake to designate the legal arena as the principal site for redressing the problem of sexual violations. The aim of courts is to establish individual culpability, while advocates, scholars, and victims and their supporters are more often interested in social change, analysis, and understanding."); *cf.* Mark Tushnet, *The Critique of Rights*, 47 SMU L. Rev. 23, 23 (1994) (describing the "critique of rights" and "the relation between legal victories and political effects").

for transforming social relations, let alone cultural consciousness, we texture our arguments and observations throughout this Article by marshalling three cultural artifacts of the 2020s that remediate sexual violence: Michaela Coel's television series *I May Destroy You*, Suzie Miller's play *Prima Facie*, and Laura Beil's podcast *Exposed: Cover-Up at Columbia University*.[53] All three artworks indict state action against sexual violence while also conjuring alternative paths of redress. But the true power of these aesthetic productions, despite their differing genres, political postures, and object lessons, is in boldly beseeching us viewers, readers, and listeners to be solidaristic, empathetic, and, when necessary, avenging. Parts II and III consult these cultural productions instrumentally, to concretize the relevant normative or legal argument at hand. But the Conclusion draws on these same aesthetic projects to soften our pronouncements and to recognize the limits of legal theorizing for sexual justice. Or: if you must choose between reading our Article or viewing *I May Destroy You*, we suggest the latter.

Part I situates the decommission hypothesis by briefly synopsizing and then triangulating between two separate debates over modern rape law. Both debates pitted, to put it bluntly, a deft-if-obtuse white man theorist against his feminist critics. The first was initiated in the late 1970s by Michel Foucault,[54] and the second was initiated by Jed Rubenfeld in the early 2010s.[55] Both men posited that, when it comes to rape, criminal law's focus should be on force and physical violence.[56] Whereas Foucault wondered if rape law should be eliminated, Rubenfeld sought to recentralize force within rape law. Feminist critics of Foucault, among them Monique Plaza, Laura Hengehold, and Ann Cahill,[57] and feminist critics of Rubenfeld, among them Deborah Tuerkheimer, Gowri Ramachandran, Patricia Falk, Luis Chiesa, and Corey Rayburn Yung,[58] leveled a host of cautions and criticisms at the reversion to force. We find several of these cautions and criticisms compelling, yet we argue that both

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[53] Suzie Miller, Prima Facie (2019); *I May Destroy You* (HBO 2020); Exposed: Cover-Up at Columbia University, Wondery (2023), https://wondery.com/shows/exposed/ [https://perma.cc/KF8J-XW5S].

[54] Michel Foucault et al., *Confinement, Psychiatry, Prison, in* Politics, Philosophy, Culture: Interviews and Other Writings, 1977–1984, at 200–10 (Lawrence Kritzman & Michel Foucault eds., 1988).

[55] Rubenfeld, *Riddle*, *supra* note 19, at 1372.

[56] Foucault et al., *supra* note 54, at 200; Rubenfeld, *Riddle*, *supra* note 19, at 1425.

[57] Monique Plaza, *Our Damages and Their Compensation*, 1 Feminist Issues 25, 26 (1981); Laura Hengehold, *An Immodest Proposal: Foucault, Hysterization, and the "Second Rape,"* 9 Hypatia 88, 88–89 (1994); Ann J. Cahill, *Foucault, Rape, and the Construction of the Feminine Body*, 15 Hypatia 43, 43–46 (2000). For a sustained, feminist interlocution of Foucault's writings and comments on sexual violence, see generally Alcoff, *supra* note 52.

[58] Deborah Tuerkheimer, *Sex Without Consent*, 123 Yale L.J. Online 335, 335–37 (2013); Gowri Ramachandran, *Delineating the Heinous: Rape, Sex, and Self-Possession*, 123 Yale L.J. Online 371, 371–76 (2013); Patricia J. Falk, *Not Logic, but Experience: Drawing on Lessons from the Real World in Thinking about the Riddle of Rape-by-Fraud*, 123 Yale L.J. Online 353, 353–54 (2013); Luis E. Chiesa, *Solving the Riddle of Rape-by-Deception*, 35 Yale L. & Pol'y Rev. 407, 410–12 (2017); Corey Rayburn Yung, Rape Law Fundamentals, 27 Yale J.L. & Feminism 1, 2–7 (2015).

debates left under or unexplored opportunities of critique, opportunities we develop to conceptually and normatively scaffold the decommission hypothesis. We rehearse the debates in reverse chronological order, for our immanent criticism of Rubenfeld's reconstruction of force stages a more generous reappraisal of Foucault's half-baked propositions. If Rubenfeld's conception of force captures a broader range of impermissible conduct than he initially supposes, then Foucault's "desexualized" assault law may become more palatable to feminist critics.[59] This, in turn, allows us to ask if criminal law is the best location to capture the phenomenological distinctions between sexual violence and nonsexual violence, and if not, whether Foucault might have been onto something after all when he pondered, "Rape could be outside the criminal law. It could quite simply come under civil law, with damages."[60]

Part I concludes with a feminist coda. Foucault, decidedly un-feminist on the rape law question, was primarily concerned that sex laws metastasize disciplinary powers over those citizens pathologized as perverts, predators, and so forth by the state or state-adjacent medical authorities.[61] Rubenfeld, his feminist priors notwithstanding,[62] was primarily concerned that rape law premised on nonconsent rather than force could lead to absurd and overreaching convictions.[63] We share Foucault's and Rubenfeld's concerns about rape law and abuses of power but we are also concerned about abuses of women. (Later on, we suggest that eliminating rape law might also be a boon for victims of sexual violence who are boys, men, and other genders). Our decommission hypothesis operates under the presumption that rape law, even modern rape law, cabins women's sexual freedom and undermines women's sexual equality. We think there is a strong likelihood that rape law as codified and enforced contravenes its (modern) premise: ending sexual violence.

Part II speculates upon some costs and benefits of the decommission hypothesis. We catalog seven possible benefits and two big costs for decommissioning rape law. We retrieve the possible benefits of decommissioning rape law mainly from extant feminist scholarship and feminist legal theory. Those benefits are: avoiding the "raped again" problem—the revictimization of victims through the police reporting process, medical intake, and cross-examination; de-spectacularizing sexual violence as a moral and legal wrong perpetrated not by monsters but by fairly ordinary men; the statutory disarticulation of rape as a property crime committed against white fathers' daughters

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[59] *See* Hengehold, *supra* note 57, at 89.

[60] Foucault et al., *supra* note 54, at 201.

[61] *Cf. id*. at 201–02 (cautioning against the dangers of separating out sexual violence from nonsexual violence under criminal law); Michel Foucault, Abnormal: Lectures at the Collège de France, 1974–1975, at 293–95 (Valerio Marchetti & Antonella Salomoni eds., 2004) [hereinafter Foucault, Abnormal].

[62] *See* Jed Rubenfeld, *The Right of Privacy,* 102 Harv. L. Rev. 737, 788 (1989) [hereinafter Rubenfeld, *Right of Privacy*]. In *The Riddle of Rape-by-Deception*, Rubenfeld rightly points out that, historically, U.S. rape law's raison d'être was not protecting women's sexual autonomy but their chastity. Rubenfeld, *Riddle*, *supra* note 19, at 1389.

[63] Rubenfeld, *Riddle*, *supra* note 19, at 1395.

and white men's wives; the discursive disarticulation of rape-as-a-crime-worse-than-death, a cultural maxim that may prescribe the injury it purports to describe; the conceptual and phenomenological separation of forced sex from consensual sex; the increased probability that boys, men, and other non-women victims of sexual violence will seek remedy through civil rights law, tort law, and other arenas of criminal law; and better meeting the needs and preferences of victims of sexual violence.

The first big cost of decommissioning rape law is expressivist, although it carries potentially serious material costs downstream. As many feminist legal scholars have written—including those responding to Foucault's provocation nearly fifty years ago[64]—*rape* captures one of the only legal articulations of a gendered harm.[65] Put more simply, eliminating rape law risks expressing that we, societally, do not care about rape, that we do not take rape seriously, that rape is not serious, and that rape may be no worse than, and maybe even not as bad as, other crimes against the person. And it is at least possible that the excision of *rape* from criminal codes could embolden perpetrators to commit sexual violence with greater impunity.

The second big cost of decommissioning rape law would be, literally, the monetary cost. What happens when the state no longer foots the bill to prosecute rape? If tort, contract, and civil rights remedies were the only available alternatives, would only rich victims (suing rich perpetrators) have their day in court? This possible cost has been the one most often raised by our colleagues, friends, and academic conference interlocutors; as we will explain, this concern is as understandable as it is resolvable.

Ultimately, we submit that the benefits of decommissioning criminal rape law outweigh the costs and that taking rape and sexual violence seriously—by which we mean operating under the aspiration to *end rape*—entreats us to disassemble, then reassemble, rape law.

Part III delineates how other arenas of criminal law, civil rights law, tort law, and contract law might be or already are harnessed to redress sexual violence. Excepting our analysis of contract law—its application to rape is more or less a pie-in-the-sky thought exercise given both the criminalization of sex work in the United States and the fact that "courts generally refuse to recognize sex as a consideration for a valid contract"[66]—we tally up the potential costs and benefits for utilizing each body of law as a response to sexual violence. Regarding criminal law, we look to Assault, Battery, Coercion and Extortion as alternative modes of redress. Regarding civil

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[64] *See* Plaza, *supra* note 57; Hengehold, *supra* note 57; Cahill, *supra* note 57.

[65] The other major legal articulation of gendered harm is sexual harassment as actionable discrimination. *See* Reva B. Siegel, *A Short History of Sexual Harassment*, *in* Directions in Sexual Harassment Law 8–11 (Catharine A. MacKinnon & Reva B. Siegel eds., 2004); *see also* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 Yale. L.J. 1683, 1686–87 (1998) (conceptualizing sexual harassment as a gender-based harm "designed to maintain work . . . as bastions of masculine competence and authority"). We thank Professor Ali Miller for helpfully articulating the expressivist dimension of rape law.

[66] Brodsky, *supra* note 40, at 206.

rights remedies, we look to Title VII and Title IX sexual harassment law as well as state laws and municipal ordinances against gender-motivated violence. Regarding tort law, we look to existing private causes of action of assault, battery, and false imprisonment as well as California's cause of action against nonconsensual condom removal ("stealthing"). Additionally, we offer another possible tort claim against violations of sexual autonomy, the deliberate contravention of an explicit conditional to sex.[67] Regarding contract law, we consider options for legal action for a sex worker whose client refuses to pay the agreed-upon fee.

These various, other-than-rape-law remedies do not exhaust all possible avenues for legally redressing sexual violence, but they probably cover most of them.[68]

The Conclusion brings Coel's, Miller's, and Beil's aesthetic projects from margin to center. The cultural transformations necessary to end sexual violence will come not from law but from art and activism.

I. Force, Phenomenology, and Feminism

A. The Force of Sexual Violence

What is force? Tellingly, the first entry for the verb "force" in Merriam-Webster's dictionary is "to do violence to, *especially:* RAPE."[69] Later entries are instructive too: "to press, drive, pass, or effect against resistance or inertia"; "to achieve or win by strength in struggle or violence: such as . . . to break open or through."[70] If the "sex" one is having looks more like "*forc[ing]* your way through," or "*forc[ing]* a castle," or "*forc[ing]* a lock," is it sex?[71] Or might the conduct be something else, like assault?

Dictionary definitions will not get us very far in the present inquiry. This is because practically, state criminal codes and case law stipulate the definitional parameters of force as an element of rape[72] and philosophically,

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[67] The deliberate contravention of an explicit conditional to sex as a potentially actionable violation of sexual autonomy was initially developed by Fischel, *supra* note 31, at 109.

[68] On utilizing mediation and arbitration to remedy sexual violence, see Adam Laytham, *Mediation and Misconduct: A Better Way to Resolve Title IX Disputes*, 2020 J. Disp. Resol. 191, 196–205; David Horton, *The Limits of Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, 132 Yale L.J. Forum 1, 8–9 (2022); Daniel Del Gobbo, *Queer Dispute Resolution*, 20 Card. J. Conflict Resol. 283, 308–09, 323–24 (2019).

[69] *Force*, Merriam-Webster, https://www.merriam-webster.com/dictionary/force [https://perma.cc/PKB3-H9F3].

[70] *Id.*

[71] *Id.*

[72] *See, e.g.,* N.Y. Penal Law § 130.35 (McKinney 2025) ("A person is guilty of rape in the first degree when . . . he or she engages in vaginal sexual contact with another person . . . by forcible compulsion."); N.Y. Penal Law § 130.00 (McKinney 2025) ("'Forcible compulsion' means to compel by either: a. use of physical force; or b. a

"force and consent are not observable facts but social constructs; they mean different things to different people."[73] It is the dominant, masculinist, social construction of force—as brutal, life-threatening, unyielding, physical violence—that impelled many liberal and feminist legal scholars of the late 20th and early 21st century to champion nonconsent as a substitution for, or additional element to, force in sexual assault law.[74] MacKinnon's assertion that "consent is a pathetic standard of equal sex for a free people"[75] notwithstanding, scholars' and activists' concerns about, inter alia, sticky norms, justiciability, and jury nullification largely drew them to Camp Consent and away from Camp Force.[76]

And then, startlingly, Professor Jed Rubenfeld, in his 2013 article *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy,* complicated consent as the alternative, liberal gravamen for rape law.[77] His consent criticism differed considerably from the consent criticisms of his feminist predecessors, a criticism that inexorably led him to propose a return to force as rape law's gravamen, a proposal all but unanimously denounced in the literature.[78]

Here is the nutshell version of Rubenfeld's *Riddle*: if the touchstone of rape law were truly and consistently the absence of consent, then an impossibly vast range of sex procured through deception would have to be criminalized as rape. If the moral and legal problem, for example, of a man pretending to be a woman's husband to have sex with her is that the woman's consent is vitiated by the man's sham, then shamming in all kinds of sexual scenarios should be equally wrongful. What if the man pretends not to be the woman's husband, but her boyfriend? Or he pretends, to procure sex, to be Jewish, to have graduated from Yale, or to be interested in a long-term relationship?[79] What if he wears a toupee, falsely claims he has had a vasectomy, or inflates his net worth? Rubenfeld's humorous rhetorical flourish, that "if fully informed consent

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threat, express or implied, which places a person in fear of immediate death or physical injury to himself, herself or another person, or in fear that he, she or another person will immediately be kidnapped."); *see also* Ark. Code Ann. § 5-14-103 (2025) ("A person commits rape if he or she engages in sexual intercourse or deviate sexual activity with another person: (1) [b]y forcible compulsion . . . ."); Ark. Code Ann. § 5-14-101 (2025) ("'Forcible compulsion' means physical force or a threat, express or implied, of death or physical injury to or kidnapping of any person.").

[73] Schulhofer, *Sexual Autonomy*, *supra* note 9, at 41.

[74] *See supra* notes 20–31 and accompanying text.

[75] MacKinnon, *supra* note 15, at 465.

[76] *See* Schulhofer, *Sexual Autonomy*, *supra* note 9, at 58. *See generally* Susan Estrich, Real Rape (1987) (arguing that criminal rape law overfocuses on forceful assaults committed by strangers and trivializes or disregards sexual violence committed by acquaintances and intimate partners); Yes Means Yes: Visions of Female Sexual Power and a World Without Rape (Jaclyn Friedman & Jessica Valenti eds., 2008) (collecting essays in general agreement that affirmative consent of all parties is an ethical prerequisite for sexual activity).

[77] Rubenfeld, *Riddle*, *supra* note 19, at 1417–23.

[78] *See supra* note 58 and accompanying text. *But see* Dougherty, *supra* note 41, at 327 (arguing, in light of Rubenfeld's riddle, for the criminalization of a wider variety of deceptions to procure sex).

[79] *See supra* notes 39–42 and accompanying text.

were the key to lawful sex, the first thing we should do is jail all the beautiful people," nonetheless points to a gravely serious concern: rape law premised on consent portends hyper-criminalization and gross state overreach.[80] Since there is no way, claims Rubenfeld, to uphold nonconsent as the gravamen of rape law without also criminalizing all the fibbers, dissemblers, and beautiful people as rapists, we are left with no choice but to abandon consent and return to force, which Rubenfeld theorizes as a violation of self-possession, paralleling the wrong of rape to the wrong of slavery and torture.[81] Indeed, at first blush, Rubenfeld's notion of force looks an awfully lot like the masculinist social construct of force that reformers of rape law have so strenuously opposed: "Rubenfeld argues . . . that *extreme amounts* of force . . . is required for sex to be rape";[82] "For Rubenfeld, force—*and lots of it*—is required to dispossess a person from their body";[83] Rubenfeld's retheorizing of substantive rape law "would . . . likely decriminalize over ninety percent of rapes in America because of the high prevalence of non-stranger rape and *rarity of severe injuries to prove the requisite force was applied or threatened*."[84]

Rubenfeld's critics ventured solutions to the *Riddle* other than, and for the purpose of staving off, the reversion to force. Some lies are "material" to sexual decisions, and some are not;[85] some are "deal breakers," and some are not;[86] some are "coercive," and some are not.[87] Some lies violate another's "sexual autonomy" while others more seriously violate their "sexual agency," a distinction unimportant for this Article.[88] Others argued that several principles, not just force and nonconsent, inform modern rape law, principles like gender equality and anti-subordination.[89] These principles, in turn, might better guide determinations over which lies for procuring sex are actionable and which are not.

A presumption shared across the extant criticisms of Rubenfeld's *Riddle* is that a reversion to force in rape law would be *really bad*, and the reversion would be really bad because, in part, Rubenfeld sets the threshold for actionable force impossibly, patriarchally, high.[90]

But does he? Our critique of Rubenfeld's *Riddle* parts ways with extant criticisms. Our critique is immanent: Rubenfeld's force is not so forceful after

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[80] Rubenfeld, *Riddle*, *supra* note 19, at 1416.
[81] *Id*. at 1380.
[82] Tuerkheimer, *supra* note 58, at 337 (emphasis added).
[83] Rana M. Jaleel, The Work of Rape 40 (2021) (emphasis added).
[84] Yung, *supra* note 58, at 3 (emphasis added).
[85] Tuerkheimer, *supra* note 58, at 344, 347.
[86] Dougherty, *supra* note 42, at 719.
[87] Chiesa, *supra* note 58, at 442–43.
[88] Tuerkheimer, *supra* note 58, at 337–41 (distinguishing sexual agency from autonomy).
[89] *See generally* MacKinnon, *supra* note 15 (describing rape as "a crime of gender inequality"); Yung, *supra* note 58 (arguing that sexual autonomy is but one of several moral principles integral to criminal laws against sexual violence).
[90] *See supra* notes 80–83 and accompanying text.

all. Rubenfeld's rape law, premised on force, would criminalize far more conduct than he appears to realize.

It is not that Rubenfeld's critics unfairly misread him, exactly, but rather Rubenfeld's conception of force cuts in one direction rhetorically and another analogically. Rhetorically, he writes:

> [R]ape, we might say, is poised halfway between slavery and torture, sometimes more like the one, sometimes more like the other, always sharing core elements with each. In particular, rape shares with slavery and torture the same fundamental violation. The victim's body is utterly wrested from her control, mastered, possessed by another.[91]

It is entirely sensible, given this passage as well as several others from *Riddle*,[92] to assume that nearly all sexual assaults would become improbable if not impossible to prove under Rubenfeld's renovated rape law. If the woman was not demonstrably enslaved or tortured (or something "halfway between"), so the thinking would go, she was not raped.

Yet a closer look at Rubenfeld's examples of requisite "force" undercut the premise that such force must be extreme, brutal, enslaving or torturous. Consider, by contrast, an analogy Rubenfeld draws to prove "sexual autonomy's irrelevance to rape law":[93]

> Imagine two friends debating whether individuals have a fundamental right of "smoking autonomy" . . . . John, a cigar smoker, claims there is such a right. Jane, a nonsmoker, denies it. John says smoking is central to and expressive of his identity; Jane says no one has a right to inflict on others unpleasant and perhaps harmful smoke. . . . John physically forces [Jane] to smoke the cigar against her will.
>
> Now: are we obliged to say that Jane was *wrong*—that there *is* a right of "smoking autonomy"— in order to conclude that she had a right not to have a cigar stuffed into her mouth? I don't think so. What makes John's act wrongful has nothing to do with whether it violated Jane's supposed right of "smoking autonomy" . . . .[94]

So if John has not violated Jane's "smoking autonomy,"[95] but John's act is nevertheless wrongful, what makes it so? Force. Precisely, the force

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[91] Rubenfeld, *Riddle*, *supra* note 19, at 1427.

[92] Rubenfeld writes, "under prevailing law, sex with an unconscious person, including someone asleep, is ipso facto rape because rape is understood to be sex without consent, and the unconscious cannot consent. Rape as a violation of self-possession would not be able to take this position." *Id*. at 1440 (internal citations omitted). We argue that "rape as a violation of self-possession" could take this position, since penetrating an unconscious person requires force. *Infra* notes 110–11 and accompanying text.

[93] Rubenfeld, *Riddle*, *supra* note 19, at 1424.

[94] *Id*. at 1424–25.

[95] *Id.*

of "stuff[ing]"[96] a cigar into Jane's mouth – *that's it*. To get uncomfortably descriptive, let us imagine further that John pushed the cigar against Jane's lips, Jane shook her head *no*, and John opened her mouth with one hand and put the cigar in her mouth with the other. Has Jane been "dispossessed"[97] of her body? Is the cigar forced upon her like enslavement or torture? Is she "utterly wrested"[98] from her body? The answer to each of these questions is debatable yet irrelevant, the answer made irrelevant by the purpose of the analogy itself: Rubenfeld is telling his readers that shoving a cigar into the mouth of another "against her will"[99] ought to constitute requisite force to be considered a criminal wrong, presumably assault.

Our readers will by now see where we are heading, de-analogizing the rape analogy back to rape. If the cigar is not a cigar, but a penis, is the conduct any less forceful? No. If John lies atop Jane to have penetrative sex with her, an immobilized Jane says "no," and John proceeds anyhow, what philosophical or commonsense definition of force could possibly disqualify nonconsensual genital penetration? If Jane pinned John down and shoved her elbow down his throat, "against [his] will," her conduct is evidently forceful. It is true that courts and commentators have generally required that penetration without consent does not, by itself, constitute force under criminal law, but we are insisting that such a juridical fantasy must be premised on a profound denial of what penetration without consent looks like and feels like.[100]

Rubenfeld would likely disagree with the position we are ascribing to him—he states that "no means no" would "not mean rape" under a theory of "rape as a violation of self-possession."[101] And yet, let us consider more closely the famous case he references, *Berkowitz*,[102] to substantiate what we take to be a vanishing distinction between forced sex and sex without consent.

> The victim was still saying "no" but "really couldn't move because [appellant] was shifting at [her] body so he was over [her]." Appellant then tried to put his penis in her mouth. The victim did not physically resist, but rather continued to verbally protest, saying "No, I gotta go, let me go" . . . .

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[96] *Id.* at 1425.
[97] *Id.* at 1426.
[98] *Id.* at 1427.
[99] *Id.* at 1424.
[100] The extrinsic force standard is defined as "anything beyond that which is inherent or incidental to the sexual act itself." State v. Jones, 299 P.3d 219, 228 (Idaho 2013) (applying the extrinsic force standard in Idaho). This standard is the "traditional view" and is still the most commonly adopted standard. *Id*. *But see* State *ex rel.* M.T.S., 609 A.2d 1266, 1279–80 (N.J. 1992) (adopting an intrinsic force standard and holding that force is satisfied by non-consensual penetration).
[101] Rubenfeld, *Riddle*, *supra* note 19, at 1438–39.
[102] Commonwealth v. Berkowitz, 609 A.2d 1338 (Pa. 1992).

> . . . Appellant disregarded the victim's continual complaints that she "had to go," and instead walked two feet away to the door and locked it so that no one from the outside could enter.
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> . . . .
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> . . . Once the victim was on the bed, appellant began "straddling" her again while he undid the knot in her sweatpants. He then removed her sweatpants and underwear from one of her legs. The victim did not physically resist in any way while on the bed because appellant was on top of her, and she "couldn't like go anywhere."[103]

Rubenfeld props up *Berkowitz* as the paradigmatic case of not-rape because not-forced sex, but how not-forced does this encounter really sound? Indeed, in a reply to his critics, Rubenfeld clarifies, while softening, the force requirement he had stipulated prior: "Force is a category much broader than physical harm. If a man rapes a woman by overpowering her or pinning her down, he has used force even if there is no physical harm."[104] *Berkowitz* fits Rubenfeld's revised description of force perfectly. Berkowitz overpowered the victim, straddled her so she could not move, and then penetrated her.[105] Moreover, while Rubenfeld writes that "the door to the room was unlocked, and the woman knew it was unlocked" that is entirely wrong: "he locked the door[!]"[106] "Imprisonment," Rubenfeld insists, "is itself an act of physical force."[107] Under Rubenfeld's theory, Berkowitz committed rape, even if Rubenfeld doesn't think so.

Rubenfeld maintains that consent enters his renovated rape law only for sex involving physical force, restraints, bondage, and other kinky activities. "Violent sex is not rape, I argue, if the violence has been consented to. Sadomasochistic sex, if consensual, is no crime."[108] However socially constructed are our definitions of force, it is simply incoherent to claim flogging someone on the behind without their consent, or "gagging" them,[109] constitutes wrongful use of force, but sticking one's penis into that same person without their consent does not do so. Likewise, Rubenfeld first avers that sex with an unconscious person or someone who is sleeping should not count as rape, since the sex does not involve force. ("Among well-settled couples . . . sexual contact of various kinds with a sleeping person is common. No one thinks all such touchings are criminal."[110]) But in the reply to critics, he reverses course: requisite force "can include not only an assault of any kind, but . . . *holding*

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[103] *Id.* at 1340 (internal citations omitted).

[104] Jed Rubenfeld, *Rape-by-Deception—A Response*, 123 Yale L.J. Online 389, 394 (2013) [hereinafter Rubenfeld, *Response*]. It is worth mentioning that Rubenfeld does not mention "slavery" or "torture" once in his response. *Id*.

[105] *Berkowitz*, 609 A.2d at 1340.

[106] Rubenfeld, *Riddle*, *supra* note 19, at 1439; Commonwealth v. Berkowitz, 641 A.2d 1161, 1163 (Pa. 1994) (exclamation added); *see also* MacKinnon, *supra* note 15, at 466–68 (describing and analyzing case).

[107] Rubenfeld, *Riddle*, *supra* note 19, at 1436.

[108] Rubenfeld, *Response*, *supra* note 104, at 392.

[109] Rubenfeld, *Riddle*, *supra* note 19, at 1437.

[110] *Id*. at 1440.

the victim down [and] *abusing an unconscious body*—nor is any resistance required."[111] Again, we are hard-pressed to imagine what Rubenfeld could mean by the "abuse of an unconscious body" if he does not mean pushing a penis into it. It cannot be that slapping the face of a sleeping person is "abuse" but ramming a few fingers in his anus is not. If that is right, sex with an unconscious or sleeping person entails force and is therefore rape, *for Rubenfeld.*

Later we will consider more carefully under what conditions sex procured through deception ought to be—or at least reasonably could be—legally actionable.[112] For now though, let us address one of the paradigmatic cases of sex-by-deception Rubenfeld discusses in his analysis: medical misrepresentation.[113] In U.S. case law, medical misrepresentation comes in two variants. The first is that of the doctor, or someone presenting himself as a doctor, who falsely informs his patient that she will die or suffer a life-threatening illness unless he, the doctor, penetrates the patient with his penis.[114] The second is that of the doctor who, instead of inserting a medical instrument into the patient's vagina, inserts his penis, tongue, or fingers.[115] Could rape law—were its lodestar a violation of self-possession accomplished through force—capture these deceits? Rubenfeld thinks no, we think yes.

In the first scenario, the doctor or person claiming to be a doctor coerces the patient into sex by threatening her life: she is told by a medical expert, or someone she reasonably believes to be a medical expert, that she will die or gravely suffer from illness unless she submits to penile penetration. Rubenfeld states unequivocally that sex procured through threats of death and serious injury constitutes requisite force under his scheme.[116]

In the second scenario, if penetration without consent is force, then the doctor penetrating or touching his patient with anything other than the medical instrument he claimed to be using is sexual assault, or at the very least battery, often defined as offensive, unconsented-to contact.[117] Indeed, an unpleasant

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[111] Rubenfeld, *Response*, *supra* note 104, at 398 (emphasis added).

[112] *Infra* Part III.C.3.

[113] Rubenfeld, *Riddle*, *supra* note 19, at 1397 n.127.

[114] *See* Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 Brook. L. Rev 39, 52, 55–57 (1998). One such example is *Don Moran v. People*, 25 Mich. 356 (1872), where although the Michigan Supreme Court overturned the trial court's rape conviction of a doctor who pressured his teenage patient into sex under false pretenses, "the court also noted that obtaining sexual intercourse by fraud may be as criminal as forcible rape but the legislature must outlaw it." *Id.* at 55–56.

[115] *See* Falk, *supra* note 114, at 52–55; People v. Ogunmola, 238 Cal. Rptr. 300 (Cal. Ct. App. 1987); *see also* Exposed: Cover-Up at Columbia University, *Trapped*, Wondery, at 27:26–27:44 (Sept. 11, 2023), https://wondery.com/shows/exposed/episode/13953-trapped/ [https://perma.cc/PFT6-7ZA7] (chronicling a New York City gynecologist who sexually abused hundreds if not thousands of girls and women, often by licking his patients' vaginas).

[116] Rubenfeld, *Response, supra* note 104, at 400–01. *But see* Schulhofer, *Sexual Autonomy*, *supra* note 9, at 48 (noting that the *Boro* court did not recognize such deception as life-threatening coercion).

[117] *See, e.g.*, Proffitt v. Ricci, 463 A.2d 514, 517 (R.I. 1983) (stating that under Rhode Island law battery is defined as "an act that was intended to cause, and does cause, an

question arises here as to whether a doctor licking his patients' vaginas, as described in the podcast *Exposed: Cover-Up at Columbia University*,[118] is penetration or contact and, if it is the latter, if it should nevertheless count as forcible assault or sexual assault. But even if the distinction between unconsented-to genital *contact* versus unconsented-to genital *penetration* is a distinction with an ethically meaningful, and not just phallocentric, difference,[119] both forms of conduct are patently wrong. It is worth pointing out that the majority of stakeholders involved in the *Exposed* case—such as the women complainants and assistant district attorney—repeatedly refer to the doctor's conduct, simply, as "assault" (and not "sexual assault" nor "rape").[120] At times, the language of "assault" appears euphemistic to avoid the discomfort of a more graphic description; but it mainly registers as experientially true: the women felt assaulted, whether or not New York criminal law would recognize the conduct as such.[121]

In any case, what we have argued in this subsection is that, even under what appears to be a reactionary reversion to force as the gravamen of rape law, unconsented-to penetration of another person's body, and perhaps

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offensive contact with or unconsented touching of or trauma upon the body of another, thereby generally resulting in the consummation of the assault").

[118] Exposed: Cover-Up at Columbia University, *Trapped*, *supra* note 115, at 27:26–27:44.

[119] *But see* MacKinnon, *supra* note 13, at 172 (arguing that penetration is not necessarily the central moral wrong for victims of sexual violence). Still, for our purposes, one could argue that penetrating a person is more "forceful" than licking them without their consent. If that distinction is ethically defensible, then, under Rubenfeld's scheme and our own, the doctor's penetrating his patient without her consent would be considered assault or sexual assault; the doctor licking his patient without her consent would be considered battery, or forcible touching.

[120] Exposed: Cover-Up at Columbia University, *Trapped*, *supra* note 115, at 11:18, 22:45, 29:24, 39:44.

[121] In New York State, assault and battery are combined into the same offense. A person is guilty of assault in the first degree when "with intent to cause serious physical injury to another person, he causes such injury to such person." N.Y. Penal Law § 120.10 (McKinney 2025). However, there are numerous statutes for sex offenses, including sexual abuse (subjecting another person to sexual contact by forcible compulsion), N.Y. Penal Law § 130.65 (McKinney 2025), forcible touching ("intentionally, and for no legitimate purpose, forcibly touches the sexual or other intimate parts of another person for the purpose of degrading or abusing such person, or for the purpose of gratifying the actor's sexual desire"), N.Y. Penal Law § 130.52 (McKinney 2025), and criminal sexual acts (engaging in oral sexual conduct or anal sexual conduct with another person by forcible compulsion), N.Y. Penal Law § 130.50 (repealed 2024). In 2014, Robert Hadden, the gynecologist featured in the podcast, was charged with five counts of a criminal sexual act, two counts of forcible touching, and two counts of sexual abuse. Jan Ransom, *19 Women Accused a Gynecologist of Abuse. Why Didn't He Go to Prison?*, N. Y. Times (Oct. 22, 2019), https://www.nytimes.com/2019/10/22/nyregion/robert-hadden-gynecologist-sexual-abuse.html [https://perma.cc/8P9L-8QGV]. Although found guilty on all counts, Hadden was given a plea deal to avoid prison time. *Id.* Hadden was ultimately charged and convicted in federal court for four counts of enticement and inducement to travel to engage in illegal sex acts. Larry Neumeister, *Gynecologist Accused of Sexually Abusing Over 200 Patients is Sentenced to 20 Years in Prison*, AP News (July 25, 2023), https://apnews.com/article/gynecologist-sex-abuse-5fdbe07e8367927bb720f7b84ce8a825 [https://perma.cc/GSV3-AYE7].

some forms of unconsented-to sexual contact, should be subsumed under criminal law's definition of force. This is not a particularly radical feminist supposition; it syncopates with legal scholars' mainstream reconstructions of force[122] as well as with sexual assault cases that appear, at first blush, to be cases of "sex without consent" but are almost always cases of defendants holding down, restraining, immobilizing, or otherwise overpowering victims.[123] To put this otherwise, there are none too many cases of "no-means-no," reverse cowgirl sex.[124]

If penetration without consent constituted force under criminal law, would we still need rape law? Might criminal assault and battery laws suffice? In the late 1970s, philosopher Michel Foucault put something like that proposition forward, along with another—that victims of sexual assault should be entitled to compensation. His speculations were roundly panned. Foucault did not make the feminist case for his suggestions. He should have, and we do so now.

B. The Phenomenology of Sexual Violence

Late into a 1977 roundtable discussion on psychiatry, criminality, and state power, Michel Foucault turns to the question of sexual violence, positing—without fully endorsing—that "when one punishes rape one should be punishing physical violence and nothing but that. And to say that it is nothing more than an act of aggression: that there is no difference, in principle, between sticking one's fist into someone's face or one's penis into their sex."[125] In a moment of epistemic humility that is also probably condescending, he adds, "I'm not at all sure that women would agree with this . . . ."[126] When the women with whom he is conversing do in fact disagree with the proposition,[127] Foucault restates it twice more: "[rape] may

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[122] *See, e.g.*, Katharine K. Baker, *Why Rape Should Not (Always) Be a Crime*, 100 Minn. L. Rev. 221, 278 (2015) ("There is some convergence, then, between what I've suggested here and Professor Rubenfeld's insistence that the force requirement be part of the definition of rape. At least in the short term, perhaps the criminal law of rape should focus only or mainly on those instances in which force or threat of force is apparent.").

[123] *See* Commonwealth v. Berkowitz, 641 A.2d 1161 (Pa. 1994); *see also* Baker, *supra* note 122, at 255–56 (quoting Elizabeth L. Paul & Kristen A. Hayes, *The Casualties of Casual Sex: A Qualitative Exploration of the Phenomenology of College Students' Hookups,* 19 J. Soc. & Pers. Relationships 639, 654–55 (2002)) (providing qualitative reports of women describing as a "bad hookup experience" what sounds like criminally forceful behavior: "He just mauled me in my drunken stupor. I wanted to cry and throw up" and "He forced sex on me when I was obviously disinterested. I just wanted it to be over").

[124] *What is Reverse Cowgirl?*, WebMD (Oct. 3, 2023), https://www.webmd.com/sex/what-is-reverse-cowgirl [https://perma.cc/7FVE-6322] ("The partner receiving penetration can take a dominant role, while the penetrative partner can be more passive.").

[125] Foucault et al., *supra* note 54, at 200.

[126] *Id.*

[127] *Id.* at 202. The two women in discussion disagree with Foucault mostly out of concern that such criminal law reform—that is, "de-sexing" sexual assault into "assault"—would neglect sexually abused children. *Id.*

be regarded as an act of violence, *possibly more serious, but of the same type*, as that of punching someone in the face";[128] and then, "It isn't a matter of sexuality, it's the physical violence that would be punished, *without bringing in the fact that sexuality was involved*."[129]

There is much to unpack here but notice from the outset what Foucault is *not* assuming: that there is a phenomenological equivalence between sexual and nonsexual violence. By phenomenological equivalence, we mean that the experiences of both forms of violence, and the meanings of such experiences for victims, are identical. Foucault is not claiming, *contra* law professor Robin West's and similar misinterpretations, that "the harms of rape do not extend beyond the harms to body and safety that attend non-sexual physical assault."[130] Nor is Foucault averring that "rape should be understood to be criminal only if accompanied by serious violence."[131]

These misreads of Foucault—first that, experientially for victims, rape is no worse than nonsexual acts of physical aggression; and second, that for rape to "be" rape it must entail extreme violence—largely explains why Foucault's ruminations were adamantly rejected.[132] Yet these are not his assertions. For Foucault is not theorizing rape and its injuries, but rape law and more precisely criminal punishment for rape. These are distinctions with big differences. The more plausible reading of Foucault's comments then is that criminal law should treat rape as physical violence, a position that parallels the one Rubenfeld edges toward in his revisited theory of rape law.[133] Sticking a cigar in another's mouth, sticking a fist in someone's face, sticking a penis in someone's vagina: these are presumptively acts of violence, certainly so in the absence of invitation, agreement, or, at minimum, consent. And when Foucault posits that the criminal law ought to treat rape as violence, he articulates no assumptions about the experiences of sexual victimization versus experiences of nonsexual victimization (or rather, he implies just one assumption when he supposes that criminal law might treat rape "*more* serious[ly]" than other acts of violence, a qualification that once again contravenes the dominant misinterpretations of Foucault on the point).[134] Instead, Foucault is positing that criminal law is the wrong forum to adjudicate—and may be

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[128] *Id.* at 201 (emphasis added).

[129] *Id.* at 202 (emphasis added).

[130] Robin West, *Desperately Seeking a Moralist*, 29 Harv. J.L. & Gender 1, 30 (2006); *see also* Hengehold, *supra* note 57, at 94 (explaining that "Foucault's proposal to treat rape like 'a punch in the face' . . . grossly underestimates the psychological and physical trauma that rape imposes on women," except it makes no such estimation at all, under- or over. Foucault's is a nascent proposal for rape law, not a phenomenological account of rape).

[131] West, *supra* note 130, at 5–6 n.18.

[132] *See* Plaza, *supra* note 57, at 29; Winifred Woodhull, *Sexuality, Power, and the Question of Rape*, *in* Feminism and Foucault: Reflections on Resistance 171 (Irene Diamond & Lee Quinby eds., 1988).

[133] Rubenfeld, *Response*, *supra* note 104, at 394–98.

[134] Foucault et al., *supra* note 54, at 201 (emphasis added). For feminist criticisms of Foucault's characterization of sexual violence, see, for example, Cahill, *supra* note 57, at 43, 58; Plaza, *supra* note 57, at 30, 33; Woodhull, *supra* note 132, at 171.

invidiously contributing to—such phenomenological differences. It is the violence of rape, not the sex of it, that criminal law should target, however the victim may experience her victimization.

Let us assume, *arguendo*, that across space and time sexual violence injures victims in a qualitatively different way than nonsexual violence does, and that sexual violence is distinctly damaging not just to one's person but to one's personhood.[135] The *arguendo* may seem intuitively correct, even if for some people, girls and women included, sexual abuse may not be so different from nonsexual abuse.[136] But even in instances where sexual violence is distinctively, disproportionately, phenomenologically damaging, one could—and we will suggest feminists should—hold that criminal law is not best equipped to manage the difference sex makes to violence. For the principal way criminal law reflects such difference is through more severe penalties: in Foucault's time, that translated to longer prison sentences; in ours, that translates to longer prison sentences as well as a battery of sex offender registration, notification, residency restrictions, and other requirements, a set of regulations that Foucault prophesied and protested.[137] Nowhere does criminal law premise its punishment on the nature of the injury experienced by the victim—a deeply subjective and difficult to prove standard.

But if sexual violence violates our personhood, not just our person—indeed, if that's the special layer of violation added by *sexual* violence—might we want a remedy better calibrated to that person's injury? The plaintiff in criminal law is the state, not the victim. Critics of Foucault argued that he discounted the distinctive experiences of sexual violation for the victim, but is it not the case that providing monetary damages for such victims, a proposal with which Foucault flirts,[138] is more personhood- and victim-centered than throwing the perpetrator in prison for 10, 15, or 25 more years? (Later we will suggest that an assortment of remedies, not just monetary damages, better

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[135] *See* Jason Schnittker, *What Makes Sexual Violence Different? Comparing the Effects of Non-Sexual Violence on Psychological Distress*, 2 SSM Mental Health 1, 7 (2022) (comparing the effects of sexual and physical violence on long-term relationships to psychological distress and finding that while sexual and physical violence have similar long-term relationships to psychological distress, sexual violence differently affects survivors' self-esteem, self-criticism, and attachment style); Jessica R. Williamson, *Self-Compassion Differences in Women Who Have Experienced Sexual Assault and Nonsexual Assault Trauma*, 2 Gender & Women's Stud. 1, 2 (2019) (finding that individuals who experienced sexual assault report significantly lower levels of self-compassion compared to those experiencing nonsexual assault trauma, such as injury to self or acts of war); Rubenfeld, *Right of Privacy*, *supra* note 62, at 752–54.

[136] *See* H. E. Baber, *How Bad is Rape?* 2 Hypatia 125, 130 (1987) ("What can be worse than rape? A number of tragic scenarios come to mind: (1) A person is killed in the bloom of youth, when he has innumerable projects and plans for the future . . . (2) A person is severely maimed . . . (3) A person is destitute, deprived of food, clothing and shelter . . . .").

[137] *See* Michel Foucault, The History of Sexuality: Volume One 30–33, 145–58 (1978) [hereinafter Foucault, Volume One] (describing, in broad historical terms, how the idea of sexuality and its alleged perversions launched and legitimated state and state-adjacent authorities).

[138] Foucault et al., *supra* note 54, at 201.

meets the preferences and needs of victims of sexual assault.[139]) Foucault's regulatory scheme, had it been developed further, might be something like this: for an act of sexual violence, the state will prosecute the perpetrator for assault or battery to redress the "violence" part of sexual violence; under civil law, the victim will or could sue for damages to compensate the "sexual" part of sexual violence, the attack on personhood.

(If one believes that the specialness of sexual violation is not only about personhood but also or mainly about gender inequality—that however we may differently experience sexual violence, the core wrong of such violence is that it perpetuates gendered subordination,[140] or the "social sexing" of men and women[141]—the calculation on criminal law comes out the same. The remedies of sexual harassment and other civil rights laws against sexual violence might better realize the goals of sex equality than incarceration).[142]

To recap, here are a few constellating points we have thus far extrapolated from Foucault's "now-notorious call for the 'desexualization of rape" *law*:[143] first, his was a proto-prescription for criminal rape law, not an experiential description of rape;[144] second, criminal law would treat rape as a form of violence, which is nonsynonymous with and in fact contravenes the supposition that only "violent" rape is serious;[145] third, criminal law might not be the appropriate location to register the experiential difference between sexual and nonsexual violence;[146] and fourth, monetary damages for victims of sexual violence, along with other nonmonetary compensation for victims, evidently foregrounds the victims of such violence and their needs, rather than the state and its needs.[147] The four points converge on the larger lesson we are reading out of the roundtable (which is just a re-narration of the third point): if and when experiences of sexual violence are phenomenologically distinguishable from experiences of nonsexual violence, there may be several legal avenues to capture that difference, criminal law being the worst-equipped to do so. (The criminal justice system may underserve most or all victims of interpersonal violence, sexual or otherwise. At this juncture, we are averring that criminal law is particularly ineffective at compensating for experiences of sexual violation.)

Why, though, is Foucault so concerned about getting criminal law out of the business of regulating sex? Or rather, what political priors animate Foucault's interest in converting, from the state's point of view, sexual violence into violence *simpliciter*? And what political priors animate our

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[139] *Infra* Part II.A.7.
[140] *See* MacKinnon, *supra* note 15, at 431–36.
[141] Plaza, *supra* note 57, at 28–29, 33.
[142] *Infra* Part III.B.
[143] Hengehold, *supra* note 57, at 89. We correct Hengehold's misreading of Foucault, who was suggesting the "desexualization" of rape law, not rape.
[144] *See supra* notes 125–29 and accompanying text.
[145] *See supra* notes 130–33 and accompanying text.
[146] *See supra* notes 135–37 and accompanying text.
[147] *See supra* notes 138–39 and accompanying text.

interest in potentially doing so? Answering and beginning to answer these questions takes us to a final constellating point for revisiting Foucault's 1977 conversation,[148] on the sociolegal construction of the perpetrators and the victims of sexual violence. This point too is ultimately about the phenomenology of sexual violence and criminal law's role in constituting and conditioning experiences of victimization.

Foucault's concern is, to put it unsympathetically, "from the standpoint of the rapist."[149] More sympathetically, and as anyone who read *History of Sexuality: Vol. 1* in college can attest, Foucault is drawing our attention to the way state and state-adjacent entities—the medical establishment, psychology, psychoanalysis, forensics—"deploy" sexuality to arrogate power, to legitimate their institutional expertise, to manage and manipulate populations and persons.[150] Foucault stresses throughout his oeuvre that the medical, social, and legal construction of the "abnormal"[151] criminal, or the pervert, is a discursive "implantation,"[152] an effect of individuation and speciation ("the sodomite had been a temporary aberration; the homosexual was now a species")[153] heralded by the experts and institutions claiming to taxonomize the persons and problems they produce. It is Foucault's and his male conversationalists' underlying resistance to, as the philosopher says elsewhere, the "psychiatrization of practices and individuals"[154] that lead them to sympathize with the decision of a father not to pursue legal action against a farmworker who raped his eight-year-old daughter, causing the daughter both physical and psychical injuries.[155] Foucault and the other men of the roundtable seem apprehensive that the farmworker's apparently aberrant sexuality will invite state seizure, invasive medical intervention, psychiatric confinement, and so on.[156] There is little concern for the effects on the daughter.

This synopsis flattens Foucault's thesis; still, in the abovementioned 1977 dialogue,[157] as well as in a 1975 lecture on abnormality,[158] a 1978 radio interview on sex between adults and children,[159] and the *History of Sexuality:*

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[148] Foucault et al., *supra* note 54.

[149] Plaza, *supra* note 57, at 26.

[150] *Cf.* Foucault, Volume One, *supra* note 137, at 106–07 (chronicling a historical shift in the forms, sources, relations, and purposes of power heralded by modern discourses of sexuality).

[151] *See* Foucault, Abnormal, *supra* note 61, at 310.

[152] Foucault, Volume One, *supra* note 137, at 36.

[153] *Id.* at 43.

[154] Foucault, Abnormal, *supra* note 61, at 295.

[155] Foucault et al., *supra* note 54, at 203.

[156] *See id.* at 203–04 (presenting Foucault and his male colleagues expressing concern that criminal legal intervention over matters of sex and sexuality invites broader forms of surveillance and repression).

[157] Foucault et al., *supra* note 54, at 204.

[158] Foucault, Abnormal, *supra* note 61, at 291–93.

[159] Michel Foucault et al., *Sexual Morality and the Law*, *in* Michel Foucault: Politics, Philosophy, Culture: Interviews and Other Writings 271 (Lawrence D. Kritzman ed., 1988).

Vol. 1,[160] Foucault is oddly incurious, sometimes even callous,[161] about the victims of sexual violence, and how different discourses and relations of power might individuate and speciate them, like the "little girl of eight, raped . . . in a barn," mentioned above.[162] Foucault's persistent focus is on the sexual monster, the pedophile and the rapist, and how expert discourses like psychiatry, forensics, and law operate to constitute sex offenders and our perceptions of them.[163] But how might rape law—and everything for which rape law is serving as a metonym for Foucault; that is, state and state-adjacent apparatuses deploying sexuality to govern persons and populations—inform our perceptions and discursive constructions of victims? Reconsider the example of the father, the farmworker, and the raped child. Foucault makes a point of acknowledging that the father is a "Reichian," a supporter of the 20th century psychoanalyst and Freud protégé, Wilhelm Reich; Foucault thus implies the doctor's sympathies for unfettered sexual expression.[164] Might it be that the father's political support for unrepressed sexual freedom blinds him from seeing the assault on his daughter as assault, and not as sex?[165] Might not a de-sexed rape law, or the conversion of sexual assault to assault in criminal law, enable the father (along with the state, Foucault, and the rest of us) to reperceive the injury against his daughter? Might rape law's, and not just rape's, commingling of sex and violence function to mystify the violence *as sex*? Whereas Holly Henderson argues that "rape is an instance in which discourses of power produce the feminine body as violable and weak," we are surmising that the law of rape—segregating sexual violence from other violence—may do the same, or redouble.[166] Even if "rape *must* be read as an attack on a gendered, sexualized body," it does not follow that such an attack must or should be criminally codified in gendered, sexualized terms.[167] And whereas Catharine MacKinnon writes, seemingly in response to Foucault, that "a feminist analysis would

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[160] Foucault, Volume One, *supra* note 137, at 31–32.

[161] Foucault, Abnormal, *supra* note 61, at 292 ("There, something happened: almost rape, perhaps. Anyway . . . .").

[162] Foucault et. al., *supra* note 54, at 203. For a considered criticism of Foucault on the issues of cross-generational sexual encounters and sexual violence perpetrated against minors, see generally Linda Martín Alcoff, *Dangerous Pleasures: Foucault and the Politics of Pedophilia, in* Feminist Interpretations of Michel Foucault 99 (Susan Hekman ed., 1996); Alcoff, *supra* note 52, at 92–109.

[163] *See, e.g.*, Foucault, Volume One, *supra* note 137, at 36–37; Foucault, Abnormal, *supra* note 61, at 295–97.

[164] Foucault et al., *supra* note 54, at 203.

[165] Foucault et. al., *supra* note 54, at 203–04.

[166] Holly Henderson, *Feminism, Foucault, and Rape: A Theory and Politics of Rape Prevention*, Berkeley J. Gender L. & Just. 225, 229; *see also* Sharon Marcus, *Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention*, *in* Feminists Theorize the Political 385, 397 (Judith Butler & Joan W. Scott eds., 1992) (arguing that rape law "separates sexual parts from the person and views them as objects which have been violated"); Chloë Taylor, *Foucault, Feminism, and Sex Crimes*, 24 Hypatia 1, 13–14 (2009) (suggesting, under a Foucauldian analysis, that dominant sociolegal constructions of rape, rapists and rape victims may exacerbate the injuries of sexual violence).

[167] Henderson, *supra* note 166, at 250; *see* Taylor, *supra* note 154, at 19 ("We need to continue to take rape seriously, as . . . Foucault failed to do, but we must do so without

suggest that assault by a man's fist is not so different from assault by a penis not because both are violent but because both are sexual," we want to inquire whether reinscribing the sexual component of sexual violence into criminal law emphasizes that injury or eclipses it.[168]

In Part II, we will put forward some more ways we and others worry that rape law constitutes sexual victims and victimhood, but for now we are foregrounding the baseline fact that rape law might and probably does have this sort of productive power, the power to make and mold how we comprehend victims of sexual violence and how victims of sexual violence may come to understand themselves and their subjectivity. None of this is to say that "women would feel less victimized by rape if society would only learn to see rape as another form of assault," a vulgarized constructivism feminist philosopher Laura Hengehold, remarking on the 1977 Foucault dialogue, swiftly rejects.[169] But then Hengehold also writes, "If men are regarded as reasonable 'qua' men, it is partly because particular women are conclusively proven unreasonable through rituals such as rape and *the rape trial*."[170] And summarily: "Rape and *the rape trial* function as a privileged forum on the meaning of sexual difference for rational discourse in Western culture."[171] Our point at this juncture is not to parse either of Hengehold's claims but to advance a Foucauldian thesis, one better derived from feminists than Foucault, that it is not only sexual violence that inflects and infects the ways we come to understand our gendered selves, gendered relationality, and gendered subordination, but also *how we choose to regulate and remedy* sexual violence.

C. Feminism

For Professor Jed Rubenfeld, rape law is a riddle. For philosopher Michel Foucault, rape law deploys sexuality to arrogate authorial powers, legitimate expertise, and exercise institutional control. For many though, indexically but not exclusively girls and women, rape is neither a problem of theory nor a problem of epistemic formation, but a material, forceful, and violative invasion. We have triangulated between these thinkers to advance explicitly feminist claims: that penetration without consent is or ought to be actionable force; that rape is not serious only when it is violent but serious because it is always violent; that the violence of sexual assault might be mystified when subsumed under rape law; that rape law informs not only our perceptions of sexual predation but also our perceptions of, and perhaps even the phenomenology of, sexual victimization.

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basing rape's gravity on psychological arguments about trauma and the constitution of sexual identities.").

[168] Henderson, *supra* note 166, at 245 (quoting MacKinnon, *supra* note 13, at 178).

[169] Hengehold, *supra* note 57, at 93.

[170] *Id.* at 98 (emphasis added).

[171] *Id*. at 102 (emphasis added).

These claims are clarified, schematized, and extended in Part II through our speculating upon the costs and benefits of decommissioning criminal rape law. Recognizing that rape is neither the only nor most prevalent mode of sexual misconduct, Part III provides an array of legal avenues for redressing sexual violations, trespasses, and threats.

II. Seven Possible Benefits and Two Big Costs for Decommissioning Criminal Rape Law

> The one thing of which I am sure is that the criminal legal system does not deserve the public's collective faith. *It does not deserve the monopoly it has over our thinking about sexual violence—the unquestioned belief that rape is first and foremost a crime, that the solution will always come through law enforcement, that cops and courts will keep victims safe*. To limit survivors' avenues for support, justice, and healing to the criminal system alone would be to abandon them, utterly and completely.[172] – Alexandra Brodsky, civil rights attorney

A. Benefits

1. *Avoiding the "Raped Again" Problem—the Revictimization of Victims Through the Police Reporting Process, Medical Intake, and Cross-Examination*

When journalistic, autobiographical, academic, and media accounts refer to victims of sexual violence as "raped again,"[173] "raped all over again,"[174] or "raped twice,"[175] they are nearly always referring to the ruthlessness of cross-examination at a criminal trial. As we know, and to this day, "rape trials traditionally have stood alone among criminal proceedings as examinations not of the defendant's actions, but of the victim's conduct, lifestyle, and personal

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[172] Alexandra Brodsky, Sexual Justice: Supporting Victims, Ensuring Due Process, and Resisting the Conservative Backlash 63 (2021) (emphasis added).

[173] MPs on the Home Affairs Select Committee, *What Is It Like To Report Rape?*, House of Commons Comms., UK Parliament (April 2022), https://ukparliament.shorthandstories.com/what-is-it-like-to-report-rape/index.html?utm_source=twitter&utm_medium=tweet&utm_campaign=report# [https://perma.cc/PK2V-S7ZN] ("Those who do find the strength to carry on are rare and have usually not reported, as going through the criminal justice system felt like being raped again, raped of justice, raped of acknowledgement, raped of a day in court to hold them accountable.").

[174] Amelia Gentleman, *Prosecuting Sexual Assault: "Raped All Over Again,"* Guardian (Apr. 13, 2013), https://www.theguardian.com/society/2013/apr/13/rape-sexual-assault-frances-andrade-court [https://perma.cc/8FSY-SRQY].

[175] MacKinnon, *supra* note 16, at 651 ("Women who charge rape say they were raped twice, the second time in court. If the state is male, this is more than a figure of speech.").

history,"[176] examinations that pivot on whether the victim was drinking alcohol, if she has a prior sexual history with the defendant, her dress, her demeanor before the alleged assault, and so on.

This dilemma is only partially explained by misogyny; it is also explained structurally, by the constraints of an adversarial system of justice, by a presumption of the defendant's innocence, and by the prevalent problems of proof in typical cases of sexual violence. "The victim's story is all the prosecution has," writes Katherine Baker, and "because the victim usually must take the stand, her memory, her credibility, and her character are inevitably at issue; she is the only proof."[177] Baker does not stop there—"[t]he circumstances in which rapes occur and the sexual nature of the crime make it *likely* that she will be a bad witness."[178] Most such cases of acquaintance rape involve alcohol, memories "are likely to be fuzzy," and victims of sexual violence have trouble both recalling and describing the incidents.[179]

Whatever portion of the re-victimizing ruthlessness of rape-trial cross-examinations we wish to source to (racialized) sexism, whatever portion we wish to source to the particularities of this or that defense lawyer, and whatever portion we wish to source to "the system," the ratio is "cold comfort for victims who have to live thought it. For many survivors considering whether to report, a trial that calls their credibility and moral fiber into question is simply too bleak a prospect."[180]

While the unsettling metaphor of "raped again" is reserved for criminal rape trial cross-examinations, we know that every aspect of rape law—from police reporting to medical intake to the trial if it gets there, and it hardly ever does—is routinely, resolutely, and uniquely horrible for victims of sexual violence.

Most victims of sexual violence never report the incident to authorities. In the United States (as in the United Kingdom), "the overwhelming majority of cases reported to the police do not end in conviction."[181] Less than 20% "of rapes reported to the police result[] in an arrest," and then only "[s]lighty more than a third" of those lead to a conviction.[182] There are myriad reasons people choose not to rely on the criminal justice system when they have experienced sexual violence, but one of those reasons is the widespread knowledge of statistics like those above, or what amounts to the same: a not-wrong assumption

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[176] Brodsky, *supra* note 172, at 55 (quoting Louis Trosch).
[177] Baker, *supra* note 122, at 236.
[178] *Id.*
[179] *Id.* at 236–37.
[180] Brodksy, *supra* note 172, at 56.
[181] Melissa Morabito & April Pattavina, *Less Than One-Fifth of Reported Rapes and Sexual Assaults Lead to Arrests*, The Conversation (Mar. 5, 2020), https://theconversation.com/less-than-one-fifth-of-reported-rapes-and-sexual-assaults-lead-to-arrests-132482 [https://perma.cc/4JMK-FZY3].
[182] *Id.*

that one's case will be dropped, mishandled, trivialized, or disbelieved.[183] "Survivors hear these messages loud and clear."[184] Civil rights attorney and anti-sexual violence activist Alexandra Brodsky describes the parade of horribles that accompanies reporting one's rape to the police: "officers are particularly unlikely to believe survivors who deviate from our popular model of the 'perfect victim,'" the perfect victim being female, white, not a sex worker, not married to the perpetrator, not using drugs or alcohol, and someone who fought back against their weapon-wielding assailant.[185] Brodsky relays findings from a 2014 survey that "the majority of officers believed *most rape reports were false*."[186] People also do not report sexual and intimate violence to the police because they fear, rightfully, that the police may arrest or otherwise perpetrate violence against *them*.[187]

As for medical intake, in *Up Against a Wall: Rape Reform and the Failure of Success*, law and gender studies professor Rose Corrigan details how "insensitive and impatient health care providers can discourage rape reporting by forcing victims to endure poor and sometimes incompetent treatment."[188] From her research, she exposits that "rape care advocates continue to encounter pervasive bias, disbelief, insensitivity and lack of training among medical personnel responding to rape victims in hospital emergency rooms."[189] Victims report extremely long wait times to be seen by medical professionals, doctors, and nurses often do not know how to administer exams, and psychological care is wanting or absent.[190]

The title of this subsection oversells it. Repealing rape and sexual assault laws from the books would not make violative experiences of cross-examination, police reporting, or medical intake vanish for victims of sexual violence. If a complainant chose to pursue a criminal assault case, rather than a sexual assault case, against a perpetrator, she might nonetheless face tough, even terrible, questions from defense counsel about her character. But it is

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[183] *See* Holly Johnson, *Why Doesn't She Just Report It? Apprehensions and Contradictions for Women who Report Sexual Violence to the Police*, 29 Can. J. Women & L. 36, 37 (2017) (discussing one survey's findings on why survivors of sexual assault decide not to report incidents of sexual assault); *see also* Michael Planty et al., Bureau of Just. Stats., U.S. Dep't of Just., *Female Victims of Sexual Violence*, *1994–2010*, at 7 (2016), https://bjs.ojp.gov/content/pub/pdf/fvsv9410.pdf [https://perma.cc/G85W-QJKD] (surveying female victims of sexual violence reasons for reporting or not reporting incidents to the police).

[184] Brodsky, *supra* note 172, at 53.

[185] *Id.* at 54.

[186] *Id.* at 55.

[187] *Id.* at 58–59 (discussing a myriad of cases and studies in which victims were arrested after calling the police). *See generally* Goodmark, *supra* note 50 (arguing that criminal justice reforms designed to better address intimate partner violence have led to greater criminalization of victims of such violence).

[188] Corrigan, *supra* note 24, at 65.

[189] *Id.* at 69.

[190] *Id.* at 71–73, 132. Corrigan qualifies her criticisms by acknowledging "specialized post-rape care for victims" that have emerged through sexual assault nurse examiner (SANE) programs. *Id.* at 117. Still, SANE carries its own unanticipated risks, like dissuading victims' reporting and undermining victims' testimony. *Id.* at 153–54.

also possible that the ways police, medical examiners, and lawyers (mis)treat victims of sexual violence have become engrained in and through rape law, through legal and medical commonsense of what rape victims "look like" and how they ought to be treated. Recategorizing the crime of rape through other criminal laws, like assault and battery, and foregrounding as well civil and tort alternatives, might serve to undermine prejudicial social, legal, and medical perspectives surrounding the credibility and believability of victims of sexual violence. Consider Brodsky's statistic reported from a 2007 study that "44 percent of officers felt they would not believe a report of rape from a sex worker."[191] What if the sex worker reported to the police that she had been *assaulted* rather than *sexually assaulted*? Might police officers come to see her differently? What if the sex worker, distrusting the police, could bring a tort action against the client for assault, battery, or for violating her sexual autonomy?[192] These alternatives might be more attractive to her than pursuing a rape charge. These alternatives would, or at least could, become more legally available and socially acceptable in rape law's absence.

2. *De-spectacularizing Sexual Violence as a Moral and Legal Wrong Perpetrated not by Monsters but by Fairly Ordinary Men*

In every state of the union, rape is a registerable sex offense. Sex offender requirements vary by state, but they often include: periodically registering with local authorities; the publication of one's image, address, conviction offense, and other biographical information on the state's sex offender website; restrictions on residency; and restrictions on employment, travel, and participation in social media.[193]

In *Up Against a Wall*, Professor Corrigan levels sustained, searing criticisms of U.S. sex offender registration and community notification laws (SORCN). While she is cautious of "sweeping generalizations"[194] about the impacts of different states' SORCN regulations, she nevertheless concludes that such regulations "discourag[e] rape reporting, decreas[e] plea bargains," and lead to the "diversion of sex crimes into non-sex charges, dismissal of legitimate but tough cases, [and an] increased reluctance to convict non-stereotypical offenders."[195] SORCN laws are, in a word, antifeminist, remaking sociolegal constructions of sexual violence and perpetrators of sexual

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[191] Brodksy, *supra* note 172, at 54.

[192] *Infra* Part III.C.3; III.D.1.

[193] *See* Richard G. Wright, *Sex Offender Post-Incarceration Sanctions: Are There Any Limits?*, 34 J. Crim. & Civ. Confinement 17, 18 (2008); Jacob Hutt, *Offline: Challenging Internet and Social Media Bans for Individuals on Supervision for Sex Offenses*, 43 N.Y.U. Rev. L. & Soc. Change 663, 668–73 (2019). *But see* Packingham v. North Carolina, 137 S. Ct. 1730, 1733, 1738 (2017) (holding blanket bans against social media use by registered sex offenders unconstitutional).

[194] Corrigan, *supra* note 24, at 217.

[195] *Id.* at 232.

violence in exactly the ways feminists contested in the 1970s. Broadly speaking, SORCN laws foreground sexual violence as extraordinary, aberrant, extremely violent, and committed by strangers. But sexual violence is so often perpetrated by family members and intimate partners, and victims do not want their loved ones to end up on the state sex offender website.[196] Prosecutors are reluctant to bring charges against alleged perpetrators that would trigger SORCN requirements if the perpetrators do not fit the stereotype of the violent, stranger rapist.[197] Rapists increasingly refuse to make plea deals, fearing SORCN obligations, and more trials mean more acquittals.[198] All in all, posits Corrigan, sex offender registration and community notification regulations "contribute to the erasure of sexual assault in local communities and across the country."[199]

That is a damning assessment of sex offender laws. Might a similar assessment hold true for criminal rape law *as such*? Granted, SORCN regulatory requirements are not the same as criminal laws against sexual violence, but the extreme, sex-exceptionalizing SORCN requirements are triggered, typically, by sex-exceptional criminal laws. Might rape law, with its heightened criminal penalties, the stigma of conviction, and the attendant sociolegal connotations of what "real rape" looks like and who a real rapist is,[200] serve to efface the ubiquity, the relative ordinariness, of sexual violence?

In the early 1980s, Professor MacKinnon made this very argument about criminal rape law. By protecting, principally, virginal white girls, rape law licenses sexual violence against everyone else: wives, nonwhite women, nonvirgins, and sex workers—and that violence in turn is socially and legally legitimated *as sex*.[201] By "adjudicating the level of acceptable force starting just above the level set by what is seen as normal male sexual behavior," rape law condones "a lot of force."[202] "Rape, from women's point of view, is not prohibited; it is regulated," and regulated to serve white men's ideological, material, and sexual interests.[203] Through its codification and enforcement, rape law functions to persecute "strange (read Black)" men while condoning men's normative, everyday sexual violence against their intimate partners, friends, and family members.[204] On this read, rape law engenders what philosopher Kate Manne terms

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[196] *See generally* Catherine M. Reich et al., *Why I Didn't Report: Reasons for Not Reporting Sexual Violence as Stated on Twitter*, 31 J. Aggression, Maltreatment & Trauma 478 (2022) (finding that many study subjects were assaulted by relatives, intimate partners, friends and trusted persons, further, some subjects did not report their assault due to a desire to protect the perpetrator).

[197] *Id.* at 222.

[198] *Id.* at 218, 222–23.

[199] *Id.* at 233.

[200] *See generally* Estrich, *supra* note 76 (challenging dominant cultural and legal assumptions about rape and rapists).

[201] MacKinnon, *supra* note 16, at 648.

[202] *Id.* at 649.

[203] *Id.* at 651.

[204] *Id.* at 653.

"himpathy," "excessive sympathy sometimes shown toward male perpetrators of sexual violence" who hail from privileged classes, like otherwise socially upstanding, white fraternity brothers.[205]

When it comes to sexual violence a lot has changed for the better since the 1980s, socially and statutorily, including reforms that relaxed rape law's gravamina.[206] Still, Professor Baker cites several studies from the 2000s showing that women tend neither to label nor to understand what happened to them as "rape," even when the situation in question meets the statutory definition of criminal rape.[207] In fact "when asked whether they have ever experienced a given situation, and that situation is described with the statutory definitions of rape instead of 'rape' itself, women report a rate of victimization that is eleven times greater than when the word rape is used."[208] Some victims may not wish to see their abusers—loved ones, friends, friends of friends—as "rapists." Likewise, some victims may not want their abusers to suffer through criminal justice processes and incarceration.[209] Baker proposes too that women may retain their sense of agency, a sense of themselves as not so injured, by "resist[ing] thinking of [themselves] as having been raped."[210] Meanwhile, prosecutors, concerned about jury bias and "maintaining a good track record," remain incentivized to reach plea deals in cases of sexual violence or, in evidentiarily more challenging he-said-she-said cases, to drop the charges altogether.[211] "We associate rape so strongly with criminal law that when criminal law turns its back on victims, we assume they were not victims at all."[212]

Rape law very likely obscures, and thereby normalizes, rote sexual violence. Most men who perpetuate sexual violence do not understand themselves as "rapists" ("so many rapes involve honest men," as MacKinnon puts it[213]); most women who experience sexual violence do not see themselves as "raped." By fading rape law out of our criminal codes, we might fade "rape" and "rapist" out of our cultural lexicon, inviting concepts like assault, coercion, and harassment to fill the vacuum, concepts that better capture the wide array of sexual misconduct perpetrated not by aberrational, psychopathic monsters but by fairly ordinary men.[214]

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[205] Kate Manne, Down Girl: The Logic of Misogyny 197–98 (2017); *see also* Alcoff, *supra* note 52, at 227 ("[T]he problem [of sexual violence] may even be worsened when the most common sorts of cases – intra-community, intra-familial violations – are regularly downplayed, obscuring the actual nature of the problem and thwarting efforts (and reducing motivations) to ascertain the main causal factors.").

[206] *Supra* notes 20–31 and accompanying text.

[207] Baker, *supra* note 122, at 255–59.

[208] *Id.* at 255.

[209] *See* Reich et al., *supra* note 196, at 489.

[210] *Id.* at 257.

[211] Brodksy, *supra* note 172, at 57.

[212] *Id.* at 57–58.

[213] MacKinnon, *supra* note 13, at 183.

[214] *See* Manne, *supra* note 205, at 198–99.

3. *The Statutory Disarticulation of Rape as a Property Crime Committed against White Fathers' Daughters and White Men's Wives*

Why, asked law professor Julia Quilter in 2015,[215] are (a woman's) resistance and (her) physical injury still so stubbornly necessary, or nearly necessary, for rape to be considered "real,"[216] whether in law or in life? Quilter's answer, rooted mostly in Anglophone legal history, historiography, and doctrine, is a bit more textured than *misogyny* pure and simple, although that's not entirely wrong; the answer is more like *patriarchy and its palimpsest*. This, in turn, further presses us to ask whether rape law is worth all its modern reconstructions or if rape law is rotten from its very foundations.

Professor Quilter observes that in medieval and early modern Europe, criminal cases of *raptus* could entail unlawful seizures, the abduction of a virgin or other "property," eloping with or sexually violating another's wife, and so forth.[217] "*Raptus* in the Middle Ages covered a diversity of experience from consensual love affairs to violent rape."[218] Elemental to *raptus*, as Quilter points out, is the "transportation of property against the will of the owner, often for the purposes of an illicit marriage."[219] It was the nonconsent of the father or husband, not the girl or woman, that was an element of the crime of seizing and transporting goods-not-one's-own. From the late 1600s through the famous legal commentaries of Coke, Hale, and Blackstone, *rape* emerges as a standalone crime of "sexual violation," but, as Quilter granularly documents, that crime remains infused with proprietary protections of *raptus* and *ravishment*.[220] Summarily, the "'requirements' such as evidence of 'movement' or transportation (from the old *rapuit*) remained relevant in rape cases but came to be re-written as the need to prove resistance and physical injury."[221] "The *force* necessary to 'carry away' a woman . . . was redeployed with respect to the overpowering of the woman's will," his overpowering evidenced through her resistance and her injury.[222]

Quilter's intervention is devastating. By hybridizing property crimes and sexual violations, English law converted the "connotation of abduction or the movement of property that was present in the older laws" onto the woman herself, so to speak, such that her resistance and injury came to demonstrate unlawful seizure.[223] Despite, in Anglo-American jurisdictions, the "formal abandonment"[224] of resistance requirements and corroborating

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[215] Julia Quilter, *From Raptus to Rape: A History of the 'Requirements' of Resistance and Injury*, 2 Law & Hist. 89 (2015).
[216] *Id.* at 89–90 (citing Estrich, *supra* note 76).
[217] *Id.* at 95–97, 99–103.
[218] *Id.* at 97, 101.
[219] *Id.* at 101.
[220] *Id.* at 104–05.
[221] *Id.* at 105.
[222] *Id.* at 111.
[223] *Id.* at 107.
[224] *Id.* at 109.

evidence (namely physical injuries) in criminal rape law, "the long and *sedimented* history" of those requirements infect our stubbornly dominant conceptions of what rape *is*.[225] Although Quilter is careful to hedge a causal claim,[226] she makes a compelling case that the palimpsestic presence of patriarchal property rights embedded in rape law terminally confounds modern reforms. If we are to transform "knowledges and cultural lineages" as well as "attitudes and behaviours that validate and animate legal [rape] 'requirements,'" then perhaps we ought to abandon rape law in favor of legal alternatives not so etymologically and historically steeped in the protection of the patriarch's property.[227]

In the United States, rape law's genealogy in protecting patriarchal property is overlayed by the country's history of enslavement, white supremacy, and, later, de jure and de facto racial segregation. In the antebellum South, summarizes historian Emily Owens, "rape law was defined . . . in racial terms: in every slaveholding state, violent sex was defined as a crime only when its victim was a white woman or girl."[228] The "whitening [of] rape law" was accomplished through multiple processes, not only through the frequent statutory specification of rape victims as white and female, but also by the harsher penalties set for Black men perpetrators and the lesser penalties set when the victim was an enslaved or freed Black girl or woman.[229] Owens, like scholars Crystal Feimster, Estelle Freedman, and Saidiya Hartman, chronicles "whiteness as the normative province of rape law," by which rape law functioned to terrorize Black men, disqualify Black women's sexual violations as legally cognizable (with a few exceptions), and buttress slaveholding white men's proprietary claims on, and sexual access to, girls and women.[230]

The gendered, racial, and proprietary dimensions of U.S. rape law are dynamic, shapeshifting through time, region, jurisdiction, and the particulars of any given criminal case. Yet rape law's stasis seems undeniable: its roots in patriarchal property protection (proscribing the seizure of not-your-own [white] daughter or wife) admixed with its explicit racial order function from colonial America to the failures of Reconstruction, infect and inflect our contemporary perceptions of who is "rapable," who is or can be a rapist, and

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[225] *Id.* at 112.
[226] *Id.* at 111.
[227] *Id.* at 112.
[228] Emily Owens, Consent in the Presence of Force: Sexual Violence and Black Women's Survival in Antebellum New Orleans 61 (2023).
[229] *Id.* at 66.
[230] *Id.* at 66. *See generally* Feimster, *supra* note 7 (expositing the racialization of postbellum rape law and sexual violence through women's political activism); Freedman, *supra* note 2 (documenting how rape and rape law have historically functioned to buttress white men's social and political power); Saidiya Hartman, Scenes of Subjection: Terror, Slavery, and Self-Making in Nineteenth-Century America 79–114 (1997) (surveying and analyzing an array of social, economic, legal, literary, and aesthetic practices that perpetuate racial subjugation).

what counts as legally remediable "rape."[231] Given the persistently, painfully low rates of criminal rape convictions in Anglo-American jurisdictions,[232] and given enduring racialized asymmetries regarding the victim's credibility and the perpetrator's culpability,[233] we are once again brought to the conclusion that rape law's failures are not failures of execution but of design.

4. *The Discursive Disarticulation of Rape as a Crime-Worse-than-Death, a Cultural Maxim that May Prescribe the Injury it Purports to Describe*

This is the most controversial, least falsifiable possible benefit of decommissioning rape law: if rape law and its attendant criminal justice processes exacerbate victims' experience of harm, injury, and wounded subjectivity, then doing away with rape law might lessen the phenomenological sense of violation. This possible benefit circles us back to Foucault's objections to criminal law's surveillance and signification of sexuality, and no legal theorist has pressed the Foucauldian critique deeper than Professor Janet Halley.[234] We turn to a snippet of Halley's work and Professor Robin West's rebuttal of it to qualify our position that decommissioning rape law might help discursively disarticulate rape as a crime worse than death.

In much of her scholarship, Professor Halley is concerned that feminism, especially once it "walks the halls of power" in the form of "governance feminism," disavows its collateral, its negative externalities—in short, its costs.[235] One such cost, she surmises, is that feminism's central focus on women's sexual harm and pain "may . . . unintentionally, intensify it."[236] She conveys the argument via a hypothetical scenario:

> Imagine: the little girl stumbles, falls, scrapes her knee. She is silent, still, composed, waiting for the kaleidoscope of dizziness, surprise and pain to subside. Up rush the adults, ululating in sympathy,

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[231] Marcus, *supra* note 166, at 386; *see also* Freedman, *supra* note 2, at 73–88 (charting Black women's postbellum political campaigns to be legally recognized as sexually violable).

[232] *See* Kathleen Daly & Brigitte Bouhours, *Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries*, 39 Crime & Just. 539, 565 (2010).

[233] *See* Patricia S. Wallace et al., *Framed as (Un)Victims of Sexual Violence: An Intersectional Model*, 19 Feminist Criminology 243, 245–46, 248 (2024); Samuel R. Gross et al., Nat'l Registry of Exonerations, Race and Wrongful Convictions in the United States 2022, at 18–26 (2022), https://www.law.umich.edu/special/exoneration/Documents/Race%20Report%20Preview.pdf [https://perma.cc/Y4HN-C5EW].

[234] *See* Janet Halley, *The Politics of Injury: A Review of Robin West's* Caring for Justice, 1 Unbound 65, 77–84 (2005) [hereinafter Halley, *Injury*]; Janet Halley, Split Decisions: How and Why to Take a Break from Feminism 345–47 (2006) [hereinafter Halley, Split Decisions]; Janet Halley, *Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict*, 9 Melb. J. Int'l L. 78 (2008) [hereinafter Halley, *Rape in Berlin*].

[235] Halley, Split Decisions, *supra* note 234, at 20–21.

[236] Halley, *Injury*, *supra* note 234, at 83.

> urgently concerned-has she broken her leg? Is she bleeding? How did it happen? We must not let it happen again! Poor thing. The little girl's silence breaks-for the first time afraid, she cries.[237]

In the analogy, the little girl stands in for girls or women who suffer sexual violence. The girl's scrape is the rape; the adults' concern is feminism, specifically feminist discourse that amplifies injury, disempowering women victims, possibly even "objectif[ying] women" and "eras[ing] their agency."[238] This is Foucauldian discourse analysis in overdrive, hanging on feminism's hook if not all of women's sense of violation from assaultive sex something close to it.

Professor West's takedown of Halley's hypothetical is persuasive and instructive.[239] Halley is asking her readers to believe, explains West, that "there is no serious harm attendant to rape," that the seriousness of the harm is discursive, produced and proliferated by feminists foremost.[240] And whereas the made-up girl "stumbles" by her own misstep, rape victims, reminds West, are violated by bad actors.[241] Moreover, to express concern that a child is hurt, like expressing concern that victims of sexual violence might be harmed, is not *ipso facto* to "smother" or "infantilize," nor is it necessarily to "overstate" or create the very injury that motors the inquiry.[242] Halley, indicts West, tailors the little-girl-stumbling-in-the-playground hypothetical to assert a preordained claim rather than argue for it, namely, that feminism aggravates if not outright invents sexual harms against women.[243]

We agree with feminist historian Joan Wallach Scott's famous argument that discourse contextualizes and conditions our experiences, including our experiences of violation.[244] It seems reasonable to suppose that discourses centering harm and violation might, in certain places and at certain times, contribute to people's heightened sense of their injuries. Political theorist Wendy Brown asks, "does a definition of women *as* sexual subordinates, and the encoding of this definition in law, work to liberate women from sexual subordination, or does it, paradoxically, legally reinscribe femaleness as sexual violability?"[245] Literary scholar Sharon Marcus makes a similar point about rape discourse more broadly. For Marcus, dominant social scripts surrounding rape—that men wield uncontrollable power to violate women, that women are too feeble and fragile to fight back against their would-be rapists, that

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[237] *Id.*
[238] *Id.*
[239] Robin West, *Desperately Seeking a Moralist*, 29 Harv. J.L. & Gender 1, 30–46 (2006).
[240] *Id.* at 33.
[241] *Id.* at 34–35.
[242] *Id.* at 15, 35.
[243] *Id*. at 33–35.
[244] Joan W. Scott, *The Evidence of Experience*, 17 Critical Inquiry 773, 786–87 (1991).
[245] Wendy Brown, *Freedom's Silences*, *in* Edgework: Critical Essays on Knowledge and Politics 83, 90 (2005).

women's sexual violation is a ruinous harm worse than death—co-constitute the felt violation of rape.[246]

It is one matter to track and challenge the discursive life of injury; it is quite another, and unsupportable, to source injury summarily to discourse.[247] We make no such comprehensive claim here. Unlike Halley, our target is not feminist discourse around rape and sexual harms, but rape law as itself a discursive practice scaffolding rape.[248] In Marcus's idiom, rape law is part of the social scripting of rape.[249] This does not mean, facilely, that *rape law* is responsible for all the experiential, physical, and psychical harms we otherwise ascribe to *rape*. But rape law does segregate sexual violence from all other kinds of violence. Rape law's severe sentencing scheme, in conjunction with sex offender registration and notification requirements, in conjunction too with separate police sex crime divisions, signal a singular awfulness to sexual violence echoed in cultural mainstays like *Law & Order: Special Victims Unit*: "In the criminal justice system, sexually based offenses are considered especially heinous."[250]

Are sex crimes always and everywhere more heinous than nonsexual crimes? And is it necessarily victim-blaming or victim-erasing to stipulate that *some* quotient of that heinousness could be attributable to the criminal justice system's very proclamation of heinousness? U.S. rape law, as we have chronicled, is steeped in patriarchy, and in white virginity as a prized, spoilable commodity. Despite modern rape law reforms, the crime of rape still connotes, unlike other crimes of violence, the ruination of a possession—*she is somebody's daughter*. To crib from Marcus again, in rape law's imaginary there are "agents of violence" (men) and "subjects of fear" (women).[251] The criminal law of rape, we are supposing, may function to foment "feminine fear" of deep violation and profound-if-proprietary woundedness.[252] By contrast, criminal laws of assault and battery, or civil laws against sexual harassment and other forms of sex discrimination, do not carry with them the same discursive baggage—propounding the heinousness

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[246] Marcus, *supra* note 166, at 391–92.

[247] *See* Cossman, *supra* note 49, at 181 ("The critique of victim feminism, even at its most scholarly (Brown, Halley, and others), runs this risk of overgeneralizing, in a kind of baby-with-the-bathwater maneuver."); Alcoff, *supra* note 52, at 74 ("[E]xperiences of sexual violations are never just 'in the head' . . . . The fact of variable interpretations and even of a historically specific social etiology of meaningful experience does not contradict the fact that the survivors retain best access to the contentful nature of that which they are processing.").

[248] *See generally* Nicola Gavey, Just Sex? The Cultural Scaffolding of Rape (2005) (expositing cultural and communicative practices, social expectations, and institutional norms that cultivate or legitimate coercive sex).

[249] Marcus, *supra* note 166, at 390–91.

[250] *Law & Order: Special Victims Unit: Payback*, at 0:00–0:07 (NBC television broadcast Sept. 20, 1999).

[251] Marcus, *supra* note 166, at 393.

[252] *Id.* at 394.

of deflowerment, now converted into the heinousness of specifically sexual violation—as does rape law.

5. *The Conceptual and Phenomenological Separation of Forced Sex from Consensual Sex*

> The law says, it says
> you can't do this to a woman.
> Can't hold her down, ignore her, keep her trapped while you
> push –
> While you push yourself inside of her.
> You can't rape,
> And then pretend it was consensual.
> Can you!?[253]

This is the question that the protagonist Tessa Ensler, a smart and successful barrister heretofore at the top of her game, rhetorically asks herself, and rhetorically asks her rapist, her audience, and "the law," in Suzie Miller's stage play, *Prima Facie*.[254] The answer, it turns out, is *yes, yes you can*. The jury finds the defendant, Tessa's colleague Julian, not guilty, despite what we the audience have witnessed several scenes prior: Julian demanding that Tessa "just lie there and let me make love to you" as she says "no" and tries to push him off her, as she kicks and fails to wriggle her way out from under him, Julian's hand covering Tessa's mouth so she cannot scream.[255]

Both barristers working out of the same office, Julian and Tessa were hooking up prior to the assault.[256] On the night in question, they go out for dinner, get drunk, and have sex back at Tessa's apartment. Tessa is drunker than Julian. After she runs out to the bathroom to vomit, Julian carries Tessa back to the bedroom and assaults her.

Unsurprisingly, Tessa's sexual history with Julian undermines her credibility in court, as does her drinking.[257] Tessa serves as a metonym for the great majority of criminal rape cases that involve an acquaintance-perpetrator and alcohol consumption, factors that make convictions hard to achieve—factors that sow doubt, even the reasonable kind.[258]

What if, though, Julian had been prosecuted for *assault* instead of for *rape*? Certainly, problems of proof, believability, and jury bias would not disappear. However, consider how the questions that Tessa anticipates being asked by Julian's defense lawyer sound under the weight of an *assault* charge rather than a *sexual assault* charge: "The restaurant bill indicates there was a

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[253] Miller, *supra* note 53, at 68.
[254] *Id.*
[255] *Id.* at 47–48.
[256] *Id.* at 31.
[257] *Id.* at 89.
[258] *Id.* at 34 ("If a story has holes, / then point them out"); *see also* Baker, *supra* note 122, at 236–37.

lot of sake drunk by you both, witnesses say you were giggling, yes?" And: "you took off most of your clothes, is that right?" And: "did you invite him to your home, to your bed?"[259]

This line of questioning seems inane—and might very well sustain a relevance objection—once the giggling, friendly man muzzles his date, demands her obedience, and forces his penis into her. His conduct now bears no resemblance to his conduct then, or rather no resemblance phenomenologically to the victim. Might it be that the crime of rape, more so than rape itself, draws the continuum between sex and sexual violence? And that continuum, partially constructed by criminal law, grants a baseline legitimacy, or a presumption of reasonability, to questions regarding Tessa's conduct, her drunkenness, and her feelings of scorn or envy.[260]

"He is the one who DID this to me!" Tessa apostrophizes onstage.[261] Unlike the sex the couple had collaboratively, Jules' behavior in this instance was one-sided, unilateral, and assaultive. With apologies to Catharine MacKinnon, it is not at all difficult for Tessa to "tel[l] the difference" between rape and sex, nor does Tessa experience the "rape in intercourse" in the earlier, enjoyable sexual encounters she shares with Jules.[262] To the contrary, Tessa laments that, because of his assault on her, she has "lost . . . the sense of joy in [her] sexuality."[263] Julian's attack is an attack on her sexuality, not an imbrication of it, an attack disguised by its envelopment in *sex* law. Under rape law's lights, the issue for the prosecutor, the defense lawyer, and the jury is whether *sex* at time two was nonconsensual if *sex* at time one was consensual. At both times—but only under rape law's lights—*sex happened.* But under assault law's lights, *there was no sex at time two; there was an assault*, an assault more recognizable as such if severed, conceptually and legally, from sex.

6. *The Increased Probability that Boys, Men, and Other Nonwomen Victims of Sexual Violence will Seek Remedy through Civil Rights Law, Tort Law, and Other Arenas of Criminal Law*

"Approximately 90 to 95% of all male sexual violations are not reported."[264] According to various studies, men do not report sexual violations for some of the same reasons women do not: "issues of stigma, shame, guilt, embarrassment, fear of ridicule or not being believed, concern over

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[259] *Id.* at 49.
[260] *Id.* at 88–89.
[261] *Id.* at 69.
[262] MacKinnon, *supra* note 16, at 646.
[263] Miller, *supra* note 53, at 91; *see also* Alcoff, *supra* note 52, at 145 ("We can then pinpoint the harm of sexual violation as an inhibiting of the very possibility of sexual self-making."). While we reject, in the Introduction, the notion of a pinpointed, common-denominator harm across all sexual violations, we appreciate Alcoff's supposition that sexual assault corrodes the making of "our sexual selves." *Id.* at 144.
[264] John C. Thomas & Jonathan Kopel, *Male Victims of Sexual Assault: A Review of the Literature*, 13 Behav. Sci. 304, 308 (2023).

confidentiality."[265] However, men may also not report sexual violence for fear of being emasculated and being perceived as gay or for fear of being perceived as fragile and feminine—rape is "supposed" to happen to girls and women.[266] As one meta-study suggests, "overall, it is assumed that men would be able to defend themselves if they did not want the sexual activity to occur, and they would find the experience pleasurable. This may lead to underreporting of male sexual victimization."[267]

In *I May Destroy You*, Kwame, the Black gay best friend of the protagonist of the show, arranges a sexual encounter via Grindr for him and his date at another man's apartment.[268] The meetup turns out not to be the date's vibe, so he departs, leaving Kwame and the apartment owner to enjoy anal sex together.[269] Then things go south.[270] The apartment owner, larger and more muscular than Kwame, slams the apartment door shut as Kwame attempts to leave, pins Kwame down to the bed and, against Kwame's verbal and direct protestations ("Can you just get off me? Get the fuck off me!"), dry humps him until he, the apartment owner, ejaculates. [271] Kwame looks pained, trapped, and humiliated—it is an unsettling scene to watch.

In the following episode, Kwame, uncertain how to proceed, enters the words "is non-consensual humping . . ." into an online search, wondering how to finish the phrase.[272] He eventually reports the incident to the police and nothing good comes of it.[273] The intake officer—Black, male, inoffensive, not particularly homophobic—is befuddled by Kwame's case.[274] The officer explains that the presence of the perpetrator's semen will not be inculpating, since he and Kwame had just had consensual sex; moreover, Kwame is not sure if the man penetrated him during the attack, leaving both Kwame and the officer questioning what kind of attack this was, and if it was an attack at all.[275] Hovering over these ambiguities is the fact that the central, centering sexual violence of *I May Destroy You* is a man's drugging and then orally raping the show's main character, Arabella.[276] Kwame's and the officer's difficulty in articulating Kwame's injury, the show implies, may in part be sourced to its nonparadigmatic coordinates. If a male acquaintance drugging and sexually assaulting a woman is the index for sexual violence, what do we call a man dry humping another man against his will? Before Kwame decides to drop his report and leave the police station, the camera zooms in on a sign taped to

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[265] *Id.* at 309.
[266] *Id.* at 309–10.
[267] Joke Depraetere et al., *Big Boys Don't Cry: A Critical Interpretive Synthesis of Male Sexual Victimization*, 21 Trauma, Violence, & Abuse 991, 1002 (2020).
[268] *I May Destroy You: That Was Fun*, at 14:45–15:53 (HBO June 16, 2020).
[269] *Id.* at 22:45–24:30.
[270] *Id.* at 27:45–29:30.
[271] *Id.*
[272] *I May Destroy You: . . . It Just Came Up*, at 9:17–9:29 (HBO June 22, 2020).
[273] *Id.*
[274] *Id.* at 18:45–21:25.
[275] *Id.*
[276] *I May Destroy You*, *supra* note 53.

the very-wide-open door of the police interview room: "ATTENTION: THIS DOOR MUST BE SHUT AT ALL TIMES YOU'RE PUTTING PEOPLE IN DANGER BY HAVING IT OPEN."[277] Kwame—Black, gay, male, and sexually active—is all but incomprehensible as a violable victim of sexual violence, not only to state authorities but also to himself.

If *I May Destroy You* telegraphs its point about the incomprehensibility of men as violable to sexual violence, and about the shades of violation occluded by a social (and legal[278]) fixation on penile penetration, we want to relay an adjacent, rather plain observation: Kwame was held captive and then assaulted by the apartment owner. Under U.K. criminal law, the apartment owner has not committed *rape*;[279] but he has committed the common law offense of *common assault*, which does not require bodily harm to the victim as an element of the crime.[280] As a counterfactual, imagine the apartment owner did not ejaculate or derive any sexual gratification whatsoever from the act—imagine instead that he had simply held Kwame down, pulsed his full body weight repeatedly upon him, and refused to get up despite Kwame's adamant insistence that he do so. Our counterfactual is to dramatize that what should be a clear case of assault and false imprisonment is mystified by the admixture of *sex*. There is a paradox here: Kwame's prior consensual sex with the perpetrator, combined with the cultural paradigm of sexual assault as gendered and penetrative, undermines rendering the conduct in question as sexual violence; yet at the very same time, the sexual nature of the conduct in question primes us—the show's viewers, characters, and institutions—to filter the conduct in question *exclusively* as (but then falling short of modal) sexual violence. The paradox, sex exceptionalist and Sisyphean, eclipses what is right in front of us: a man holds another man down by force, captive and against his will. If rape law were decommissioned, might it be easier for boys and men to say—and even to think—*I was attacked*? And if rape law were decommissioned, might such a plea be more readily heard—and then more readily believed—by state actors?

How might decommissioning rape law benefit other nonwomen victims of sexual violence, namely nonbinary and trans persons? The suggestion here, like all the benefits of decommission estimated throughout this Part, is speculative but we hope sensible.

In a 2023 California study, nonbinary and trans people experienced physical assault, sexual assault, sexual harassment, and intimate partner

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[277] *I May Destroy You: . . . It Just Came Up*, *supra* note 272, at 9:17–9:29.

[278] In the U.K., penetration with a penis is a necessary element of the crime of "rape," which is the most serious sex crime in the Sexual Offences Act 2003. Sexual Offences Act 2003, c. 42, § 1 (Eng. & Wales). Lesser sexual offenses do not require penile penetration. *Id.* § 2.

[279] *See id.* § 2.

[280] Crown Prosecution Service, Offences against the Person, Incorporating the Charging Standard (2022) (UK), https://www.cps.gov.uk/legal-guidance/offences-against-person-incorporating-charging-standard [https://perma.cc/3U2H-24GL].

violence at much higher rates than their cis peers.[281] Like ciswomen and cismen, most nonbinary and trans people do not formally report their experiences of sexual violence.[282] Sexual violence victims do not report to the police and other authorities for the reasons outlined above and others: they lack faith in the legal system, they anticipate that reporting will make matters worse for them and their abusive partners, and so forth.[283] Black women and members of the LGBTQ+ community in particular are reluctant to report crimes due to impressions of over-policing and police misconduct.[284] As reported by the National Sexual Violence Resource Center, "57% of trans and non-binary people said they feel uncomfortable asking the police for help," and "58% who interacted who interacted with law enforcement in the past year experienced mistreatment, such as verbal harassment, repeated misgenderings, physical assault, or sexual assault."[285] These concerns might not be much ameliorated by substituting the crime of sexual assault with the crime of assault. Crimes must be reported to be prosecuted, whatever the crime. On the other hand, if *rape* continues to connote binary, "wall-to-wall" gendered domination-and-subordination,[286] and if rape law is societally perceived to rectify sexual violence in binary, gendered, domination-and-subordination terms,[287] might it be more difficult for trans and nonbinary persons to see themselves as protectable under rape law's reach? If the conduct in question was reperceived by nonbinary and trans victims (and boys and men, and girls and women . . .), and likewise recodified as, assault or battery, coercion, a civil violation of the victim's right to participate at their school or workplace, and so on, then delaminating said conduct from the crime of *rape* might embolden nonbinary and trans persons to come forward and pursue action against their violation. It might even be possible that if, say, a nonbinary person, trans person, or sex worker reported their *assault* to the police, rather than their *sexual assault*, they might not be so readily sexualized by the police themselves.[288] Such

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[281] *See* Anita Raj et al., California Violence Experiences Survey (CalVEX) 5 (2023), https://geh.ucsd.edu/wp-content/uploads/2024/03/2023_calvex_report_03.04.24-compressed.pdf [https://perma.cc/RJH7-P5XP].

[282] *See id.* at 6.

[283] Catherine M. Reich et al., *Why I Didn't Report: Reasons for Not Reporting Sexual Violence as Stated on Twitter*, 31 J. Aggression, Maltreatment & Trauma 478, 483 (2022).

[284] Raj et al., *supra* note 281, at 37.

[285] Nat'l Sexual Violence Res. Ctr, Sexual Violence & Transgender/Non-Binary Communities (2023), https://www.nsvrc.org/sites/default/files/publications/2019-02/Transgender_infographic_508_0.pdf [https://perma.cc/8DWN-8G8X].

[286] Halley, *Injury*, *supra* note 234, at 69 (referencing Catharine MacKinnon's view of "(hetero)sexuality as a wall-to-wall domain of male superordination").

[287] *See* Depraetere et al., *supra* note 267, at 1006 (finding that "societal ideals" surrounding "gender roles, sexual scripts, and rape myths" may contribute to boys' and men's underreporting of sexual violence).

[288] *Cf.* Brodsky, *supra* note 172, at 54 (noting that police officers often do not believe victims who deviate from the "perfect victims" model); Nat'l Sexual Violence Res. Ctr., *supra* note 285 ("57% of trans and non-binary people said they feel uncomfortable asking the police for help. 58% who interacted with law enforcement in the past year

victims might then appear to the police as rights-bearing citizens whose rights to bodily integrity have been violated, rather than as objects of violence—ruined, disreputable, and rapable.

7. *Better Meeting the Needs and Preferences of Victims of Sexual Violence*

What "justice" looks like, or would look like, for victims of sexual violence has no single answer—different people with different experiences of sexual violence want different things. Yet some recent studies asking versions of that question reflect patterned answers: accountability, recognition of injury (victims want to be believed), a forum to voice one's grievance, social and financial support, and "consequences" for the perpetrator, where "consequences" tends to mean admission of guilt, public exposure, or mandated counseling, and less frequently "conventional punishment and imprisonment."[289]

In her doctoral dissertation research, Haley Clark found that while some of her "victim/survivors"[290] of sexual violence interviewees sought punishment of the perpetrator, "more than half rejected the notion of retribution," seeking instead recognition, contrition, and counseling services for their abuser.[291] Some did not wish to report their relatives (uncles and fathers, usually) to authorities and thus risk sending them to prison.[292] For those of Clark's interviewees who did wish to see their perpetrator punished, they sought in such punishment the public avowal of wrongdoing, or "deterrence from future offending," rather than comeuppance pure and simple.[293]

Restorative justice is perhaps the most well-known alternative to the criminal justice system for remedying acts of violence, a multipronged

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experienced mistreatment, such as verbal harassment, repeated misgendering, physical assault, or sexual assault.").

[289] Clare McGlynn & Nicole Westmarland, *Kaleidoscopic Justice: Sexual Violence and Victim-Survivors' Perceptions of Justice*, 28 Soc. & Leg. Stud. 179, 186–89 (2019); *see also* Cossman, *supra* note 49, at 173–75 (cataloguing studies that demonstrate the noncarceral remedy preferences of victims of sexual violence); Shirley Jülich & Fiona Landon, *Achieving Justice Outcomes: Participants of Project Restore's Restorative Processes*, *in* Restorative Responses to Sexual Violence: Legal, Social, and Therapeutic Directions 192, 200–203 (Estelle Zinsstag & Marie Keenan eds., 2020) (finding that alternative justice solutions can facilitate important aspects of justice for victims of sexual violence like accountability, voice, and validation without incarceration).

[290] Readers will note that we have mostly opted to use the term "victim" and its cognates in reference to complainants/witnesses/plaintiffs in cases of sexual violence rather than "survivor" and its cognates. We acknowledge the feminist political payoffs for the idiom of survivorship, but the sex de-exceptionalizing normative undercurrent of our Article propels us to the more universal idiom of victimhood. For a thoughtful account of the different terms and their polyvalent usage, see Charnell Covert, *Survivor, Victim, Victim-Survivor*, FORCE, https://upsettingrapeculture.com/survivor-victim/ [https://perma.cc/JK2B-E37D].

[291] Haley Catherine Clark, A Fair Way to Go: Criminal Justice for Victim/Survivors of Sexual Assault 94 (Apr. 2011) (Ph.D. dissertation, University of Melbourne).

[292] *Id*. at 91.

[293] *Id.* at 95.

project rooted in Indigenous activism from 1980s New Zealand.[294] "Unlike the retributive criminal justice system," the aim of restorative justice "is not punishment but restoration, rehabilitation, and the healthy integration of all parties back into the community."[295] In New Zealand, academics and activists developed Project Restore in 2005, a restorative justice-based approach to sexual violence that operates from "the understanding that victim-survivors of sexual harm were typically re-traumatised and re-victimised within the legal system."[296] Project Restore has blossomed over a generation, its staff working closely with New Zealand's Ministry of Justice and Ministry of Corrections to facilitate restorative justice resolutions to instances of "sexual harm."[297] Powerfully, and reminding us of the prevalence of sexual abuse within intimate and family relations, the organization's leaders write:

> Unlike generic restorative justice models, Project Restore does not work to restore relationships but rather to transform relationships. The aim of restorative justice, typically, is to restore relationships that have been harmed. In the case of abusive relationships, there has been an imbalance of power enabling the abuse. The aim of Project Restore is to transform the relationship so that the victim-survivor can experience a sense of justice and co-exist with the person responsible in any shared community.[298]

The core mission of Project Restore, then, achieved through the mediation work of "facilitators," "survivor specialists," and "accountability specialists," is to "restore a sense of humanity, justice, and dignity" to victims of sexual violence.[299] Such a project entails strengthening, sometimes by reconstituting, community and family relations, rather than locking abusers—most often lovers, parents, siblings, and neighbors—behind bars.

In the United States, INCITE! Women and Trans People of Color Against Violence, a network of feminists of color, began organizing in the early 2000s to "end state violence and violence in our homes and communities."[300] INCITE! hosted an inaugural conference for activists of color to "develop analyses and strategies around ending violence that place women of color at the center."[301] The conference and its subsequent organizing sparked a radical reimagining of responses to sexual violence, one

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[294] Mimi E. Kim, *From Carceral Feminism to Transformative Justice: Women-of-Color Feminism and Alternatives to Incarceration*, 27 J. Ethnic & Cultural Diversity in Soc. Work 219, 225 (2018).

[295] *Id*. at 226.

[296] Shirley Jülich et al., *Restorative Justice Following Sexual Harm*, Eur. F. for Restorative Just. (Nov. 17, 2023), https://www.euforumrj.org/en/restorative-justice-following-sexual-harm [https://perma.cc/EQ2L-NLHJ].

[297] *Id.*

[298] *Id.*

[299] *Who are we?*, Project Restore NZ, https://www.projectrestore.nz/about-us/ [https://perma.cc/838L-TQ7N].

[300] *About*, INCITE!, https://incite-national.org/history [https://perma.cc/N3M5-6RAV].

[301] *Id.*

informed by criticisms of criminalization, principles of prison abolition, and restorative and transformative justice principles.[302]

People who have experienced sexual violence emphasize not only restoration but also prevention as justice.[303] "I think the only way you could get justice is for it not to happen really, that's the only justice that I can see in a broad sense," as one victim/survivor put it.[304] Prevention strategies, from comprehensive sex education to public awareness campaigns to public health interventions cultivate a safer world, freer from sexual violence.[305]

Whatever victims of sexual violence want in order to feel whole again—safe, respected, dignified, agentic, sexually autonomous—we have come across no survey reporting that what victims want, in any kind of aggregate, is for perpetrators to be incarcerated for twenty-five years to life, or for them to endure other forms of exceptional and extraordinary punishment, like surgical castration[306] (see our second possible benefit of decommissioning rape law).[307] These sorts of hyper-punitive criminal justice responses to sexual violence are ineffective, even likely counterproductive.[308]

One might respond that criminal justice remedies never meet the preferences of complainants since they, after all, are ultimately witnesses for the state's case against the defendant. But if a central concern about decommissioning rape law is the potential dismissal or disfiguration of harm to the victim, then the incongruence between what victims of sexual violence want and what the criminal law of sexual violence delivers is morally significant.

Excising rape from criminal law will not magically manifest accountability, safety, and support. However, it seems reasonable to suppose that eliminating rape law might serve to further validate restorative justice projects that aim to provide victims of sexual violence what they want and need. Subsequently, eliminating rape law could incentivize victims to seek out such programs insofar as they would become increasingly mainstream and normative

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[302] Kim, *supra* note 294, at 225; *see also* Cossman, *supra* note 49, at 168 (highlighting Black, feminist, and abolitionist activists' and scholars' opposition to incarceration as a solution for sexual violence).

[303] McGlynn & Westmarland, *supra* note 289, at 193–94; *see also* Clark, *supra* note 291, at 126–29 (quoting study participants who prioritized preventing future sexual violence as central to their sense of justice).

[304] McGlynn & Westmarland, *supra* note 289, at 193, (quoting research participant Emma).

[305] *See generally* Jennifer S. Hirsch & Shamus Khan, Sexual Citizens: A Landmark Study of Sex, Power, and Assault on Campus (2020) (advocating institutional, educational, and architectural reforms to reduce prevalence of sexual violence and unwanted sex).

[306] Jaclyn Diaz, *What to Know About Louisiana's New Surgical Castration Law*, NPR (July 1, 2024), https://www.npr.org/2024/07/01/nx-s1-5020686/louisiana-new-surgical-castration-law [https://perma.cc/CT4E-WT9D].

[307] *Supra* Part II.A.2.

[308] *See generally* Emily Horowitz, From Rage to Reason: Why We Need Sex Crime Laws Based on Facts, Not Fear 169 (2023) (documenting the pervasive social, legal and physical harms faced by persons classified as sex offenders despite U.S. sex offender regulatory regimes being "terrible, useless, and mean-spirited").

in rape law's absence. Excising rape law may also encourage a societal understanding of sexual violence as a public health problem, one requiring sustained and multilateral prevention efforts—and prevention is meaningful as a form of justice for victims of sexual violence. "We can't punish our way out of this problem," observes sociologist Shamus Khan.[309]

In the *Exposed* podcast, Marissa Hoechstetter, a woman abused by Dr. Hadden says, as the second criminal case against Hadden goes to trial, "I'm really trying to not focus on a verdict, because him going to jail doesn't change what happened to us, it doesn't change Columbia [University's] responsibility."[310] What sort of institutional reforms are necessary to prevent medical professionals from sexually abusing their patients? How might Columbia University be held responsible for its astonishing negligence over Hadden's decades-long history of abuse?[311] And might these questions be given greater salience, might they be more askable and more answerable, out from under rape law's shadow? In rape law's absence, issues of prevention, victim compensation, and institutional and individual accountability would likely be elevated over prison and punishment.

B. Costs

1. *Expressivist*

Our explication of the expressivist cost of decommissioning rape law is brief, not because we think the cost trivial but to the contrary: it is significant, self-evident, and does not need much parsing. If rape law is not the only criminal law through which the state recognizes and recompenses gendered, sexual violence, it is certainly our major cultural metonym for doing so: rape law, as an *idea*, conjures, simply and summarily, state power harnessed against sexual violence. To excise rape law is to risk enervating that very idea—that the state is attuned to rape, its pervasiveness, and its severity. While we believe a mosaic of other, non-rape laws better redresses the variedness of sexual violence, and while we believe that rape law undercuts a finer-tuned, more strategic, more successful legal approach to eliminating sexual violence, we acknowledge what we could call the sledgehammer function of rape law. Taking away

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[309] Liam Archaki, *Researchers Discuss Novel Approach to Sexual Assault Prevention*, Amherst Student (Mar. 29, 2023), https://amherststudent.com/article/researchers-discuss-novel-approach-to-sexual-assault-prevention/ [https://perma.cc/FKP8-PG88].

[310] Exposed: Cover-Up at Columbia University, *Remember Who the F*ck You Are*, Wondery, at 21:27 (Oct. 2, 2023), https://wondery.com/shows/exposed/ [https://perma.cc/KF8J-XW5S].

[311] *See* Bianca Fortis, *Columbia University to Set Up $100 Million Fund or Patients of Predator OB-GYN,* ProPublica (Nov. 13, 2023), https://www.propublica.org/article/columbia-university-settlement-fund-obgyn-robert-hadden [https://perma.cc/MJX6-87TE]; *see also* Alcoff, *supra* note 52, at 228 ("Outraged publics need to direct their attention to the role of institutions in blocking reports through non-disclosure agreements and legal maneuvers.").

the state's sexual violence sledgehammer (however ineffective and dysfunctional) is, to put it colloquially, not a good look, as if we are neutralizing the state's capacity to act against rape. But our wager is that the material benefits of reassembling rape law outweigh the symbolic costs of disassembling it.[312]

Another critical, expressivist component of rape law, and more precisely the rape trial, is that it offers victims of sexual violence a public, state-sponsored forum for declamation and reclamation; that is, a forum for victims to speak out against their abuse and their abuser, and to narrate their experiences of injury and violation. A recurring theme in both the play *Prima Facie* and the podcast *Exposed* is that women's opportunity to voice their grievances takes precedence over the sentencing, even the conviction, of the perpetrator.[313]

But victims may author and read aloud impact statements in any sort of trial, rape or otherwise. Whether Robert Hadden (or Harvey Weinstein, or Bill Cosby, or . . .) was charged with rape, assault, coercion, false imprisonment, or some other crime, victims could still be given formal, state-sanctioned opportunities to give public statements. What would be admittedly lost, under our decommission regime, would be to speak about one's sexual victimization at a *rape* trial.

2. *Material*

When the state presses criminal charges against a person for rape, it does more than symbolically express a gendered injury: it foots the bill. Accordingly, a second cost to decommissioning rape law is losing the state's financial support to bring a remedy for sexual injury.

After a victim reports an incident of sexual violence to the police or prosecutor, the state may decide to press criminal charges. A state district attorney is tasked with compiling evidence, conducting interviews, preparing for trial, and presenting the case in court—lengthy and expensive legal work when conducted by private attorneys. While individuals do fund the state criminal apparatus through taxes and mandatory fees and fines,[314] a survivor is not responsible for paying the direct financial costs of a criminal trial brought in response to his or her sexual injury.

Thus, perhaps the most cutting criticisms of decommissioning rape law and relying on the civil tort system to remedy instances of sexual violence is that such a scheme would disparately impact those disadvantaged by social and economic inequalities.

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[312] *See infra*, Part III.

[313] Miller, *supra* note 53; Exposed: Cover-Up at Columbia University, *Remember Who the F*ck You Are*, *supra* note 310.

[314] *See* Zach Ahmed, *How NY Makes Poor People Pay to be Prosecuted*, NYCLU (Dec. 16, 2021), https://www.nyclu.org/commentary/how-ny-makes-poor-people-pay-be-prosecuted [https://perma.cc/JY5R-E8B6].

First and foremost, there is the inability to pay. In the United States, there is no right to legal representation in a civil trial.[315] This causes a significant "justice" gap between the legal needs of people and the services available.[316] Given the high cost of legal assistance, many people are barred from understanding the legal rights they have or the potential claims they may bring. In fact, according to a recent report on access to justice, it is estimated that "80 percent of the civil legal needs of those living in poverty go unmet as well as 40 to 60 percent of the needs of middle-income Americans."[317] Someone who is assaulted and poor might not have the ability to pay for consultation with a lawyer, let alone the means to pay for full representation. While private attorneys often take personal injury cases on commission, this may have a downstream effect on the types of cases that an attorney chooses to take. For example, attorneys may be incentivized to only accept winnable cases with substantial damage awards. Finally, defendants with more resources can purchase better, higher quality, and more involved legal counsel, which may in turn limit complainants' successes against rich and powerful perpetrators.

Scholars have documented how the American legal tort system is rife with systemic inequality. Professor Richard Abel explains the American tort system as "intimately related to the rise of capitalism," a system that discriminates based on class, race, and gender.[318] For example, Abel writes, the system privileges white-collar workers because blue-collar workers are relegated to other legal mechanisms, like workers' compensation, that pays "only a fraction of tort damages."[319] Feminist scholars have demonstrated that traditional tort doctrines, products of judge-made common law, imbue decades of gender bias and discrimination.[320] Professors Martha Chamallas and Linda Kerber have shown how courts historically refused to recognize emotional harm absent physical impact, which barred women's recovery in cases involving negligent infliction of emotional distress.[321] And the tort system is deeply entwined with racial inequality. Professor Richard Delgado has written on the

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[315] Lassiter v. Dept. of Soc. Servs., 452 U.S. 18, 26–27 (1981) (finding that the constitutional right to counsel presumptively applies only when a litigant may be deprived of personal liberty); *see also* Turner v. Rogers, 564 U.S. 431, 448 (2011) (holding that the State is not required to provide counsel at civil contempt proceedings, even if an individual faces incarceration).

[316] Rebecca Buckwalter-Poza, *Making Justice Equal*, Ctr. for Am. Progress (Dec. 8, 2016), https://www.americanprogress.org/article/making-justice-equal/ [https://perma.cc/DEH2-YL32].

[317] *Id.* (citing Deborah L. Rhode, Access to Justice (2005)).

[318] Richard L. Abel, *A Critique of American Tort Law*, 8 Brit. J.L. & Soc'y 199, 199 (1981).

[319] *Id*. at 202.

[320] Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 Cornell L. Rev. 575, 577 (1992); Martha Chamallas, *Social Justice Tort Theory*, 14 J. Tort L. 309, 312–13 (2021).

[321] Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 Mich. L. Rev. 814 (1990); *see also* Bender, *supra* note 321, at 577–78 (describing how legal standards of fright and emotional distress developed to reflect male expectations and norms).

failure of the tort system to remedy racial injury,[322] and others have written on the problematic use of race and gender-specific data in tort litigation and how systemic inequality is perpetuated through unequal damage awards.[323]

These systemic critiques are persuasive and the financial cost of private litigation undoubtedly deters some people from seeking legal remedy for their sexual injury. Herewith, though, are a few qualifying rebuttals. First and foremost, the state itself perpetuates financial, racial, and gendered inequality.[324] Second, being backed by state power does not necessitate a good outcome for survivors. The state has substantial discretion in deciding whether to bring charges. According to a report from the FBI, of 1,000 instances of rape, only 13 cases get referred to a prosecutor and only seven will lead to a felony conviction.[325] Given that rape cases are hard to try and prosecutors are rewarded for winning, prosecutors also tend to only bring cases that they believe they can win, thus limiting the availability of redress in court.[326] Moreover, at any stage of the process, the state can negotiate a plea deal with perpetrators. To the profound dismay of the victims of his sexual abuse, the Manhattan District Attorney's Office negotiated such a deal with Robert Hadden, the doctor featured in *Exposed*.[327] The terms of the plea spared Hadden from serving any prison time (until federal prosecutors picked up the case). Indeed, the *Exposed* episode expositing the plea is titled "Why Is That a Win?"[328]

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[322] Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets and Name-Calling*, 17 Harv. C.R.-C.L. L. Rev 133 (1982).

[323] *See, e.g.*, Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 Fordham L. Rev. 73 (1994); Alejandra Ayotitla & Ross Pesek, *Valuing the Lives of Plaintiffs of Color in Tort Law*: *A Critique of the Use of Race-Based Data in Damage Award Calculations*, Neb. L. Rev. Bull., Aug. 26, 2023, at 1. *But see* Eric Helland & Alexander Tabarrock, *Race, Poverty, and American Tort Awards: Evidence from Three Data Sets*, 32 J. Legal Stud. 27, 51–53 (2003) (concluding that the magnitude of tort awards correlate with Black and Hispanic poverty rates of the county in which the case was heard).

[324] *See generally* Alexandra Natapoff, Punishment Without Crime (2018) (discussing how the misdemeanor system perpetuates existing inequalities); Michelle Alexander, The New Jim Crow (2010) (explaining how mass incarceration in our criminal legal system replicates and reinforces racial injustice); Deborah Epstein & Lisa A Goodman, *Discounting Women: Doubting Domestic Violence Survivors' Credibility and Dismissing their Experiences*, 167 U. Penn. L. Rev. 399 (2019) (describing how the criminal legal system systematically discounts survivor experiences); Ahmed, *supra* note 314 (discussing how financial hardship is replicated and exacerbated by the criminal legal system).

[325] *What to Expect from the Criminal Justice System,* RAINN, https://www.rainn.org/articles/what-expect-criminal-justice-system [https://perma.cc/378T-8N9Z] (citing *National Incident-Based Reporting System 2012–2014*, Fed. Bureau of Investigation (2015)).

[326] *See* Brodsky, *supra* note 172, at 57–58.

[327] Jan Ransom, *19 Women Accused a Gynecologist of Abuse. Why Didn't He Go to Prison?,* N.Y. Times (Oct. 22, 2019), https://www.nytimes.com/2019/10/22/nyregion/robert-hadden-gynecologist-sexual-abuse.html [https://perma.cc/7K9V-HPFE]; Exposed: Cover-Up at Columbia University, *Why Is That a Win?*, Wondery (Sept. 11, 2023), https://wondery.com/shows/exposed/ [https://perma.cc/KF8J-XW5S].

[328] Exposed: Cover-Up at Columbia University, *Why Is That a Win?*, *supra* note 327. See Cossman, *supra* note 49, at 177, for further criticisms of criminal trials and their impacts on victims.

For those who remain unconvinced that a civil system is the appropriate means to remedy sexual injury, our decommission hypothesis does not preclude criminal charges. Our abolitionist feminist commitments notwithstanding, we outline in Part III how the state can bring criminal assault, battery, coercion, extortion, and statutory rape charges against perpetrators of sexual violence; in turn, citizens may pursue private causes of action through civil, tort and contract law.[329] Our proposal is to decommission criminal rape law, not to decommission criminal prosecution of rape entirely.

III. Rape Law Disassembled, Reassembled

In this section, we review a constellation of remedies that might replace rape law across criminal and civil law. Yet however disassembled, reassembled, or constellated, law can never fully capture the varied harms that arise from instances of sexual violence. Our overview is thus not intended to be comprehensive because it cannot be; we neither provide every possible theory of recovery nor provide in-depth analyses of all the benefits and costs of this or that legal remedy. We provide these alternatives to rape law as a point of departure, not arrival.

A. Criminal Law

1. *Assault and Battery*

Traditionally, criminal assault and battery constitute two unique offenses: assault is an intentional act that puts another person in fear of immediate harm whereas battery is an intentional or harmful touching of another person. Many states distinguish assault and battery as two separate crimes.[330] Some states have merged their criminal assault and battery laws into one, such that the offense of assault includes battery (the actual causing of harm).[331] Consider New York's law for assault in the second degree, which states that a person is

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[329] *Infra* Part III.A.

[330] In California, assault is "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." Cal. Penal Code § 240 (West 2024). Battery is "any willful and unlawful use of force or violence upon the person of another." Cal. Penal Code § 242 (West 2024). Florida also maintains separate criminal assault and battery laws; criminal assault in Florida is defined as the "intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent." Fla. Stat. § 784.011 (2024). Battery occurs when a person "actually and intentionally touches or strikes another person against the will of the other; or intentionally causes bodily harm to another person." Fla. Stat. § 784.03 (2024).

[331] *See, e.g.*, N.Y. Penal Law § 120.05 (McKinney 2025); N.J. Stat. Ann. § 2C:12-1 (West 2025).

guilty of assault when "with intent to cause serious physical injury to another person, he causes such injury to such person."[332]

Whether a violent act of physical touching is prosecuted under an assault statute, battery statute, or both has more to do with the state's criminal code than the nature of the act itself. If an instance of sexual misconduct includes force—and if, as we argue in Part I, penetration without consent is forcible conduct—then assault and battery statutes will be easily satisfied. In Florida, criminal battery occurs when a person "actually and intentionally touches or strikes another person against the will of the other; or intentionally causes bodily harm to another person."[333] In Florida, jamming one's fingers into someone else's mouth without their consent qualifies as battery. So too would jamming one's penis into someone else's body. In California, punching someone in the face entails the "willful and unlawful use of force or violence upon the person of another."[334] So too is restraining someone in a room against their will and humping them, like the complainant in *Berkowitz* or Kwame in *I May Destroy You.*[335]

Many of the benefits we articulated in Part II carry over into a sexual-violence-as-battery regime, such as spotlighting the ordinariness of sexual violence, disarticulating rape as a property crime or a harm-worse-than-death, and incentivizing nonwomen to come forward to report assault, rather than rape.

However, prosecuting rape and other instances of sexual violence under criminal assault laws does not solve every problem we have henceforth enumerated with prosecuting sexual violence as rape. Most obviously, prosecuting sexual violence under assault and battery criminal statutes does not avoid state intervention; it would not solve the myriad problems associated with bringing criminal charges against a family member or coworker; it does nothing to stymie mass incarceration (although prison terms for assault and battery tend to be lower than the prison terms for rape); and it relies, evidently and unadvisedly, on the criminal legal system to punish interpersonal violence.[336]

As the chorus of feminist critics protested in response to Foucault's provocation to treat rape as a "punch in the face,"[337] recoding sexual violence into the crime of assault or battery removes rape as a crime of gendered harm. For some, the switch removes precisely what is exceptional about sexual injury—the specialness of sex. Katharine Baker writes, of the

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[332] N.Y. Penal Law § 120.05 (McKinney 2025).

[333] Fla. Stat. § 784.03 (2024).

[334] Cal. Penal Code § 242 (West 2024).

[335] Commonwealth v. Berkowitz, 641 A.2d 1161, 1163 (Pa. 1994); *I May Destroy You: That Was Fun*, *supra* note 268.

[336] *See generally* Leigh Goodmark, Decriminalizing Domestic Violence (2018) (detailing how the criminal legal system became the primary vehicle to remedy intimate partner violence despite its inability to prevent violence or ensure just outcomes); Leigh Goodmark, A Troubled Marriage: Domestic Violence and the Legal System (2013) (exploring the history and failures of the legal system's response to domestic violence).

[337] Foucault et al., *supra* note 54, at 201.

1970s reformist account of rape: "What makes rape different from other batteries is the part of the body that is touched or invaded . . . Nonconsensual intercourse or touching of this part of the body may cause emotional, relational, hedonic, and dignitary injuries."[338]

We concede in Part I that, experientially, sexual violence may be different than other forms of violence. But we wonder if presupposing a deeper psychic injury positions sexual violence as an *always-already worse* injury, as Henderson suggests.[339] In the aggregate, sexual violence might be a worse harm for many than nonsexual violence,[340] but it also might be tendentious, or even recursive, to build that presumption into criminal law.[341]

Listening to the podcast *Exposed*, there is something particularly horrific about pregnant women being assaulted by their trusted OBGYN. In one episode, a woman explains that Dr. Hadden shielded his abuse by hiding under her pregnant belly.[342] If specificity is what is lost through a decommissioned regime that relies instead on assault or battery, criminal assault and battery statutes still encode and distinguish instances of violence based on status relationships. In New York, assault in the second degree is a class D felony;[343] however, it is a class C felony to assault a judge or a police officer.[344] States could just as well classify assault as aggravated or to a higher degree when the perpetrator is in a position of authority over the victim.

2. *Coercion and Extortion*

Modern scholarship on rape and rape law has heavily focused on coercive inducements to sex, whether and under what circumstances sex procured through such coercion should constitute rape, and why the law so consistently fails to recognize coercive sex as rape.[345] Threats to induce sex—leveraged by employers, doctors, police officers, foster parents, or just large men—could be prosecuted under criminal laws against coercion and/or extortion. In New York, for example, coercion in the first degree occurs when a person instills in the victim "a fear that he or she will cause physical injury to a person."[346] When an employer says to his employee, "have sex with me or I'll fire you," it seems reasonable that the

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[338] Baker, *supra* note 122, at 227–28.

[339] Henderson, *supra* note 166, at 226 ("In suggesting that feminism rethink naturalized versions of sexual violence, I mean specifically those conceptions of rape in which: sexual injury is always, already the worst form that violence can take."); *see also supra* Part II.A.4.

[340] *See* Schnittker, *supra* note 135, at 2–3; Williamson, *supra* note 135, at 2.

[341] *See supra* Part II.B.1.

[342] Exposed: Cover-Up at Columbia, *Trapped*, *supra* note 115, at 05:03.

[343] N.Y. Penal Law § 120.05 (McKinney 2025).

[344] N.Y. Penal Law § 120.08 (McKinney 2025) (assault on a police officer); N.Y. Penal Law § 120.09 (McKinney 2025) (assault on a judge).

[345] *See*, *e.g.*, Schulhofer, Unwanted Sex, *supra* note 1, at 346; Buchhander-Raphael, *supra* note 32, at 147; MacKinnon, *supra* note 15, at 447; Alan Wertheimer, Consent to Sexual Relations 163–93 (2003).

[346] N.Y. Penal Law § 135.65 (McKinney 2025).

employee may fear not only being fired by her boss but also being raped; that is, being physically injured. Other statutes would more readily make the boss's threat actionable, however. Under Maryland's extortion statute, "a person may not obtain, attempt to obtain, or conspire to obtain . . . labor, services, or anything of value from another person with the person's consent, if the consent is induced by wrongful use of actual or threatened . . . economic injury."[347] Getting fired is an economic injury and we think sex is something of value (if sex were valueless the boss would not want it). In New Jersey, "a person is guilty of criminal coercion if, with purpose unlawfully to restrict another's freedom of action to engage or refrain from engaging in conduct, he threatens to . . . perform any other act . . . which is calculated to substantially harm another person with respect to his . . . business, calling, career, [and] financial condition."[348] There is nothing more substantially harmful to one's career than losing it.

Coercive demands that threaten physical violence ("have sex with me or I will kill you/otherwise injure you") are straightforwardly criminalized by all state laws against coercion; of course, such threats are also codified as criminal assault.[349]

3. *Statutory Rape Law*

Despite this Article's overarching, normative commitment to de-exceptionalizing criminal sex laws,[350] there are nevertheless instances in which we advocate for the explicit maintenance of rape law: the proscription of sex in certain relationships of extreme dependence. We think sexual relations between a child and their guardian, for example, or sexual relations between an incarcerated person and a guard, should be criminal under statutory rape law. In these instances, consent should not be an available defense, although a guardian's or correctional officer's additional use of force might aggravate the crime. If the ten-year-old daughter was willing to engage in a sexual encounter with her father or was forced to do so, or if the incarcerated person was willing to engage in a sexual encounter with the guard or was

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[347] Md. Code Ann., Crim. Law § 3-701 (LexisNexis 2024).

[348] N.J. Stat. Ann. § 2C:13-5 (West 2025).

[349] For the criminalization of coercive sexual demands that threaten physical violence, see, for example, N.Y. Penal Law § 135.61 (McKinney 2025) ("A person is guilty of coercion in the second degree when he or she commits the crime of coercion . . . and thereby compels or induces a person to engage in vaginal sexual contact, oral sexual contact or anal sexual contact . . . ."). For the application of coercive sexual demands to criminal assault laws, see, for example, Fla. Stat. § 784.011 (2024) ("An 'assault' is an intentional, unlawful threat by word or act to do violence to the person of another, coupled with an apparent ability to do so, and doing some act which creates a well-founded fear in such other person that such violence is imminent.").

[350] See generally Aya Gruber, *Sex Exceptionalism in Criminal Law*, 75 Stan. L. Rev. 755 (2023), for an account of U.S. rape law and other criminal sex laws as buttressing white supremacy, traditional marriage norms, and girls' and women's chastity.

forced to do so—such distinctions might matter for gradations and sentencing, but all such encounters should be, and typically are, criminalized.

This position is not new; something like it is adopted in most states' criminal codes.[351] Federal law also prohibits sex between individuals in federal custody and those acting in their capacity as a federal law enforcement officer.[352] There are no defenses for consent, and demonstrations of force are not necessary.[353] One of this Article's authors has argued for drawing a line against sex between minors and adults in superordinated positions of authority or trust.[354] We maintain that line here even when such sex appears to be consensual, willing, or not unwilling.

Unexpectedly, this is the line Foucault raised—although did not draw—in his 1977 roundtable discussion. As we noted in Part II, Foucault is not particularly sympathetic to the idea of a child sexual "victim," glibly remarking that "[t]here are children who throw themselves at an adult at the age of ten—so?"[355] And yet Foucault concedes "there is the important problem of parents, especially of step-fathers, which is very common."[356] Foucault does not go so far as to suggest the state should prohibit sexual relationships between a child and her stepfather, but his concession carves out a possible exception to his otherwise total sex de-exceptionalizing project. For all kinds of reasons—among them gendered subordination, familial dependence, exploitation, sequelae, trauma, and sexual autonomy—it seems to us, and maybe to Foucault, that a stepfather soliciting his stepdaughter for, say, fellatio, is materially different than, and should be legally differentiated from, a stepfather asking his stepdaughter to take out the trash.

Beyond child/guardian and incarcerated person/guard dyads, there are other relationships of extreme dependence in which sex is or ought to be legally proscribed. Preserving and promoting these statutory exceptions may be more important in a regime that decommissions rape law, especially in instances where applications of force are absent (or very hard to prove).

Our advocacy for specified statutory rape laws—whatever they might be called in code—maintains a *limited* sex exceptionalism in criminal law. In general, sex exceptionalism in U.S. criminal law is a bad idea, rooted in unsavory histories of misogyny, racism, and the commodification of white virginity.[357] Statutory rape laws, however, that pivot on the highly superordinated procuring sex from the highly subordinated, reflect a societal commitment, foremost, to shielding the vulnerable from sexual abuse.[358]

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[351] Fischel, *supra* note 31, at app. B.
[352] 18 U.S.C. § 2243 (2023).
[353] *Id.*
[354] Fischel, *supra* note 31, at 82–83.
[355] Foucault et al., *supra* note 54, at 204.
[356] *Id.* at 205.
[357] *See supra* Prologue and Part II.A.3; Gruber, *supra* note 350, at 772–81.
[358] Our conception of statutory rape laws is contiguous with but nonidentical to the colloquial understanding of "statutory rape law" as age of consent laws. On the racialized,

B. Civil Rights Law

1. *Title VII and Title IX*

> "Schools and workplaces have done far more for the survivors I know and represented than the police ever have."[359] – Alexandra Brodsky, civil rights attorney

Title VII and Title IX are federal civil rights laws that provide remedies for sexual harassment, including sexual violence, that occurs within specific institutions.[360] Title VII of the Civil Rights Act protects employees and job applicants from discrimination on the basis of sex.[361] Sexual harassment, including verbal or physical conduct of a sexual nature, is recoverable under Title VII.[362] Title IX protects people from discrimination on the basis of sex in educational institutions.[363] The Department of Education (DOE) has clearly stated that Title IX requires schools to "address sexual violence and other forms of sex discrimination."[364] Title VII and Title IX place legal responsibility on the governing institution—the employer and the University, respectively—to take action for the misbehavior of its employees and students.[365]

Currently, schools receiving federal funding are required to investigate instances of rape and sexual violence that occur on campus.[366] Each university is required to maintain a Title IX office, whereby students can bring a formal complaint of sexual misconduct against other university members.[367]

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gendered history of U.S. age of consent laws, their liberalization in the 1970s, and their neoliberal enforcement in the 1990s and 2000s, see Carolyn E. Cocca, Jailbait: The Politics of Statutory Rape Laws in the United States 9–29 (2004).

[359] Brodsky, *supra* note 172, at 73.

[360] Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2023); Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1689 (2023).

[361] 42 U.S.C. § 2000e-2 (2023).

[362] Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 66 (1986); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998).

[363] 20 U.S.C. § 1681 (2023).

[364] Baker, *supra* note 122, at 221 (citing Press Release, U.S. Dep't of Educ., U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations (May 1, 2014), http://www.ed.gov/news/ press-releases/ us-department-education-releases-list-higher-education-institutions-open-title-ix-sexual-violence-investigations [This Press Release is no longer available on the U.S. Department of Education website as of February 2025.]).

[365] *See e.g.*, Faragher v. City of Boca Raton, 524 U.S. 775 (1998) (holding that an employer is liable for hostile work environment claims created by sexual harassment from a supervisor under Title VII); Press Release, U.S. Equal Emp. Opportunity Comm'n, EEOC Wins Jury Verdict Against Favorite Farms for Sexual Harassment and Retaliation (Dec. 21, 2018), https://www.eeoc.gov/newsroom/eeoc-wins-jury-verdict-against-favorite-farms-sexual-harassment-and-retaliation [https://perma.cc/FE8J-3ZSA]; U.S. Equal Emp. Opportunity Comm'n, EEOC-CVG-2024-1, Enforcement Guidance on Harassment in the Workplace § IV(C) (2024) (providing guidance on employer responsibility for workplace sexual harassment under Title VII), https://www.eeoc.gov/laws/guidance/enforcement-guidance-harassment-workplace#_ftnref274 [https://perma.cc/4DRD-MVEC].

[366] U.S. Dep't of Justice, Civil Rights Division, Title IX Legal Manual § V(E) (updated 2025), https://www.justice.gov/crt/title-ix [https://perma.cc/82PT-979M].

[367] *Id*. § V(D).

Generally, students have the option of pursuing an internal disciplinary hearing or reporting instances of sexual misconduct to law enforcement.[368]

In *Why Rape Should Not (Always) Be A Crime*, Katharine Baker expertly articulates why criminal law has not successfully changed social norms that lead to sexual injustice, particularly on college campuses.[369] Baker proposes that it may be more effective to use Title IX to curb campus sexual assault rather than criminal law in part because "most people are still not ready to call most men who secure sex without consent 'rapists.'"[370] Her central claim is that DOE's leveraging of Title IX to recast sexual assault as a problem of sex *discrimination* may effectively shift responsibility onto the university to change norms and behaviors, rather than place responsibility on the state to prosecute people's classmates.[371] Baker suggests that shifting from criminal prosecution to civil liability better redresses sexual violence on campus: the burden of proof is lower, criminal stigma is avoided (by all parties), and female agency is increased.[372] "It may be that the best way to reduce non-consensual sex," writes Bakers, "is to treat it as something distinct from rape."[373]

Title VII frames workplace sexual assault as actionable sex discrimination. While employees can pursue internal reporting mechanisms, employees can also file complaints with the Equal Employment Opportunity Commission, which can bring a lawsuit against a workplace for sexual harassment.[374] To succeed on a claim, plaintiffs must meet a rather stringent "severe and pervasive" standard, meaning that the harassment must alter the terms of employment.[375] A recent case in which a woman was raped by her supervisor, reported it to management, and the employer took no action was sufficient to find a Title VII violation.[376] It is not a perfect standard, and many of the same fears that arise around reporting a friend on campus exist for reporting a coworker or a boss in the workplace; but fundamentally Title VII provides a means to redress sexual harm and receive compensation for damages sustained.

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[368] *See, e.g.*, N.Y. State Educ. Dep't, NYSED Title IX Grievance Procedure 3, https://www.nysed.gov/file-upload/nysed-title-ix-grievance-procedure [https://perma.cc/FS53-89MH] ("Upon receipt of a sex discrimination complaint or report, the Title IX Coordinator will promptly contact the Complainant with a written notice describing the available options, including pursuing a criminal complaint with a law enforcement agency, pursuing NYSED's investigative process (or both simultaneously) and the potential consequences of pursuing both options . . . .").

[369] Baker, *supra* note 122, at 222–25.

[370] *Id*. at 224–25.

[371] *See id*. at 265.

[372] *See id*. at 265–77.

[373] *Id*. at 277.

[374] *Filing a Charge of Discrimination*, U.S. Equal Emp. Opportunity Comm'n, https://www.eeoc.gov/filing-charge-discrimination [https://perma.cc/7M3T-R75N].

[375] Meritor, 477 U.S. at 67.

[376] Press Release, U.S. Equal Emp. Opportunity Comm'n, EEOC Wins Jury Verdict Against Favorite Farms for Sexual Harassment and Retaliation, *supra* note 365.

In *Rape Redefined*, Catharine MacKinnon argues that quid pro quo sexual harassment—*have sex with me and I'll promote you*; or *have sex with me and I will not fire you*—should be considered criminal *rape* (or, we suppose, *attempted rape* if the employee refuses)[377] rather than actionable sex discrimination under civil law, as she famously elaborated decades ago.[378] Our decommission hypothesis substitutes assault and battery for criminal rape, and since, in this scenario, the employee consents to the sexual exchange (if she did), it would be hard to criminalize such conduct as assault or battery. However, we think MacKinnon's earlier argument is more compelling than the latter: the core problem with this sex is that it undermines (women's) equal participation in the workplace and not that the sex is forced upon the employee, like a cigar pushed into a mouth. We suggest that the appropriate body of law to remedy these sexual demands is civil, not criminal (although in certain instances, laws criminalizing coercion or extortion may be available to victims).[379]

MacKinnon concludes her proposal to criminalize unequal workplace sex as rape in this way: "The real point of law is not incarceration or damage awards anyway but voluntary compliance, otherwise known as legal socialization or education."[380] We agree, but believe the civil law of sex discrimination better induces social compliance—here, a world free of sexual violence—than does the criminal law of rape.

The main drawback of utilizing Title VII and Title IX to redress sexual violence is obvious: these federal laws are jurisdictionally limited to specific contexts, workplaces, and universities. Beyond the military (which has its own apparatus for addressing sexual violence), it is hard to imagine other contexts beyond work and school where we are organized institutionally, physically, and socially such that some governing body can take jurisdiction over instances of interpersonal harm. But our proposal does not deprive non-students and non-employees of any avenues of redress—nothing is worse for them by highlighting that VII and IX are and ought to be used to redress sexual violence in institutional settings. This part of our proposal just does not apply to nonstudents and nonworkers. Criminal laws of assault, battery, coercion, and extortion would still be available to them, as described above, and so might other civil and tortious remedies, as described below.

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[377] MacKinnon, *supra* note 15, at 476.

[378] Catharine MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination 5–6, 161–64 (1979).

[379] *See supra* Part III.A.2.

[380] MacKinnon, *supra* note 15, at 477.

2. *Gender-Motivated Violence*

Statutes that create a civil remedy for victims of "crimes of violence motivated by gender" exist in California,[381] Illinois,[382] New York City,[383] and Westchester County.[384] California's law states that "any person who has been subject to gender violence may bring a civil action for damages against any responsible party."[385] The statute in turn defines "gender violence" as a "form of sex discrimination" and means either:

> (1) One or more acts that would constitute a criminal offense under state law that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, committed at least in part based on the gender of the victim, whether or not those acts have resulted in criminal complaints, charges, prosecution, or conviction.
> (2) A physical intrusion or physical invasion of a sexual nature under coercive conditions, whether or not those acts have resulted in criminal complaints, charges, prosecution, or conviction.[386]

These statutes operationalize a civil remedy for acts that would constitute a criminal offense under state law. Under our decommissioned regime, this would not require an explicit rape law; assault clearly qualifies as a criminal offense under state law that uses physical force against another. Under New York City's gender-motivated violence act, the underlying qualifying crime can be a misdemeanor or felony against a person.[387] This clears one of two major hurdles in meeting the statutory requirements.

The other hurdle is proving gender motivation. As Alexandra Brodsky explains, proving gender motivation may sound "theoretically more complex," yet many judges "easily [accept] that rape, sexual assault, and domestic violence—even against men—[are] per se gender-motivated."[388] There is a legitimate question about the utility of such a legal avenue under a decommissioned regime in which assault would be the underlying crime, not rape. Herewith, two responses. First, given that gender-motivated violence is a remedy under civil law, the burden of proof is lower than in criminal statutes. Second, even if rape law did not exist, rape still would, its gendered coordinates no less gendered the day after decommission.

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[381] Cal. Civ. Code § 52.4 (West 2024).
[382] 740 Ill. Comp. Stat. Ann. 82/10 (2024).
[383] N.Y.C., N.Y., Admin. Code § 10-1104 (2025).
[384] Westchester County, N.Y., Code § 701.01 (2024); Brodsky, *supra* note 40, at 202.
[385] Cal. Civ. Code § 52.4 (West 2024).
[386] *Id*.
[387] N.Y.C., N.Y., Admin. Code § 10-1103 (2025).
[388] Brodsky, *supra* note 40, at 203–04.

C. Torts

1. *Intentional Torts: Assault, Battery and False Imprisonment*

There are many good reasons why people who have experienced sexual assault may want to avoid the criminal legal system.[389] As an alternative, people may wish to use tort law to recover for assault, battery, and false imprisonment.

Under tort law, an actor is liable for assault if he intends to cause harmful or offensive contact with a person and that person is put in imminent fear of that contact.[390] An act is done with the intention of putting another in immediate harmful or offensive contact if it is done for the purpose of causing fear or with knowledge that, to a substantial certainty, such fear will result.[391] The Restatement's definition of assault, adopted by most states, may meet many of the sexual violence scenarios countenanced throughout this article.

Battery, unlike assault, actualizes on physical contact. Under the Restatement, adopted by most states, an actor is liable to another for battery if he acts intending to cause a harmful or offensive contact and harmful conduct occurs.[392] Contact is offensive when it offends a reasonable sense of personal dignity[393]—that is, the contact would offend "the ordinary person."[394] In fact, the Restatement even uses the example of flicking a glove in someone else's face to constitute an offensive touching.[395] If flicking a glove in someone else's face constitutes battery, placing a penis on someone else's face should too, let alone conduct that is more invasive or penetrative.

False imprisonment occurs when a defendant intends to confine or restrain another within fixed boundaries, their action directly or indirectly results in confinement, and the plaintiff is either conscious of the confinement or harmed by it.[396] Physical barriers, physical force, threats, or refusing to provide a safe means of escape can all constitute confinement, as can holding someone down on a bed, like Berkowitz did.[397]

The benefits of pursuing remedies to sexual injuries through tort law read as a counter to many of the downsides of criminal prosecution: plaintiffs, rather than prosecutors, have control of what claims to redress; plaintiffs may

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[389] *See supra* Part II.A; Baker, *supra* note 122, at 236 (explaining how sexual assault trials inevitably call into question a victim's credibility and character).
[390] Restatement (Second) of Torts § 21 (Am. L. Inst. 1965).
[391] *Id.* § 21 cmt. d.
[392] Restatement (Second) of Torts § 13 (Am. L. Inst. 1965).
[393] Restatement (Second) of Torts § 19 (Am. L. Inst. 1965).
[394] *Id.* § 19 cmt. a.
[395] *Id.*
[396] Restatement (Second) of Torts § 35 (Am. L. Inst. 1965).
[397] While Berkowitz was not charged with false imprisonment, our point is that he could have been and probably should have been. *Cf.* Commonwealth v. Berkowitz, 641 A.2d 1161, 1163 (Pa. 1994).

avoid re-victimization through police involvement and invasive cross-examinations into sexual histories; victorious plaintiffs receive damages.

Yet redressing sexual violence through the tort system is not without drawbacks. Plaintiffs may be denied equal access to the private law system due to inability to pay and systemic inequalities. Moreover, some remedies under tort law may not provide survivors of sexual assault with the same expressive power as a state-powered trial against sexual violence.[398]

2. *Nonconsensual Condom Removal*

In the fourth episode of *I May Destroy You*, Arabella is introduced to Zain, a fellow writer at the publication house who is tasked to serve as her mentor.[399] After coming back to Arabella's flat, Arabella and Zain have sex, but not before Arabella asks Zain to put on a condom.[400] While Arabella's back is turned to him, Zain slips the condom off.[401] Arabella, irritated after Zain tries to gaslight her by saying that he thought she knew he removed the condom, demands Zain buy her a morning-after pill, which he does.[402] In the next episode, Arabella listens to a podcast in which the hosts discuss the practice and prevalence of men's non-consensual condom removal, sending Arabella spiraling as she senses that her encounter with Zain may have constituted a deeper violation than she previously thought.[403] (The show inches toward a contiguous and unsettling conclusion, that Arabella's very sense of violation-by-stealthing is amplified if not constituted by the cultural and juridical discourses surrounding stealthing. That possibility neither makes the injury less real nor exonerates Zain.)

In "*Rape-Adjacent": Imagining Legal Responses to Nonconsensual Condom Removal*, civil rights attorney Alexandra Brodsky outlines how and why nonconsensual condom removal, colloquially termed "stealthing," might be actionable as a legal wrong.[404] Based on her interviews with victims of stealthing along with her review of journalistic and social scientific literature on the practice, Brodsky enumerates two possible arguments for why stealthing may transform consensual sex into impermissibly nonconsensual sex. The first argument is consent-based: contact with someone's skin is fundamentally different from contact with a condom, and thus requires separate consent.[405] The second argument is risk-based: because the risks of sex without a condom are generally greater than the risks with one (read: pregnancy and contracting sexually transmitted infections), surreptitious condom removal impermissibly

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[398] *See supra* Part II.B.
[399] *I May Destroy You: That Was Fun*, *supra* note 268, at 10:00–13:05.
[400] *Id.* at 21:40–22:42.
[401] *Id.* at 22:20–22:40.
[402] *Id.* at 24:40–27:45.
[403] *I May Destroy You: . . . It Just Came Up*, *supra* note 272, at 3:35.
[404] Brodsky, *supra* note 40, at 196–208.
[405] *Id.* at 190–91.

exposes the other partner to more dangers than to which she had implicitly agreed.[406] Brodsky warns against the second risk-based model because of its potential unintended consequences for transgender people and people with STIs: a cause of action against stealthing based on the problem of risk enhancement might legitimize the criminalization of people who do not wish to share their gender histories and/or their HIV status with their sexual partners.[407] Subsequently, and after reviewing various forms of redress for stealthing under criminal, tort, and civil rights law, Brodsky builds a case for a new cause of action specific to condom removal.[408] The tort would "prohibit the removal of a condom during sex without both partners' affirmative permission" and would allow for compensatory and punitive damages and injunctive and declaratory relief.[409]

In 2021, California became the first state to ban "stealthing." The law makes it a civil offense to remove a condom without consent.[410]

3. *Deliberate Contravention of an Explicit Conditional to Sex*

Despite Brodsky's rhetorical condemnation of stealthing as a practice of "violence"[411] or "gender violence,"[412] ultimately the gravamen for her tort is something much more akin to a principle of sexual autonomy:[413] *I agreed to sex under circumstances XYZ, you did too, and then you changed the circumstances to ABC.* And so, what makes stealthing egregious—and thus legally impermissible—is not that the perpetrator used force or violence but that he wrongfully undermined another person's sexual choices. Notice that under such a principle, as contoured by Brodsky, a practice we might call "reverse stealthing" would be equally actionable. Consider: man A instructs man B, "Fuck me without a condom." Man B obliges and, suddenly nervous about

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[406] *Id.* at 185.

[407] *Id*. at 193–95; *see also* Alex Sharpe, Sexual Intimacy and Gender 'Fraud': Reframing the Legal and Ethical Debate 5 (2018) (objecting to the sex offense prosecution of young transgender and gender non-conforming people for "gender identity fraud"); Kim Shayo Buchanan, *When is HIV a Crime? Sexuality, Gender, Consent*, 99 Minn. L. Rev. 1231, 1238 (2015) (interrogating the race, gender, and sexual hierarchies underlying the criminalization of failure to disclose HIV-positive status); Kyle Kirkup, *Releasing Stigma: Police, Journalists, and Crimes of HIV Non-Disclosure*, 46 Ottawa L. Rev. 127, 127 (2015) (arguing police officers and journalists respond to HIV non-disclosure cases in ways that stigmatize HIV status itself).

[408] Brodsky, *supra* note 40, at 208–09.

[409] *Id.* at 209.

[410] Joe Hernandez, *California is the 1st State to Ban 'Stealthing,' Nonconsensual Condom Removal*, NPR (Oct. 7, 2021), https://www.npr.org/2021/10/07/1040160313/california-stealthing-nonconsensual-condom-removal [https://perma.cc/K33J-LFR3]. California Assembly member Cristina Garcia said she was motivated to write the bill after reading Brodsky's article. *Id.*

[411] Brodsky, *supra* note 40, at 184.

[412] *Id.* at 189.

[413] *See id.* at 186, 205.

contracting an STI, slips a condom on his penis, unbeknownst to man A, and continues to penetrate him.[414]

It seems to us that under Brodksy's theory man B has committed a legal wrong against man A, contravening his sexual autonomy. This might appear spurious except such an account of violated sexual autonomy, codified as a tortious wrong, carries an unexpected benefit: it goes a long way to solving Rubenfeld's Riddle, that is, the riddle over what kinds of deceptions, embellishments, or concealments undertaken to procure sex ought to be actionable, if any.[415]

In *Screw Consent: A Better Politics of Sexual Justice,* Fischel abstracts out from Brodsky's (and now California's) treatment of stealthing to propose a more generalizable legal wrong: the deliberate contravention of an explicit condition to procure sex. To put this more plainly, if person A agrees to sex with person B under, and only under, certain conditions, and person B purposefully violates those conditions, he has committed a wrong. "Normatively, the deliberate contravention of an explicit condition to sex is a violation of sexual autonomy in a way that other forms of concealment, deception, and misrepresentation are not."[416] The point here is not simply to solve Rubenfeld's Riddle but to make available legal remedies when sexual autonomy is egregiously affronted but done so without the use of force or violence.

We thus propose that states enact statutory torts akin to the doctrines of fraudulent misrepresentation in tort law or promissory estoppel in contract law. Whereas someone enters into an agreement in reasonable reliance on a promise, and that promise turns out to be false or to not happen, the law recognizes recovery.

Again, one can come up with endless scenarios in which seeking tortious recovery for deliberately deceptive sex seems ridiculous ("I'll have sex with you if and only if you voted for Kamala Harris in 2024 . . ."). But consider the vast universe of nondisclosures, concealments, lies, and embellishments to procure sex that would *not* be eligible under such a narrowly tailored tort. Indeed, the indexical scenario of such deceptive sex, when it is not stealthing, is the nonpaying client of a sex worker, which takes us to our final subsection of Part III. Consider: a sex worker offers a man oral sex for $20. The man agrees, receives the blowjob, and then refuses to pay the sex worker. What legal avenues should be available to the sex worker for redress and recovery?

D. Contract Law

1. *On the Problem of Nonpaying Clients*

In our above hypothetical, we ask what legal avenues should be available to a sex worker if they offer a man oral sex for $20, the man agrees, receives

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[414] The hypothetical is adapted from FISCHEL, *supra* note 31, at 111–12.
[415] *See supra* notes 39–42 and accompanying text.
[416] FISCHEL, *supra* note 31, at 111–12.

the blowjob, and then refuses to pay. If it sounds like a breach of contract that is because it is.

Under traditional common law principles of contract law, a contract for services is formed through an offer, agreement, and consideration, most easily understood as the promise or forbearance each party makes in the transaction.[417] One party's failure to perform their side of the bargain constitutes a breach of contract, enabling the non-breaching party to recover damages. Here, the sex worker offers sex, the man agrees, there is valid consideration (the man gets oral sex, the sex worker gets $20), and so a contract is formed. In societies that have decriminalized sex work and recognized sex work as labor, it is not hard to imagine a sex worker suing the client under breach of contract and recovering damages—probably $20, but maybe more depending on the circumstances (travel costs, time costs, the costs of any requested apparel, sex toys, whatever).

Yet in the United States, the sex worker faces two legal hurdles to recover on the contract. First and foremost, sex work is criminalized in the United States in all states except certain jurisdictions in Nevada,[418] and contracts are invalidated if their performance is criminal.[419] More broadly, the Restatement (Second) of Contracts invites courts to invalidate contracts that contradict public policy principles, thus opening the door for courts to reject contracts that rely on sex as a basis for the exchange.[420]

Until decriminalization becomes a legislated reality in the United States, sex workers need another avenue of redress when their client fails to pay. Here, we believe the sexual autonomy tort outlined above—the Deliberate Contravention of an Explicit Conditional to Sex—applies. Just as stealthing violates a deliberate conditional to sex ("put a condom on before you have sex with me"), so does a client's nonpayment, and both ought to be actionable under a tort protecting sexual autonomy rights.

In our decommissioned regime, the legal avenue *un*available to the sex worker in this scenario is criminal rape (or criminal assault). Professor Jonathan Herring argues otherwise, claiming that the "error is to see the only loss" in cases where a sex worker does not receive payment "as to the money she was not paid and to ignore the fact that her sexual autonomy had been infringed."[421] He concludes: "A man who has sexual intercourse with another knowing that person would not be agreeing to the activity if s/he knew the

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[417] Restatement (Second) of Contracts §§ 3, 24, 30 (Am. L. Inst. 1981).

[418] *Prostitution Laws By State*, Decriminalize Sex Work, https://decriminalizesex.work/advocacy/prostitution-laws-by-state// [https://perma.cc/X4RY-HW7K].

[419] Restatement (Second) of Contracts § 512 (Am. L. Inst. 1981) ("A bargain is illegal . . . if either its formation or its performance is criminal, tortious, or otherwise opposed to public policy.").

[420] Albertina Antognini & Susan Frelich Appleton, *Sexual Agreements*, 99 Wash. U. L. Rev. 1807, 1811–12 (2022).

[421] Jonathan Herring, *Mistaken Sex*, 2005 Crim. L. Rev. 511, 523.

truth is using that person for his own ends. It is the 'sheer use of another person.' It should be rape."[422]

Herring's proposal is well-intentioned but ill-advised. What jury or judge is going to send a man to prison for rape for not paying a sex worker for otherwise consensual sex?[423] And what might the sex worker want—her money or his prison time? And we think the wrong of forced, assaultive sex is normatively, and thus ought to be legally, distinguished from the wrong of sex procured under false pretenses. The point is not to trivialize the latter wrong but to disaggregate wrongs of assault from wrongs of breach of contract from wrongs of sexual autonomy violations.

Conclusion
Sexual Violence and Aesthetic Redress or, "We See You, Bob"[424]

> Bob found the line that separated him from everything else.
> Rather than crossing it, he tiptoed on it . . .
> and saw how in this gray area where nothing was quite clear,
> no one could be clear. . . .
> They couldn't pinpoint what it was he did
> that we felt was so wrong. . . .
> We have to start observing Bob.
> Telling him we do see the detail.
> We see you, Bob. . . .
> And in that place where rules, clarity, law,
> and separation cease to exist,
> we will show you exactly what we mean
> by violation.[425]

Michaela Coel's character Arabella offers this mic-dropping monologue to a circle of fellow sexual violence survivors in the eighth episode of *I May Destroy You*.[426] Delivered with quiet resolve, Arabella sends up what is colloquially called "gray area" sex. As she instructs, sex in the gray area is not gray because, say, everyone was drunk, memories were blurry, and one partner, indexically the man, got carried away. Rather the sex is "gray" because Bob—a pseudonym for whichever men the survivors are discussing but a metonym for men, well, all over—manipulates the situation to make the sex gray.[427] Bob

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[422] *Id.* at 524.

[423] In the U.K. case cited by Herring, a sex worker agreed to have sex with a man for €25, who later refused to pay. The Court of Appeal dismissed a conviction for rape, holding that fraud did not vitiate consent. *Id.* at 523.

[424] *I May Destroy You: Line Spectrum Border* (HBO July 27, 2020).

[425] *Id.* at 1:31–2:54.

[426] *Id.*

[427] *See* Maddie Brockbank, *The Myth of the 'Gray Area' in Rape: Fabricating Ambiguity and Deniability*, 4 Dignity: J. Analysis Exploitation & Violence 1, 6 (2019).

eroticizes the grayness, is gratified through gaslighting a woman's boundaries rather than conspicuously violating them. He is turned on by trespassing her to the very degree the trespass is unrecognizable, let alone reportable, to law.

Arabella's exhortation to the women is commanding if unspecified, despite its directive ("we will show you *exactly* what we mean").[428] How are Arabella and her comrades to expose and exploit the gray area that Bob has manufactured to extract unwanted sex? Perhaps by yanking down on his testicles or erection,[429] jamming fingers unexpectedly into his anus, broadcasting his name on a shitty men list,[430] vandalizing his property or in some other way skewering him and his reputation. However the women get vengeance, it will not be through law.

Diegetically, this scene occurs shortly after the two detectives heading the investigation of Arabella's rape inform Arabella that there is not enough evidence to move forward on her case.[431] The detectives—both women, one Black and one white, humorless yet supportive—do not metaphorize anything like a hyper-carceral, racist police state—they do their jobs perfectly fine.[432] But for all Arabella's and her friend's hopes in the criminal justice system, it is ultimately inapt, unhelpful, and disappointing. Arabella's case, despite the detectives' good intentions, efforts, and characters, is dropped, just like most real-life cases of sexual violence are in the U.K. (and the U.S.).[433] So how ought Arabella and the rest of us to redress sexual violence? More importantly, how do we prevent the Bobs from coercing unwanted sex in the first place? How do we transform culture so that we no longer need to "see" Bob because Bob "cease[s] to exist"?[434]

The show *I May Destroy You*, the play *Prima Facie*, and the podcast *Exposed: Cover-Up at Columbia University* are 2020s, post-MeToo cultural artifacts which remediate occurrences of sexual violence in the wake of criminal law's all but inevitable failure. In the crucible of that failure, the aesthetic projects point toward and perform other possibilities for ending sexual violence and realizing sexual justice.[435]

In the climactic scene of *Prima Facie*, barrister Tessa Ensler, now under cross-examination as a witness in the state's case against Julian, Tessa's colleague who sexually assaulted her, serves full throttle feminist catharsis. Charging

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[428] *I May Destroy You: Line Spectrum Border*, *supra* note 410, at 1:31–2:54.

[429] *See* Marcus, *supra* note 166, at 400.

[430] *See* Moira Donegan, *I Started the Media Men List: My Name is Moira Donegan*, The Cut, N.Y. Mag. (Jan. 10, 2018), https://www.thecut.com/2018/01/moira-donegan-i-started-the-media-men-list.html [https://perma.cc/L3AS-ZN7V].

[431] *I May Destroy You: Line Spectrum Border*, *supra* note 424, at 6:00–8:00.

[432] *Id*.

[433] Rajeev Syal, *Nearly 70% of Rape Victims Drop Out of Investigations in England and Wales*, The Guardian (May 30, 2023), https://www.theguardian.com/society/2023/may/30/nearly-70-of-victims-drop-out-of-investigations-in-england-and-wales [https://perma.cc/V87U-4CEN].

[434] *I May Destroy You: Line Spectrum Border*, *supra* note 424, at 1:31–2:54.

[435] *See also* Cossman, *supra* note 49, at 195 ("[N]ot every harm calls for a legal remedy. Rather, some call for changing the narratives of sexual norms, behaviors, expectations, and ethicality.").

through the objections of defense counsel and the warnings of the trial judge, Tessa monologues on gender, sexual violence, law, and the perennial problems of credible testimony and material proof in cases of acquaintance rape.

Tessa explains to the play's audience (for at this point the "jury" has been *voir dired*) that sexual violence victims' recollection of specifics is necessarily fractured and fuzzy, making victims' testimonies imprecise.[436] And so, Tessa challenges,

> We have it all wrong when it comes to sexual assault . . .
> [the law] must change.[437]

But change in what way? Surely Tessa, who earlier in the play extols the virtues of law's impartiality and rigorous procedures, who herself strenuously cross-examines victims of sexual violence, would not tolerate a legal system that altogether discarded the inconsistencies of victims' testimonies.[438] Tessa's frustrations, we are submitting, are instructively ambivalent. Like commentary from *Prima Facie*'s author, Suzie Miller, Tessa stresses both that law has to change and that it cannot,[439] or that even when it does—see the repeal of marital rape exemptions[440]—criminal law is structurally stacked against victims of sexual violence.

So Tessa takes bigger swings still, indicting the rules, procedures and practice of law as patriarchal all the way down, shielding rather than stopping sexual violence:

> The law has been shaped
> by generations and generations of men.[441]

Her monologue concludes in a plea:

> Something
> has
> to change.[442]

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[436] Miller, *supra* note 53, at 93.
[437] *Id*. at 95.
[438] *Id.* at 20, 24.
[439] *Id.* at 94–95 (*compare* "there cannot be justice," *id.* at 94, *with* "[law] must change," *id.* at 95); Suzie Miller, *Introduction*, *in* Miller, *supra* note 53, at 7 (*compare* "while I firmly believe that 'innocent until proven guilty' is the bedrock of human rights, I always felt that its application in sexual assault cases served to undermine rather than to uphold any real fairness," *id.* at 7–8, *with* "But does the legal system deserve [our] faith? Or does it silence women further? How can society and therefore law evolve to reform this area of law?" *Id.* at 8). Unless Miller is proposing that defendants in (and only in) criminal cases of sexual assault ought to be assumed guilty until proven innocent—which seems intolerable from any reasonable liberal, left, or feminist political perspective—then Miller's call is an exhortation to simultaneously reform and abandon law.
[440] Miller, *supra* note 53, at 82; *see also* Jessica Klarfeld, *A Striking Disconnect: Marital Rape Law's Failures to Keep Up with Domestic Violence*, 48 Am. Crim. L. Rev. 1819, 1833–36 (2011) (cataloguing statutory specifications and prosecutorial decisions that cabin the success of the repeal of marital rape exemptions).
[441] Miller, *supra* note 53, at 92.
[442] *Id.* at 98.

Still, the question remains. What is the something that is to change? Is the "something" law or gendered cultural norms? The answer must be both, yet when Tessa apologizes that "all my professional life I have participated in a system that has/done this to women," one wonders skeptically if not cynically what hope there is for the "system" and its embedded patriarchal interests.[443] Tessa is only able to realize some semblance of justice by going "off script" when she takes the witness stand—her message on sexual violence, gender, and the insufficiency of law can only be expressed in a staged courtroom, not a real one, and to an audience, not a jury. "But most of all I have lost my faith in this, the law," grieves Tessa.[444]

What are the available arenas for redressing sexual violence when we lose faith in criminal law? In this Article, we have proposed other bodies of law, like civil rights and torts. *Prima Facie* proffers that we might find more success on stage than in court. The playwright, Suzie Miller, left law for theater after all, disheartened as she was that law too often fails women.[445] Through Tessa and her courtroom peroration, *Prima Facie* performs the very change Tessa calls for—it is the *something*, demanding its viewers and readers to contest both the gender norms that impel sexual violence and the legal norms that preserve the status quo. For even as Tessa "know[s] the jury won't find Julian guilty" she reflects that "a weight has been lifted" by her courtroom speech, delivering to its listeners an injunction to recognize and then resist the pervasiveness of sexual violence.[446] Paradoxically, her speech in a staged court of law is also about the futility of courts of law. Part of what realizing justice means, for Tessa, is publicly calling out law's limits. From the perspective of *ending rape*, it seems less important for Julian to be found guilty (although the result would have been welcome), than for Tessa to see law itself as "an imperfect human construct" which in turn "frees her to find her voice and call us all to action."[447]

The podcast *Exposed: Cover-Up at Columbia University* delivers its aesthetic and political remediations of sexual violence mostly despite its true crime genre conventions rather than because of them, which is to say we are interpreting the text somewhat against its grain. Or to put this differently still: what the state of New York and the federal government want from criminally convicting Robert Hadden is not the same as what the podcast wants from exposing Hadden's abuse and Columbia University's enabling of it, which is not the same as what the victims of Hadden's predatory behavior want to realize justice.

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[443] *Id.* at 92.
[444] *Id.* at 91.
[445] Leah Putnam, *Why Suzie Miller Quit Her Job as a Lawyer and Wrote* Prima Facie, Playbill (May 5, 2023), https://playbill.com/article/why-suzie-miller-quit-her-job-as-a-lawyer-and-wrote-prima-facie [https://perma.cc/WUC7-LVN5].
[446] Miller, *supra* note 53, at 96.
[447] *Id.* at 9.

In narrativizing the federal criminal trial Hadden will face after the New York District Attorney's office arranged a plea deal on the state criminal charges, the podcast's host, Laura Beil, tells listeners that now "survivors would be given a second chance at justice."[448] This time, Beil hopes on behalf of the survivors, prosecutors will "put [Hadden] behind bars."[449] Laura Millendorf, who first went after Hadden's sex crimes as a New York Assistant District Attorney, laments that in the New York case, the women survivors "didn't get the justice they deserved . . . seeing this man in handcuffs."[450] On this count the federal conviction delivered, the judge sentencing Hadden to twenty years in prison for his crimes of sexual abuse.[451]

But is Hadden being handcuffed and imprisoned "justice" for the survivors of Hadden's abuse? Is that what they wanted, collectively? The hundreds if not thousands of women whom Hadden assaulted do not seek grievance in a singular, collective voice, obviously, but the women themselves who are interviewed on the *Exposed* podcast seem to want something else, something undeliverable through carcerality and true crime's generic resolutions. The women featured in *Exposed* concretize our earlier ruminations on Foucault and the phenomenology of sexual violence: resolution, or something like it, will not and cannot come through criminal law, but through public acknowledgment, civil action, and what we have called aesthetic redress.[452]

Evelyn Yang, wife of 2020 Democratic primary presidential candidate Andrew Yang, explains to Beil that she was willing to discuss Hadden's abuse in a CNN interview because what happened to her was "injustice and so I wanted to talk about it."[453] She reflects further that while her coming forward publicly was intimidating for her, she did so because she understood it as "survivors' work."[454] Yang was motivated to speak out because women before her did so, and women's public testimonies against Hadden came cascading in after Yang's interview.[455] For Yang, it seems, what mattered less was prison time for Hadden and what mattered more was collective solidarity and mutual recognition through victims' shared vulnerability. Law professor Brenda Cossman notes that "many studies have shown that victims/survivors

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[448] Exposed: Cover-Up at Columbia University, *Remember Who the F*ck You Are*, *supra* note 310, at 17:58.

[449] *Id*. at 16:45.

[450] Exposed: Cover-Up at Columbia University, *Willful Blindness*, Wondery, at 22:22 (Oct. 9, 2023) https://wondery.com/shows/exposed/ [https://perma.cc/KF8J-XW5S].

[451] *Id.* at 36:45; *see also* Press Release, United States Attorney's Office, Southern District of New York, Former Obstetrician/Gynecologist Robert Hadden Sentenced To 20 Years In Prison For Sexually Abusing Numerous Patients (July 25, 2023) (press release detailing the prison sentence and other penalties ordered against Robert Hadden), https://www.justice.gov/usao-sdny/pr/former-obstetriciangynecologist-robert-hadden-sentenced-20-years-prison-sexually [https://perma.cc/35H7-FYZN].

[452] *Supra* Part I.B.

[453] Exposed: Cover-Up at Columbia University, *Unbelievable*, Wondery, at 02:54 (Sept. 25, 2023) https://wondery.com/shows/exposed/ [https://perma.cc/KF8J-XW5S].

[454] *Id.* at 32:42.

[455] *Id.* at 27:35–27:56.

seek above all to have their injury acknowledged and recognized."[456] On this front, participating in the *Exposed* podcast itself manifests as partial remedy; whatever else it is, *Exposed* is a vehicle for women sexually abused by their gynecologist to publicly name their abuser, describe their experiences of and after the abuse, and express their hopes of a safer world for themselves and their children.

Marissa Hoechstetter, whom we quoted earlier, relays that a guilty verdict against Hadden in the federal criminal trial will neither change the past nor rectify institutional failures at Columbia University.[457] Still, Marissa goes on to say that what gives her some sense of satisfaction is that Hadden's manipulations and behaviors are exposed through the trial itself.[458] Like Hoechstetter, many of the interviewed women victimized by Hadden say they feel vindicated by the guilty verdict ("I've waited for this day for so long"),[459] not because the doctor will be sent off to prison but because the verdict expressively affirms, through a public hearing, that the women were injured and that their injuries matter. The podcast itself seems to further the mission of public notice and social awareness better than prison.

On the other hand, if ever there was a bad guy to test the limits of prison abolitionism it is Robert Hadden, a man who used his position of medical authority to hurt, molest, and humiliate hundreds upon hundreds of women, women who were often pregnant, scared, and trapped in the doctor's office. If we ended prisons, if we shut down the criminal justice system, what would we do with the Robert Haddens of the world? Hadden's behaviors challenge our decommission hypothesis; even more, his behaviors challenge the very idea that aesthetic redress for sexual violence could be meaningful at all. And yet in the fifth episode of the podcast we learn what we should have known was coming: Hadden's childhood was an awful blend of torture and neglect. His father was absent and his mother suffered alcoholism.[460] Hadden himself was sexually abused by his siblings.[461] In *Exposed*, the doctor's horrific biography has nowhere to go narratively; the podcast is generically committed to his villainy. Nevertheless, the introduction of familial neglect and sexual assault *against the doctor* broaches without quite advancing a story about cycles of violence, about abusive behavior begetting abusive behavior, and about the nonexistence or insufficiency of social support systems and public health provisions that would bring sexual violence and family abuse to an end.

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[456] Cossman, *supra* note 49, at 178. As philosopher Linda Alcoff opines, "we must continue to open up more venues for more speech," to publicly call out and resist sexual violence; in tandem, "we also need a strategy for altering the existing conditions of echoability," such that a diversity of survivors' narratives will be recognized and respected. Alcoff, *supra* note 52, at 40.

[457] Exposed: Cover-Up at Columbia University, *Remember Who the F*ck You Are*, *supra* note 310, at 21:27.

[458] *Id*. at 21:43–22:00.

[459] *Id.* at 31:54.

[460] *Id.* at 8:05–8:32.

[461] *Id.* at 8:32–8:45.

Our proposal to disassemble and reassemble rape law does nothing facially to stall or stop cycles of sexual violence; no law or legal reform will singlehandedly upset patterns of social dysfunction. *Exposed*, even if unwittingly, invites its listeners to countenance not only the legal remedies that would punish sexual violence but also the societal transformations necessary to prevent it.

Finally, and as its subtitle suggests, the other big-fish target of *Exposed* is Columbia University and its administrators, staff, nurses, deans, and faculty who were complicit in Hadden's predation. The last episode briefly holds out the possibility that deans and other lead administrators could face criminal liability for neglecting to intervene against Hadden, despite their knowledge of his history of abusive behavior.[462] The hope is dashed as listeners quickly learn there will be no criminal investigation against the university.[463] Still, in what is framed as a second-best alternative, Columbia agreed to settlements in two different lawsuits with Hadden's victims that totaled out to over $236 million.[464] While lead administrators of Columbia University "offer[ed] [their] deepest apologies to all [Hadden's] victims and their loved ones,"[465] several of those victims criticized the university's statement for not avowing its responsibility in shielding Hadden from investigation and so facilitating his abuse.[466]

We want to make two last points on *Exposed* before canvassing *I May Destroy You*'s concluding if instructively inconclusive visions of sexual justice. First, it strikes us that a multimillion-dollar settlement from a powerful institution may be more important for victims than sending a dean to prison for a few months or a couple of years. The settlement went after the machine and not just its cogs. But second, money is not morally sufficient either, for nothing can ever make these plaintiffs whole again, whether prison, a payout, or public avowal. Law is always late to the violation[467] and the violation, especially but not exclusively when sexual, is never fully reparable. Yet a multimillion-dollar settlement against a powerful and elite institution, alongside the equally important public broadcasting of that settlement through *Exposed* and other media, may function as a catalyst, not only by provoking other institutions to address rather than avoid problems of sex discrimination, sexual

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[462] Exposed: Cover-Up at Columbia University, *Willful Blindness*, *supra* note 450, at 24:18–25:53.

[463] *Id.* at 27:00.

[464] *Id.* at 31:25.

[465] Press Release, Minouche Shafik & Katrina Armstrong, Statement to the Columbia Community from University President Minouche Shafik and CUIMIC CEO (Sep. 18, 2023), https://www.cuimc.columbia.edu/news/statement-columbia-community-university-president-minouche-shafik-and-cuimc-ceo-katrina-armstrong [https://perma.cc/6CFJ-YEDT].

[466] *See* Dylan Andres, *Shafik and Armstrong Issue "Deepest Apologies" to Hadden Survivors after Bombshell Report*, Colum. Spectator (Sept. 19, 2023), https://www.columbiaspectator.com/news/2023/09/19/shafik-and-armstrong-issue-deepest-apologies-to-hadden-survivors-after-bombshell-report/ [https://perma.cc/28K3-XV3Q].

[467] *See* Marcus, *supra* note 166, at 388 ("Quite literally, the rape has already occurred by the time a case comes to court.").

harassment, and sexual violence, but also by encouraging people to call out their abusers and the institutions that enable them.

In the penultimate episode of *I May Destroy You*, Arabella spots the man who drugged and sexually assaulted her.[468] Night after night she and her best friend Terry scout the bar where she first met the man, whom we later learn is named David, in the hope of catching him should he return.[469] Now he has, and the final episode of *I May Destroy You* stages three alternative resolutions for Arabella, all of which are unsettling and surreal, beautiful and brutal.[470]

The first ending is a vengeful inversion of the show's inaugural violence. Arabella, along with Terry and her other friend Theo (white, female, damaged by traumas sexual and otherwise), send David into a stupor, drugging him with the same drug he had slipped into Arabella's drink twelve episodes prior.[471] The three women pummel the skinny, white, and nondescript David into bloody oblivion, grab and expose his penis (lex talionis: "He saw my thing, I wanna see his thing"), and beat him dead.[472] Arabella hides the body under her bed—where demons never die.[473] It is undeniably if shamefully (for us good pacifists) delectable to see the man get his comeuppance, to see him get his ass kicked by three injured but not immobilized women. Vengeance comes up short for Arabella though, who is left unsatisfied by exacting her retribution. Arabella is bedeviled by a "damned spot" problem,[474] as David's blood stains the note cards she has pinned to her bedroom wall to help her finish her overdue book manuscript.[475] Killing David is catharsis without closure. His murder makes Arabella's narrative incompletable, the monster under the bed forever haunting her.

The second ending is a plan hatched by Terry who wants to see Arabella's abuser apprehended by the police.[476] They need evidence, realizes Terry, and so they scheme to lure David into attempting to sexually assault Arabella once again. Arabella snorts an obscene amount of cocaine before flirting with David (who does not recognize her) and then David predictably roofies her drink.[477] Arabella plays the part of drugged out damsel but the cocaine has neutralized the soporific, and when David takes Arabella to the bathroom stall to abuse her she soberly confronts him.[478] Rattled, David nearly undergoes a metamorphosis—begging for Arabella's apology, confessing his history of sexual violence, relaying his sense of worthlessness and loneliness.[479] David's

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[468] *I May Destroy You: Would You Like To Know the Sex?*, at 28:10–30:33 (HBO July 13, 2020).
[469] *Id.*
[470] *I May Destroy You: Ego Death* (HBO July 14, 2020).
[471] *Id.* at 3:30–14:15.
[472] *Id.*
[473] *Id.*
[474] William Shakespeare, Macbeth act 5, sc. 1, l. 37.
[475] *I May Destroy You: Ego Death*, *supra* note 470, at 3:30–14:15.
[476] *Id*. at 15:00–25:45.
[477] *Id.*
[478] *Id.*
[479] *Id.*

moral transformation is cut short by the police, blustering in bellicose and unforgiving.[480] Arabella is distraught, perhaps by the opportunity lost for David's rehabilitation.[481] David will face a criminal trial and be incarcerated, we are to assume, a criminal justice "resolution" that resolves nothing for Arabella.

In this second ending, Terry's entrapment plan materializes as rap artist Vince Staples' "Rain Come Down" drives the action:[482]

> Where I'm from, we don't go to police
> Where I'm from, we don't run, we just roll with the heat[483]

The problem for Arabella is that neither rolling with the heat (extralegal vengeance, ending #1) nor calling the police (legal vengeance, ending #2) betters Arabella or her world.

The third ending, spoiler alert, does not offer final closure as/or adequate remedy, yet its promise for a safer, more solidaristic, and more feminist world is held open to the very degree this scenario is not mobilized by the will to punish. This ending is the most fantastical, the soundtrack slowed, the crowded bar emptied out but for key characters.[484] The plot device is a reversal of gender norms. Arabella asks David what he would like to drink rather than the other way around.[485] Terry, who had been lap dancing for a large and muscular man in the prior iteration now herself enjoys the lap dance from him, the absurdity of the heavy man shimmying atop her a shrewd indictment of gender norms.[486] Indeed, the sendup of gender roles is social commentary, intimating that everyday heteronormativity accelerates the conditions of sexual violence.[487] In this scenario, Arabella is the aggressor, but not predatorily.[488] In the bathroom stall where Arabella was first victimized, David and Arabella make out.[489] The scene cuts to the couple in Arabella's bedroom, naked and vulnerable, before Arabella penetrates David from behind, presumably with a dildo but in this fantasy scene it could just as well be Arabella's penis.[490] Arabella fucks David forcefully and lovingly.[491] Inhabiting a masculinist (but non-toxically masculine) position, Arabella accesses a sense of self-possession and sexual agency that has mostly eluded her since the initial

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[480] *Id.* at 25:50–32:04.
[481] *Id*
[482] *Id*.
[483] Vince Staples, *Rain Come Down*, *on* Big Fish Theory (Def Jam Recordings and Blacksmith Records 2017).
[484] *I May Destroy You: Ego Death*, *supra* note 470, at 25:50–32:04.
[485] *Id*.
[486] *Id*.
[487] *Id*. For the classic indictment of heterosexual norms as sources and symptoms of sexual violence, see Adrienne Rich, *Compulsory Heterosexuality and Lesbian Existence*, 5 Signs: J. Women Culture & Soc'y 631 (1980) (discussing the relationship between sexual violence against girls and women and culturally imposed heterosexuality).
[488] *I May Destroy You: Ego Death*, *supra* note 470, at 25:50–32:04.
[489] *Id*.
[490] *Id*.
[491] *Id.*

assault. "I'm not gonna go unless you tell me to," David says to Arabella post-coitus, to which she calmly answers, "Go."[492] He exits quietly, fully nude, his dead doppelganger crawling out from Arabella's bed to exit the scene too, letting Arabella move on with her writing, her friendships, and her life.[493] Viewers are left unsure how Arabella ends her book manuscript but she finally does so, titling it *January 22nd*, named for the day she was drugged and attacked.[494] She has overcome her writer's block, not her trauma. There is no singular object lesson bequeathed by *I May Destroy You*'s multiple endings and yet for Arabella, trauma is not surmountable but rather serviceable, channeled into writing, diffused but not defeated by her friendships, politicized through aesthetic remediation. For Arabella, that remediation is the fictional manuscript, *January 22nd.* For Michaela Coel, it is *I May Destroy You.*[495]

The final episode of *I May Destroy You* is titled "Ego Death," ostensibly named for the bar where Arabella was first assaulted, Ego Death Bar, and where Arabella has camped out nightly, fixating on her assailant to reappear.[496] It would be an easy albeit facile interpretation of Coel's titular choices to aver: sexual assault can kill the self, the ego, one's sense of coherence and psychological integrity. The harder lesson is that Arabella's ego and its defenses must be demolished for her to rebuild herself and revitalize her relationships. Over the arc of the show, Arabella avoids processing the violence against her and its ensuing trauma by snapping at her friends, demonizing those who would otherwise support her, and relying on social media to fuel her rage and mask her grief as anger. One also senses that "Arabella's obsession with bringing her rapist to justice lurks behind her messy struggle to figure out her own self-concept,"[497] which is to say that, for Arabella, pursuing her assailant through the criminal justice system is not carceral but compensatory, allowing Arabella to circumvent her own loss and vulnerability. By reclaiming her narrative, a reclamation literalized through the alternative endings Arabella (and Coel) authors, Arabella ventures onward with the trauma of her violation rather than drowning under its weight. Her ego defenses lowered, Arabella accepts needed advice from a colleague to finish out her book (the very colleague, Zain, who "stealthed" Arabella earlier in the show;[498] their later collaboration functions as an apology by Zain and an act of [guarded] forgiveness from Arabella).[499] Arabella is once

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[492] *Id.*

[493] *Id.*

[494] *Id.*

[495] *See* Olive Pometsey, *How Michaela Coel Transformed Her Trauma Into the Year's Best TV Show*, GQ (July 10, 2020), https://www.gq.com/story/michaela-coel-i-may-destroy-you-interview [https://perma.cc/F5G7-35A5].

[496] *I May Destroy You: Ego Death*, *supra* note 470.

[497] Melanie McFarland, *"I May Destroy You" Ends with a Revolutionary "Ego Death" Because the Other Options Would be a Lie*, Salon (Aug. 25, 2020), https://www.salon.com/2020/08/25/i-may-destroy-you-ending-finale-hbo/ [https://perma.cc/4CKH-EZEE].

[498] *I May Destroy You: That Was Fun*, *supra* note 268, at 22:20–22:40.

[499] *I May Destroy You: Would You Like to Know the Sex?*, *supra* note 468, at 16:20–18:50.

again able to focus on her friends' injuries, needs, and aspirations, rather than just her own. Anger, solipsism, and isolation transmute to reciprocity, collective care, and solidarity, a transmutation accomplished not through law but through art.

Canvassing the play *Prima Facie*, the podcast *Exposed*, and the show *I May Destroy You*, we have efforted to outline the limits of legal reform, even or especially our own proposals herein. Nonetheless, we have argued that disassembling and reassembling rape law is feminist: such reforms, we have contended, would provide better paths for redress and remedy against sexual violence than the extant regime. But to see the Bobs, and then to stop them, will require something more: activism and art that transvalues our relational, institutional, and cultural norms.