



## ARTICLE

**Sex Exceptionalism in Criminal Law**

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**Abstract.** Sex crimes are the worst crimes. People generally believe that sexual assault is graver than nonsexual assault, uninvited sexual compliments are worse than nonsexual insults, and sex work is different from work. Criminal codes typically create a dedicated category for sex offenses, uniting under its umbrella conduct ranging from violent attacks to consensual commercial transactions. This exceptionalist treatment of sex as categorically different rarely elicits discussion, much less debate. Sex exceptionalism, however, is neither natural nor neutral, and its political history should give us pause. This Article is the first to trace, catalog, and analyze sex exceptionalism in criminal law in the United States. Through a genealogical examination of sex-crime law from the late eighteenth century to today, it makes several novel contributions to the debate over how criminal law should regulate sex.

First, this Article casts doubt on the conventional account that rape law's history is solely one of sexist tolerance, an account that undergirds contemporary calls for broader criminal regulations and higher sentences. In fact, early law established rape as the most heinous crime and a fate worse than death, but it did so to preserve female chastity, marital morality, and racial supremacy. Sex-crime laws were not uniformly underenforced but rather selectively enforced—a tool used to entrench hierarchies and further oppressive regimes from slavery to social purity. Second, this Article employs this history to suggest that it is past time to critically examine whether sex crimes should be exceptional. Indeed, in the 1960s and 1970s, the enlightened liberal position was that rape law should be less exceptional and harmonized with the law governing “ordinary” assault.

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*Sex Exceptionalism in Criminal Law*  
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Third, this Article spotlights the invisible but powerful influence sex exceptionalism exerts on scholarship and advocacy. Sex exceptionalism has flourished despite the liberal critique, and today it is adopted without hesitation. Sex dazzles theorists of all types. For sex crimes, retributivists accept exorbitant sentences, utilitarians tolerate ineffective ones, and critics of mass incarceration selectively abandon their principled stance against expanding the penal state. Denaturalizing sex exceptionalism and excavating its troubling origins forces analysts to confront a detrimental frame underlying society's perpetual enthusiasm for punitive sex regulation.

**Table of Contents**

Prologue.....	758
Introduction .....	762
I. Sex Exceptionalism in History .....	769
A. Rape.....	774
1. Morality and marriage in early American rape law .....	774
a. Chastity was key .....	776
2. Race takes center stage in the postbellum era .....	779
B. Other Sex Offenses.....	782
1. Evangelicalism versus free love .....	783
2. Enter the “sexual deviant” .....	786
a. The “vag lewd” regime.....	787
b. Vag lewd laws and women .....	788
II. Sex Exceptionalism in Retreat and Retrenchment.....	790
A. Sex Exceptionalism’s Retreat.....	792
1. The liberal turn: harmonization and deregulation .....	792
a. Adopting an assault paradigm.....	794
b. Limits to the harmonization project.....	798
c. Liberal reform and public morals .....	801
d. Feminists’ complicated relationship with liberalization .....	803
B. Sex Exceptionalism’s Resurgence.....	810
1. The demise of sexual liberation.....	810
a. Strange bedfellows: moralists and dominance feminists .....	810
b. Limiting sexual liberty.....	813
2. Reenter the “sexual deviant” .....	815
a. Predator panic.....	815
b. The modern privileged predator.....	818
III. Sex Exceptionalism in Contemporary Practice.....	821
A. Sex Blinders.....	821
B. Carceral Sex Exceptionalism.....	824
1. The politically salient predator .....	824
2. Subway sex policing.....	828
C. A New Vag Lewd?.....	831
1. The feminist anti-hassling movement .....	831
a. Calls for criminalization .....	833
b. Race and class construct street hassling.....	836
2. Sex in public .....	841
Conclusion .....	845

## Prologue

*[E]verything pertaining to sex has been a “special case” in our culture.*

—Susan Sontag<sup>1</sup>

A few years ago, I attended a large international academic conference. I stayed at the conference hotel—a new establishment with one of those cool lobbies where mustachioed bartenders mix craft cocktails. On the second day of the conference, I presented my paper and headed out to a trendy restaurant with two colleagues and friends who, like me, are left-leaning legal scholars. After our meal, we walked back to the conference, enjoying the afternoon sun in our conference attire. A man walked up beside me, too close, even pre-social distancing, for the norms of ordinary interaction.

He was slight with a limp. His clothing was soiled, several sizes too big, and excessively layered for the summer heat. He looked like he was unhoused and had seen better days. There may have been some mental health or substance issues at play, but I could not be sure. In any case, he came right beside me and said, “You’re so beautiful.” I looked at him and replied pleasantly, “Thank you.” He kept pace with me for a few awkward moments and then limped off.

“Oh my gosh. Are *you* OK?” one of my companions asked me earnestly, a concerned furrow crossing her brow. “That was so gross,” added the other, “that guy was sexually harassing you.” Their conversation went on for a few moments, as they lamented the frequency with which such sexist and bothersome incidents occur. In fact, they ruminated, such sexual microaggressions produce a daily grind of stress for women solely because of their gender. For them, the moment was a pebble in a mountain of proof that everyday patriarchy harms women.

I walked along, uneasily digesting my lunch and the conversation. I recognized that on-the-street interactions range from mundane to assaultive, from culture-clash discomfiting to traumatic. To be sure, my own reactions have included replying with a pleasantry and, alternatively, getting out of there. But according to the feminist anti-hassling literature, mild-mannered “thank-you” responses like the one I gave further all women’s subordination: “[A] ‘thank you’ is *never* the appropriate response to an injury, no matter how seemingly harmless or ‘flattering’ it may be. Here, the harms of invasion and assertion of male power to act upon a woman have occurred, although they may come in a ‘harmless’

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1. Gayle Rubin, *Thinking Sex: Notes for a Radical Theory of the Politics of Sexuality*, in PLEASURE AND DANGER: EXPLORING FEMALE SEXUALITY 267, 278 (Carole S. Vance ed., 1984) (quoting SUSAN SONTAG, *STYLES OF RADICAL WILL* 46 (1969)).

form,” one author opines.<sup>2</sup> Another confirms, “Both the derogatory and the ‘flattering’ behaviors are frightening and threatening to women.”<sup>3</sup>

There is a popular feminist<sup>4</sup> view that, when a man engages in public *sexual* behavior, he should be condemned and punished for reinforcing male supremacy’s geographic totalitarianism: All “street harassment” keeps women in fear of public spaces and, in turn, accomplishes “a ghettoization [of women] to the private sphere of hearth and home.”<sup>5</sup> Society is accordingly obligated to protect women going about their day from these degrading and cumulatively liberty-destroying encounters.<sup>6</sup>

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2. Olatokunbo Olukemi Laniya, Note, *Street Smut: Gender, Media, and the Legal Power Dynamics of Street Harassment, or “Hey Sexy” and Other Verbal Ejaculations*, 14 COLUM. J. GENDER & L. 91, 101 (2005) (emphasis added).

3. Elizabeth Arveda Kissling, *Street Harassment: The Language of Sexual Terrorism*, 2 DISCOURSE & SOC’Y 451, 455 (1991).

4. Feminism is of course “heterodox, encompassing a range of ideas about gender, biology, equality, state power, and economic distribution”:

[N]ot all feminist theories invoke or support criminal law, and not all those who favor unrestrained prosecution of gender crime are feminists. In the 1970s, as the battered women’s and antirape movements grew, different feminists with different commitments vied for control of the narrative and agenda. Some feminists prioritized formal equality, while others sought radical substantive justice. Some abhorred domesticity, while others celebrated motherhood. Some saw sexuality as a tool of patriarchy, while others regarded sex as radically liberating. Some feminists allied with state authorities, and indeed, some *were* state authorities. Others regarded the state as something to be rapidly torn down.

AYA GRUBER, THE FEMINIST WAR ON CRIME: THE UNEXPECTED ROLE OF WOMEN’S LIBERATION IN MASS INCARCERATION 6-7 (2020) [hereinafter GRUBER, FEMINIST WAR]. This Article concentrates on the second-wave feminist groups that were sex-skeptical and promoted or accepted criminalization, because they ultimately won control of the agenda and in turn contributed powerfully to contemporary sex exceptionalism. See generally *id.* at 42-58 (exploring ways in which the voices of feminists of color were actively suppressed). The less popular anti-carceral and pro-sex feminists exerted less influence over sex-law reform in the latter part of the twentieth century. See *id.* at 141-50 (laying out the critiques of feminist rape reform that never took hold); see also ANGELA Y. DAVIS, WOMEN, CULTURE, & POLITICS 45 (1984) (explaining how “the failure of the antirape movement of the early 1970’s to . . . acknowledge[] the social conditions that foster sexual violence as well as the centrality of racism” alienated Black feminists from that movement).

5. Cynthia Grant Bowman, *Street Harassment and the Informal Ghettoization of Women*, 106 HARV. L. REV. 517, 520 (1993).

6. For calls for criminalization, see, for example, Laniya, *supra* note 2, at 126-27; Marc Tran, Comment, *Combating Gender Privilege and Recognizing a Woman’s Right to Privacy in Public Spaces: Arguments to Criminalize Catcalling and Creepshots*, 26 HASTINGS WOMEN’S L.J. 185, 206 (2015) (suggesting that it is “time to adopt statutes to criminalize [street harassment and upskirt photography]”); Sonja Arndt, Note, *Street Harassment: The Need for Criminal Remedies*, 29 HASTINGS WOMEN’S L.J. 81, 90 (2018) (“As one of the leaders of the free world, the United States should strive to take the lead in protecting its citizens from harassment and discrimination, which can be accomplished through criminalizing street harassment.”); and Erin Sheley, *A Broken Windows Theory of Sexual*  
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Still, it was hard to see how I, with my economic advantage and power to summon the police without fear, was the marginalized victim while the apparently homeless and disabled Black man was the privileged executor of male power. Of the many possible explanations for this man's actions—wanting to forge a human connection, intoxicated chattiness, or even a gendered cultural performance—a patriarchal desire to use sexual innuendo to achieve male dominion over the city space was surely not the likeliest. Nevertheless, what mattered was the sexual subtext of the encounter, which, as minimal as it was, transformed what was at worst a tiny nuisance into a gender inequity and social ill.<sup>7</sup> Moreover, the sexual nature of the compliment, according to advocates, made my thank-you response “not acceptable.”<sup>8</sup> Staying quiet would also have been a poor choice, as “silence only protects the harasser.”<sup>9</sup> The better course for women is, if they are willing, to reprimand the offending actor, publicly shame him, or contact the authorities.<sup>10</sup>

Now, imagine that the scenario had played out slightly differently, with the man uttering not a sexual compliment but a nonsexual insult: The same man approached but instead growled, “You think you're better than me. F\*\*\* you.” Would my companions have called the man a “gross” harasser and sympathized with my presumed fear and disgust?<sup>11</sup> Would the appropriate

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*Assault Enforcement*, 108 J. CRIM. L. & CRIMINOLOGY 455, 458 (2018) (advocating for “[a]ggressive prosecution of even ‘harmless’ non-consensual street harassment”).

7. See Kissling, *supra* note 3, at 454 (“[M]ale intentions are irrelevant . . .”).
8. See Laniya, *supra* note 2, at 101-02; Deirdre Davis, *The Harm That Has No Name: Street Harassment, Embodiment, and African American Women*, 4 UCLA WOMEN'S L.J. 133, 138-39 (1994) (arguing that the unacceptability of “‘thank you’ as a response” is one characteristic that identifies an act as street harassment); Deborah Tuerkheimer, *Street Harassment as Sexual Subordination: The Phenomenology of Gender-Specific Harm*, 12 WIS. WOMEN'S L.J. 167, 194-96 (1997).
9. MARTHA J. LANGELAN, BACK OFF!: HOW TO CONFRONT AND STOP SEXUAL HARASSMENT AND HARASSERS 100 (1993).
10. The argument for criminal penalties, *supra* note 6, presumes that people will, in fact, call police. See also *id.* at 22 (applauding women's shift from “retreating helplessly or acting like fearful, embarrassed victims” to using “‘confrontation’ techniques” that involve “not only speaking up and filing charges but taking decisive, personal action”); *Street Harassment and the Law: Direct Responses*, STOP STREET HARASSMENT, <https://perma.cc/EW43-CQT4> (archived Jan. 20, 2023) (asserting that “[p]ublic shaming is often an effective tactic” and recommending the “Not Your Baby” app, a sexual harassment response generator). In 2013, anti-hassling group Hollaback! “unveil[ed] a new, targeted system to report sexual harassment to New York City Councilmembers via iPhone and Droid app.” Press Release, Hollaback!, Hollaback! Launches New App for Real-Time Reporting of Street Harassment and Violence to City Officials (Aug. 19, 2013, 2:45 PM), <https://perma.cc/5VQZ-2CLE>.
11. As Martha Nussbaum writes, sexual matters foment disgust sentiments. MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION & CONSTITUTIONAL LAW 17 (2010). Political scientists have discovered that disgust sensitivity, which can be “activated by public discourse,” orients people “toward [state] protection,” including  
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course have been to reprimand or shame the man? Had I done so, or gone further and alerted the authorities, I may have taken on the mantle of “upstanding citizen” or “vulnerable woman,” on whose behalf authoritarian and racist law-enforcement programs like quality-of-life policing, stop-and-frisk policies, and street sweeping of the unhoused have been erected.<sup>12</sup>

From the birth of American cities, police have wielded their authority to cleanse the streets of vagrants and undesirables, preserve the public welfare of “law-abiding” people, and maintain the state’s domination of public spaces.<sup>13</sup> Many progressives, including my compatriots, consider such street policing utterly archaic and insensitive to the plight of unhoused people who, by necessity, have an outsized presence on the street.<sup>14</sup> They, like Jeremy Waldron, lament “a state of affairs in which a million or more citizens have no place to perform elementary human activities like urinating, washing, sleeping, cooking, eating, and standing around.”<sup>15</sup> Yet when it comes to unhoused persons’ “gross” public sexual conduct, even liberals fail to see this behavior as the inhumane consequence of the private property system, despite

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“policies that protect us from outsiders who might ‘pollute’ our folkways.” Cindy D. Kam & Beth A. Estes, *Disgust Sensitivity and Public Demand for Protection*, 78 J. POL. 481, 483, 493 (2016); *see also* Yoel Inbar, David A. Pizarro, Joshua Knobe & Paul Bloom, *Disgust Sensitivity Predicts Intuitive Disapproval of Gays*, 9 EMOTION 435, 438 (2009) (finding high disgust sensitivity predicts homophobic sentiments).

12. *See* Sara K. Rankin, *Punishing Homelessness*, 22 NEW CRIM. L. REV. 99, 109 (2019) (noting the pervasiveness of criminal laws targeting the people associated with street disorder); Olúfẹ́ mí O. Táíwò, *Who Gets to Feel Secure?*, AEON (Oct. 30, 2020), <https://perma.cc/6PUS-XBV3> (observing the government’s provision of security to the privileged at the expense of those who lack material security).
13. *See* Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. 1637, 1644-48 (2021) (discussing the historical criminalization of public disorder); KATHERINE BECKETT & STEVE HERBERT, *BANISHED: THE NEW SOCIAL CONTROL IN URBAN AMERICA* 8-15 (2009) (arguing that criminal laws and policing maintain public exclusion zones, operatively “banishing” vulnerable people from them); *see also* Marie-Eve Sylvestre, *Disorder and Public Spaces in Montreal: Repression (and Resistance) Through Law, Politics, and Police Discretion*, 31 URB. GEOGRAPHY 803, 805 (2010) (studying the state management of public space in Montréal).
14. *See* Rankin, *supra* note 12, at 106-09; NAT’L L. CTR. ON HOMELESSNESS & POVERTY, *NO SAFE PLACE: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES* 16-18 (2019), <https://perma.cc/B93T-K837> (cataloging and critiquing the laws that criminalize the day-to-day activities of unhoused people); ALLISON FRANKEL, SCOUT KATOVICH & HILLARY VEDVIG, ALLARD K. LOWENSTEIN INT’L HUM. RTS. CLINIC AT YALE L. SCH., “FORCED INTO BREAKING THE LAW”: THE CRIMINALIZATION OF HOMELESSNESS IN CONNECTICUT 2 (Hope Metcalf, Alisha Bjerregaard & Soo-Ryun Kwon eds., 2016), <https://perma.cc/CKV4-ZB9V> (critiquing the “devastating cycle” produced by criminalizing homelessness).
15. Jeremy Waldron, *Essay, Homelessness and the Issue of Freedom*, 39 UCLA L. REV. 295, 301 (1991).

the fact that sex, even more so than sleeping, urinating, or cooking, is *the* “primal” activity that must be performed exclusively within private confines.<sup>16</sup>

In the case of my conversant, the tinge of flirtation in his comment made his behavior *sexual* and changed our relationships to the state. The man ceased to be a vulnerable person who progressives would say needed material aid and protection against police violence. In an instant, he became a patriarchal oppressor using sex to harm a vulnerable woman. He was no longer a person who conservatives might ignore as a nuisance; instead, he was a prurient threat in need of state management. Once we entered the sexual realm, I was the disempowered victim who required state aid, and he was the empowered, dangerous agent against whom the state could appropriately wield the weapons of criminal law.

### Introduction

Sex exceptionalism is “the idea that sex and sexualities are inherently different from all other human activities and topics of study,” as Susan Stiritz and Susan Appleton explain.<sup>17</sup> In the criminal law context, critics of our uniquely harsh sex-crime regime often focus on spectacular cases of children whose minor sexual infractions ensnared them in a Kafkaesque system of lifetime registration, social ostracism, and sadistic “treatment.”<sup>18</sup> But I tell the simple story above to show that even sophisticated left-leaning thinkers embrace as natural—indeed, pre-legal and pre-moral—the *principle* that sex radically changes the equation. People widely believe that a sexual assault is far worse than a beating, that sexual commerce is distinct from nonsexual commerce, and that molestation, which is often nonviolent and committed by children, is an order of magnitude more horrific than child abuse.<sup>19</sup> An

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16. *See id.* (discussing how legislators, empowered by a housed electorate, “make public places available only for activities other than” primal human tasks).

17. Susan Ekberg Stiritz & Susan Frelich Appleton, *Celebrating Masters & Johnson’s Human Sexual Response: A Washington University Legacy in Limbo*, 53 WASH. U. J.L. & POL’Y 71, 74 (2017); *see also* Adrienne D. Davis, *Bad Girls of Art and Law: Abjection, Power, and Sexuality Exceptionalism in (Kara Walker’s) Art and (Janet Halley’s) Law*, 23 YALE J.L. & FEMINISM 1, 47 (2011) (defining “sexuality exceptionalism” as the “view of sex as exceptional, that is, distinctive (and distinguished) from other market and political relations”).

18. *See* Sarah Stillman, *The List*, NEW YORKER (Mar. 6, 2016), <https://perma.cc/5CT5-56B9> (focusing on the legal and social disabilities suffered by children convicted of sex offenses); Amy E. Halbrook, *Juvenile Pariahs*, 65 HASTINGS L.J. 1, 3-5 (2013) (observing the stigmatization of juvenile sex offenders). *See generally* Corey Rayburn Yung, *Sex Offender Exceptionalism and Preventive Detention*, 101 J. CRIM. L. & CRIMINOLOGY 969 (2011) (cataloging and critiquing draconian sex-offender laws).

19. For examples of the exceptional treatment of sex work, *see generally* Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1657-60 (2010) (examining “neo-abolitionists”

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unhoused person who aggressively curses at passersby draws passing contempt or even sympathy; an unhoused person who exposes himself to passersby is dangerous and deviant. A person who commits an assault during a fight is a hothead; a person who commits a sexual assault—sex without consent or even without an affirmative expression of consent—is a rapist.<sup>20</sup>

In recent years, scholars have analyzed sex exceptionalism in a variety of areas, including family, contract, and property law, uncovering how doctrines in these areas confine, discipline, and penalize sexual activity.<sup>21</sup> Jennifer Rothman, for example, critiques intellectual property law’s “negative view of sex that either dismisses the value of sex or, worse yet, treats it as something harmful.”<sup>22</sup> Yet no one has offered a similar overarching analysis of criminal law, which is openly and *categorically* sex-exceptionalist. Criminal law carves out a specific category, “sex crimes,” and fits within that category offenses from

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focus on sex in anti-human-trafficking advocacy as a means to combat commercial sex more broadly); and Grace Chang & Kathleen Kim, *Reconceptualizing Approaches to Human Trafficking: New Directions and Perspectives from the Field(s)*, 3 STAN. J. C.R. & C.L. 317, 320-21 (2007) (emphasizing that advocates focus on sex in trafficking and apply a trafficking model to all commercial sex). On the molestation point, see HOWARD N. SNYDER, BUREAU OF JUST. STATISTICS, U.S. DEP’T OF JUST., NCJ No. 182990, SEXUAL ASSAULT OF YOUNG CHILDREN AS REPORTED TO LAW ENFORCEMENT: VICTIM, INCIDENT, AND OFFENDER CHARACTERISTICS 8 (2000) (finding that juveniles commit 40% of assaults on children younger than six years old).

20. For affirmative consent statutes, see, for example, MINN. STAT. § 609.341(4)(a) (2022) (“[W]ords or overt actions . . . indicating a freely given present agreement . . .”); OKLA. STAT. Tit. 21, § 113 (2022) (“[A]ffirmative, unambiguous and voluntary agreement . . .”); WIS. STAT. § 940.225(4) (2023) (“[W]ords or overt actions . . . indicating a freely given agreement to have sexual intercourse . . .”); VT. STAT. ANN. Tit. 13, § 3251(3) (2022) (“[A]ffirmative, unambiguous, and voluntary agreement . . .”); 10 U.S.C. § 920(g)(7)(A) (“[F]reely given agreement . . .”). See also CRIM. INSTRUCTIONS SUBCOMM., COMM. PROPOSED JURY INSTRUCTIONS, PA. SUPREME CT., PENNSYLVANIA SUGGESTED STANDARD CRIMINAL JURY INSTRUCTIONS § 8.311B(1) (3d ed. 2016 & Supp. 2019) (suggesting that a victim must “make[] . . . willingness known to the defendant by words or behavior”); and *State ex rel. M.T.S.*, 609 A.2d 1266, 1277 (N.J. 1992) (requiring an affirmative expression of consent). For debate on affirmative consent, compare Deborah Tuerkheimer, *Affirmative Consent*, 13 OHIO ST. J. CRIM. L. 441, 443-44 (2016), with Aya Gruber, *Consent Confusion*, 38 CARDOZO L. REV. 415, 418-20 (2016) [hereinafter Gruber, *Consent Confusion*].
21. See, e.g., Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809, 814-18 (2010) (demonstrating the law’s role in channeling sexual activity into intimate relations); Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1256 (2009) (noting how family law and criminal law constructed sexual intimacy in terms of family and family in terms of sexual intimacy); Courtney Megan Cahill, *Reproduction Reconceived*, 101 MINN. L. REV. 617, 650 (2016) (discussing how the law governing reproductive services differentiates between lab-based and sexuality-based reproduction).
22. Jennifer E. Rothman, *Sex Exceptionalism in Intellectual Property*, 23 STAN. L. & POL’Y REV. 119, 120 (2012).

assaults to extortions.<sup>23</sup> Sexual-assault behaviors range from sudden attacks to deceptive statements.<sup>24</sup> The only uniting quality is sex. This structure, which unites diverse misconduct under one umbrella, keeps the focus squarely on the fact of sex rather than on the quality of the misconduct.

Criminal law's creation of a dedicated category for "sex crime" nevertheless seems so natural that it rarely merits discussion. "Sex is different" has always been in the ether. Sex exceptionalism's extensive past and ubiquitous present allows it to operate invisibly and intuitively today. Gayle Rubin observes that sex has always been "burdened with an excess of significance."<sup>25</sup> For centuries, sex has been "taken charge of, tracked down as it were, by a discourse that aimed to allow it no obscurity, no respite," Michel Foucault remarks.<sup>26</sup> Thus, "[w]hen faced with the prospect of . . . a zone where sex is not regulated by criminal or family law," Melissa Murray notes, even sophisticated analysts "reflexively revert back to what we have known and attempt to interpret this new space through our [preexisting] lens."<sup>27</sup>

This paper aims to denaturalize the idea that appending sex to harmful, and even nonharmful, conduct automatically renders it categorically different and worse than analogous nonsexual conduct. "Sex crime" is not a natural, neutral, or even fixed category. In between "sex" and "crime" lies decades of history, particular ideologies, social hierarchies, and politics. Demystifying sex in criminal law is important because the sex-crime category does so much work. Falling into the category can quite literally be a life-or-death issue for

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23. See, e.g., ALASKA STAT. §§ 11.41.410-470 (2022) (Sexual Offenses); COLO. REV. STAT. §§ 18-3-401 to -418 (2022) (Unlawful Sexual Behavior); TEX. PENAL CODE ANN. §§ 21.01-.19 (West 2022) (Sexual Offenses); N.Y. PENAL LAW §§ 130.00-96 (McKinney 2022) (Sex Offenses). Some Codes group sex offenses with public morals offenses. See, e.g., CAL. PENAL CODE § 261-368.7 (West 2022) (Crimes Against the Person Involving Sexual Assault, and Crimes Against Public Decency and Good Morals); OKLA. STAT. tit. 21, §§ 851-1176 (West 2022) (Crimes Against Public Decency and Morality). *But see* S.C. CODE ANN. §§ 16-3-600 to -755 (2022) (grouping criminal sexual conduct and nonsexual assault together). Some arguably nonwrongful behaviors are also lumped in, like consensual teenage sex and consensual commercial sex. See Cynthia Godsoe, *Recasting Vagueness: The Case of Teen Sex Statutes*, 74 WASH. & LEE L. REV. 173, 176 (2017) (characterizing statutory rape laws as "vaguenets" that "criminalize harmless conduct" and give unchecked discretionary power to enforcers).

24. See Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372, 1395-1406 (2013) (examining the notion of "rape-by-deception"); Patricia J. Falk, *Rape by Fraud and Rape by Coercion*, 64 BROOK. L. REV. 39, 45-47 (1998) (discussing sexual frauds and coercions, including extortion).

25. Rubin, *supra* note 1, at 279.

26. 1 MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 20 (Robert Hurley trans., Random House 1978) (1976).

27. Murray, *supra* note 21, at 1257.

defendants.<sup>28</sup> Once conduct is characterized as *sexual* harm, it receives a wholly different legal and sociocultural treatment than all nonsexual harm.<sup>29</sup> Once a person is categorized as a *sex* offender, that person occupies a wholly different legal and sociocultural world than the one occupied by even heinous nonsexual criminal actors.

Sex also has a special hypnotic quality. It stimulates incomparable titillation and foments incomparable disgust.<sup>30</sup> John D’Emilio and Estelle Freedman observe, “Sex is easily attached to other social concerns . . . and it often evokes highly irrational responses.”<sup>31</sup> The plasticity of the “sexual” label makes it a powerful tool of politics. Today, right-wing politicians and pundits see great advantage in characterizing a wide range of their opponents and disfavored groups—LGBTQ people, progressive parents, civil libertarians—as sexual deviants,<sup>32</sup> a trend vividly illustrated by the unfortunate introduction of the phrase “OK groomer” into the public lexicon.<sup>33</sup>

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28. See, e.g., FLA. STAT. § 921.141(6)(d) (2022) (including “sexual battery” as an aggravating factor in capital cases); Don Thompson, *Many Sex Offenders Killed in California Prison*, ASSOCIATED PRESS (Feb. 16, 2015), <https://perma.cc/92F4-6PH6> (finding that sex offenders make up 15% of California prisoners but nearly 30% of prison homicide victims); Gitika Ahuja, *Sex Offender Registries: Putting Lives at Risk?*, ABC NEWS (Apr. 18, 2006), <https://perma.cc/3XJS-NQST> (describing how a vigilante used online registries to track down and kill registered sex offenders). Sex offenders often receive mandatory life sentences. See MINN. STAT. § 609.3455 (2022) (mandating a life sentence for certain sex offenders); COLO. REV. STAT. § 16-22-113(3) (2022) (imposing a lifetime registration requirement on certain offenders). For critiques of sex offender registration and notification requirements, see JUDITH LEVINE & ERICA R. MEINERS, *THE FEMINIST AND THE SEX OFFENDER: CONFRONTING SEXUAL HARM, ENDING STATE VIOLENCE* 50-52 (2020); Wayne A. Logan, *Challenging the Punitiveness of “New-Generation” SORN Laws*, 21 NEW CRIM. L. REV. 426, 454-57 (2018); Catherine L. Carpenter, *The Constitutionality of Strict Liability in Sex Offender Registration Laws*, 86 B.U. L. REV. 295, 369-70 (2006); and Eric S. Janus & Wayne A. Logan, *Substantive Due Process and the Involuntary Confinement of Sexually Violent Predators*, 35 CONN. L. REV. 319, 382-83 (2003).
29. See, e.g., *infra* notes 322-26 and accompanying text (discussing the law’s differential treatment of physical contacts based on undisclosed sexual intent).
30. See *supra* note 11.
31. JOHN D’EMILIO & ESTELLE B. FREEDMAN, *INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA*, at xvii-xviii (3d ed. 2012).
32. See, e.g., Parental Rights in Education, 2022 Fla. Laws ch. 22 (codified at FLA. STAT. § 1001.42(8)) (the so-called “Don’t Say Gay” bill). Christina Pushaw, Florida Governor Ron DeSantis’ press secretary, remarked, “The bill that liberals inaccurately call ‘Don’t Say Gay’ would be more accurately described as an Anti-Grooming Bill.” She added, “If you’re against the Anti-Grooming Bill, you are probably a groomer or at least you don’t denounce the grooming of 4-8 year old children.” James Kirchick, Opinion, *When Reagan Said Gay*, N.Y. TIMES (Mar. 22, 2022), <https://perma.cc/TS35-H56B>. States have followed Florida’s lead, proposing a cascade of “Don’t Say Gay” bills. See Dustin Jones & Jonathan Franklin, *Not Just Florida. More than a Dozen States Propose So-Called “Don’t Say Gay” Bills*, NPR (Apr. 10, 2022, 7:01 AM ET), <https://perma.cc/B6NB-28A4>.
33. Jamie Paul, *“OK Groomer” and the Dangers of Crying Wolf*, QUEER MAJORITY, <https://perma.cc/H39X-FP62> (archived Jan. 20, 2023).

But sex exceptionalism is not just a product of conservatism, prejudice, and moralism. Although progressives largely reject religious views of sex's inherent immorality, many still harbor an instinct that sex crimes are the worst crimes.<sup>34</sup> This is not surprising, Judith Levine and Erica Meiners remark, given that "social justice activists' anxieties about sex are no less acute than anyone else's."<sup>35</sup> Many progressives also embrace sex exceptionalism because they adhere to the canonical feminist view that sex crimes uniquely subordinate women and have been uniquely tolerated by the state.<sup>36</sup> The issue of sexual danger thus resonates on both the right and left and has become an indispensable trope supporting the carceral status quo. Sex offenses and offenders are exceptional in many ways: worse than their nonsexual counterparts, punished more severely, and frequently excised from the progressive mass incarceration critique.

What follows is a critical analysis of the widely held intuition that sex crimes are categorically different. I seek to uncover how laws and discourses reinforce, often unintentionally, a regressive, carceral, and masculinist sexual order that Herbert Marcuse described as the tyranny of "organized genital

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34. There are a growing number of progressives, including feminists, who oppose proposals for new or more forceful criminal sex regulations, even those in the name of feminism. See *supra* note 4 (discussing diverse types of feminism). This group includes abolitionist and public-defense-oriented commentators opposed to any effort to strengthen criminal law and enforcement, see, for example, Mariame Kaba, *Opinion, Yes, We Mean Literally Abolish the Police: Because Reform Won't Happen*, N.Y. TIMES (June 12, 2020), <https://perma.cc/5ZGL-JTMD>, the handful of feminist scholars who critique "carceral feminism," see, for example, ELIZABETH BERNSTEIN, *BROKERED SUBJECTS: SEX, TRAFFICKING, AND THE POLITICS OF FREEDOM* 21 (2018); and LEIGH GOODMARK, *DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE* 1 (2018), and Black feminists and feminists of color who have for decades opposed the carceral approach to domestic and sexual violence, see, for example, MARIAME KABA & ANDREA J. RITCHIE, *Black Feminist Musings*, in *NO MORE POLICE. A CASE FOR ABOLITION* 270, 270-86 (2022); and ANGELA Y. DAVIS, *ARE PRISONS OBSOLETE?* 62-66 (2003). Perhaps today these groups enjoy more popular support than in times past, but their influence on feminist antirape efforts remains limited. As someone who has cautioned against feminist-driven carceral policies for two decades, I would be delighted to discover that most progressives reject feminist proposals to strengthen criminal law, but there is no reason to believe this is the case. See GRUBER, *FEMINIST WAR*, *supra* note 4, at 171 (discussing the popularity of carceral feminist proposals); Kate Levine, *The Progressive Love Affair with the Carceral State*, 120 MICH. L. REV. 1225, 1227-28 (2022) (reviewing *id.*) (discussing how progressives embrace punitiveness for some kinds of defendants); Benjamin Levin, *Decarceration and Default Mental States*, 53 ARIZ. ST. L.J. 747, 756-57 (2022) (describing "carceral progressivism"); Hadar Aviram, *Progressive Punitivism: Notes on the Use of Punitive Social Control to Advance Social Justice Ends*, 68 BUFF. L. REV. 199, 202-03 (2020) (discussing the discourse of "progressive punitivism").

35. LEVINE & MEINERS, *supra* note 28, at 14.

36. See *infra* notes 71-74 and accompanying text (examining this canonical view).

sexuality.”<sup>37</sup> Here, I do not take a definitive position on *when* the law should prohibit sexual conduct or *how* the state should enforce such prohibitions, although my general anti-carceral stance is apparent. Moreover, it is not my position that we should examine lawmakers’ and society’s punitive impulses *only* when sex is at issue.<sup>38</sup> Even without sex clouding the picture, lawmakers’ determinations of which behaviors to label criminal or violent are marked by politics, arbitrariness, and biases about race, class, and gender.<sup>39</sup> And I am not saying that sexual wrongdoing generally produces minimal harm or less harm than other wrongdoing. It is not necessarily exceptionalist to treat sexual assault as more injurious than nonsexual assault.<sup>40</sup>

My point is that legal scholars and policymakers should not presume sex is *sui generis* and exempt it from typical criminal law analyses. Nor should they assume “sex is a natural force that exists prior to social life” and “eternally unchanging, asocial, and transhistorical,” as Rubin notes.<sup>41</sup> Instead, sex must be “understood in terms of social analysis and historical understanding.”<sup>42</sup> By putting sex-crime law in its social and historical context, I hope to decrease sex’s hypnotic power—a power that predisposes even sophisticated theoreticians to embrace knee-jerk, punitive reactions that stray from the distributional, philosophical, and empirical frameworks they apply in non-sex cases.

Of course, not all sex exceptionalism is knee-jerk, and liberal and feminist commentators offer thoughtful rationales for why sex crimes are *in fact* categorically worse than their non-sex analogues.<sup>43</sup> At the same time, taking the long view, current sex-exceptionalist policies and arguments are still tethered to older sex-exceptionalist norms, law, and discourses that, far from being liberationist, served to cabin and control female and nonprocreative sexuality, entrench Christian morals and marital mores, and maintain white

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37. HERBERT MARCUSE, *EROS AND CIVILIZATION: A PHILOSOPHICAL INQUIRY INTO FREUD* 205-08 (1974).

38. My scholarship frequently cautions about the “punitive impulse” outside of the sex context. See Aya Gruber, *Race to Incarcerate: Punitive Impulse and the Bid to Repeal Stand Your Ground*, 68 U. MIA. L. REV. 961, 966-67 (2014); Aya Gruber, *When Theory Met Practice: Distributional Analysis in Critical Criminal Law Theorizing*, 83 FORDHAM L. REV. 3211, 3212-13 (2015); Aya Gruber, *A Provocative Defense*, 103 CALIF. L. REV. 273, 277-78, 312 (2015).

39. See DAVID ALAN SKLANSKY, *A PATTERN OF VIOLENCE: HOW THE LAW CLASSIFIES CRIMES AND WHAT IT MEANS FOR JUSTICE* 8-9 (2021); Alice Ristroph, *Criminal Law in the Shadow of Violence*, 62 ALA. L. REV. 571, 575 (2011) (observing the constructed nature of the concept of violence).

40. See *infra* notes 77-80 and accompanying text.

41. Rubin, *supra* note 1, at 275.

42. *Id.* at 277.

43. See *infra* notes 365-72 and accompanying text (describing the dominance feminist view of sex).

supremacy.<sup>44</sup> For this reason, late-twentieth-century liberal law reformers retreated from sex exceptionalism.<sup>45</sup> But propelled by a variety of conservative and liberal forces, it came roaring back.<sup>46</sup> Today, sex exceptionalism powerfully, if invisibly, shapes law and policy.

Part I examines the origins of sex exceptionalism in American criminal law and its development from the late eighteenth century through the mid-twentieth century.<sup>47</sup> Today's sex exceptionalism is a legacy of the past, but it is also a product of *denying* the past. While the feeling that the sex-crime category is natural endures, *why* criminal law singled out sex is lost to the passage of time. Early laws outlawing rape and other criminal sex did not reflect concerns for women's autonomy, equality, and safety. Rather, they aimed to control female sexuality and reproduction, confine sex to marriage, and vindicate religious values.<sup>48</sup> Criminal sex law's substance and enforcement adapted to the anxieties of the times: Reconstruction-era fears of Black men's sexuality and equality, the turn-of-the-century preoccupation with vice and idleness, and the mid-century panic over homosexuality.<sup>49</sup> Over time, this exceptional status was extended from sex acts to sex offenders, who became a discrete and pathologized subclass.<sup>50</sup>

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44. See *infra* Part I.A.

45. See *infra* Part II.A.

46. See *infra* Part II.B.

47. I do not discuss sex offenses against children, which have their own unique history.

48. See *infra* Part I.A.

49. See *infra* Part I.A.2 (discussing race and sexuality); notes 178-82 and accompanying text (discussing homosexual panic).

50. This is not meant to be a comprehensive history of U.S. sex law, which has been done with care by great historians. See generally, e.g., D'EMILIO & FREEDMAN, *supra* note 31 (history of sex in the U.S.); ESTELLE B. FREEDMAN, *REDEFINING RAPE: SEXUAL VIOLENCE IN THE ERA OF SUFFRAGE AND SEGREGATION* (2013) (history of sexual violence in the U.S.); JESSICA R. PLILEY, *POLICING SEXUALITY: THE MANN ACT AND THE MAKING OF THE FBI* (2014) (history of anti-vice law, sex policing, and vice patrol in the U.S.); GEOFFREY R. STONE, *SEX AND THE CONSTITUTION: SEX, RELIGION, AND LAW FROM AMERICA'S ORIGINS TO THE TWENTY-FIRST CENTURY* (2017) (history of sex regulation in the U.S.); WILLIAM N. ESKRIDGE JR., *DISHONORABLE PASSIONS: SODOMY LAWS IN AMERICA, 1861-2003* (2008) [hereinafter ESKRIDGE, *DISHONORABLE PASSIONS*] (history of same-sex sex regulation in the U.S.); WILLIAM N. ESKRIDGE, JR., *GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET* (1999) [hereinafter ESKRIDGE, *GAYLAW*] (history of same-sex regulation in the U.S.); EDWARD SHORTER, *WRITTEN IN THE FLESH: A HISTORY OF DESIRE* (2005) (history of sexual desire). For very different feminist political histories, compare SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 16-209 (1975) (providing an influential feminist history of rape emphasizing sexual danger, failed feminist interventions, and the lack of sexual regulation), with Ellen Carol DuBois & Linda Gordon, *Seeking Ecstasy on the Battlefield: Danger and Pleasure in Nineteenth-Century Feminist Sexual Thought*, in ELLEN CAROL DUBOIS, *WOMAN SUFFRAGE AND WOMEN'S RIGHTS*, 139, 151-52 (1998) (discussing the history of feminist participation in the repressive sexual order and the internal feminist resistance).

Part II traces the criminal law's initial retreat from, and subsequent return to, sex exceptionalism in the latter part of the twentieth century. Influenced by liberal legal scholars, new social science on sex, and the 1962 Model Penal Code, states began to modernize their sex-crime laws to reflect contemporary concerns over bodily integrity rather than outdated concerns about chastity, marriage, and morality. This shift entailed reconceptualizing rape as sexual assault and deregulating sexual and reproductive choices.<sup>51</sup> Despite this, sex-crime law retained much of its original exceptionalist structure. Then, in the 1980s and '90s, a convergence of family-values moralists, feminist activists, and opportunistic politicians reinforced and expanded criminal sex exceptionalism.<sup>52</sup> These efforts produced public sex panic and draconian sex-crime punishment systems, forging the sex-exceptionalist impulse into the collective social consciousness.<sup>53</sup>

Part III turns to the present and illustrates the persistence of this sex-exceptionalist impulse, even within politically liberal circles, by examining the influence of sex-crime discourse on subway- and street-policing policy in New York City. Today's progressives imagine a criminal law that considers structural causes of crime, rejects state violence as the preferred response, and permits empathy for even violent offenders.<sup>54</sup> At the same time, contemporary feminist movements like #MeToo demand that the state and powerful private entities have zero tolerance for sexual wrongdoing.<sup>55</sup> The result is that many progressives entertain a carve-out from their carceral skepticism for sexual crimes. For these crimes, the enlightened move is to strengthen and widen the net of the criminal system, cruel and racist though it may be.<sup>56</sup>

## I. Sex Exceptionalism in History

Criminal law is plainly sex-exceptionalist. From sex-work criminalization and the wildly different sentences for simple assault and sexual assault to the unique, draconian sex offender registration and notification (SORN) system, criminal law

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51. See *infra* Part II.A.

52. See *infra* Part II.B.

53. See *infra* Part II.B.2.a.

54. See Levin, *supra* note 34, at 764-69 (describing contemporary progressive opposition to criminal punishment).

55. See, e.g., Council for Advancement & Support of Educ., Zero Tolerance Pledge (2018), <https://perma.cc/8FRV-5NU5>; Erin Gloria Ryan, *When #MeToo Becomes #YouToo*, DAILY BEAST (Dec. 27, 2017, 5:00 AM ET), <https://perma.cc/X37C-7N9X>.

56. See GRUBER, FEMINIST WAR, *supra* note 4, at 6 (introducing the idea of a progressive carceral carve-out); Levine, *supra* note 34, at 1232-33 (utilizing the carve-out frame).

has always reflected and reinforced sex's special status.<sup>57</sup> Adding sex to a criminal law equation typically results in broader substantive prohibitions and harsher penalties. For example, a simple assault that leaves no injuries is a misdemeanor or no crime at all,<sup>58</sup> but a sexual assault without physical injury or intent to injure is often a serious felony.<sup>59</sup> Depending on the jurisdiction, the penalty for simple assault ranges from days to months in jail, but is rarely longer than six months.<sup>60</sup> The penalties for sexual assault, by contrast, generally range from years in prison to life.<sup>61</sup> Sexual assault convictions often trigger mandatory-minimum sentences,<sup>62</sup> and even minor offenses can result in placement in the SORN system.<sup>63</sup>

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57. See *supra* note 19 and accompanying text (sex work); *supra* note 28 and accompanying text (critiques of SORN requirements); *infra* notes 409-10 and accompanying text (additional critiques of SORN requirements).
58. See, e.g., ALA. CODE § 13A-6-22 (2022) (specifying that third-degree assault, a misdemeanor, requires unwanted touching *and* actual injury); CONN. GEN. STAT. § 53a-61 (2021) (same); KY. REV. STAT. ANN. § 508.030 (West 2022) (fourth-degree assault, same). For the purposes of this analysis, the terms “assault” and “battery” are interchangeable.
59. Sexual assault is commonly a felony and does not require intent to injure. See, e.g., MONT. CODE ANN. § 45-5-502 (2021) (specifying that sexual assault is *any* “sexual contact without consent” and may, in certain circumstances, result in life imprisonment); WIS. STAT. § 940.225(3) (2023) (“Whoever has sexual intercourse with a person without the consent of that person is guilty of a Class G felony.”); VT. STAT. ANN. tit. 13, §§ 3251-52 (2022) (specifying that sex without affirmative consent is a felony).
60. See, e.g., CAL. PENAL CODE §§ 241, 243 (West 2022) (up to six months for simple battery and simple assault); S.C. CODE ANN. § 16-3-600(E)(2) (2022) (up to thirty days for third-degree assault and battery); WYO. STAT. ANN. § 6-2-501 (2022) (a fine for simple assault and up to six months for battery); ARK. CODE ANN. §§ 5-13-203, -13-207 (2022) (up to thirty days for simple assault and up to one year for battery).
61. See, e.g., NEV. REV. STAT. § 200.366(2) (2022) (up to life imprisonment without the possibility of parole); UTAH CODE ANN. § 76-5-402(3) (LexisNexis 2022) (five years to life); VT. STAT. ANN. tit. 13, § 3252(f) (2022) (three years to life); MONT. CODE ANN. § 45-5-502(3) (2021) (up to life or one hundred years in prison if the offender inflicts bodily injury or other criteria are satisfied); MISS. CODE ANN. § 97-3-101(1) (2022) (up to thirty years if certain criteria are satisfied).
62. COLO. REV. STAT. § 18-1.3-1004(1)(b) (2022) (setting a maximum indeterminate life sentence and minimum of the “midpoint in the presumptive range for the level of offense”); UTAH CODE ANN. § 76-5-402(3) (LexisNexis 2022) (setting a minimum of five years in all cases and a minimum of life for defendants previously convicted of a “grievous sexual offense”); TENN. CODE ANN. §§ 39-13-503(b), 40-35-111(b)(2) (2022) (setting a minimum of eight years in prison).
63. *People v. Mosley*, 344 P.3d 788, 790 (Cal. 2015) (permitting registration for “sexually motivated” simple assault at the court’s discretion); *People v. Honan*, 111 Cal. Rptr. 3d 351, 352 (Ct. App. 2010) (upholding registration requirement for indecent exposure conviction); D.C. CODE § 22-4001(8)(D) (2022) (registration for nonconsensual sexual contact); COLO. REV. STAT. §§ 16-22-102(9), 16-22-103(2) (2022) (registration for unlawful sexual contact); CAL. PENAL CODE § 290(c)(1) (West 2022) (registration for misdemeanors, including lewd and lascivious conduct involving minors); see also HUM. RTS. WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE US 5 (2007), <https://perma.cc/JRG9-AZZW> (“[I]n many states, people who urinate in public, teenagers who have consensual sex with  
*footnote continued on next page*”)



Lawmakers, scholars, and the public accept and often seek to strengthen this sex-exceptionalist legal regime.<sup>64</sup> Within the mainstream liberal academy, few criticize sex-crime sentences' contribution to mass incarceration, preferring to focus on more palatable nonviolent drug offenders.<sup>65</sup> In fact, a popular liberal position is that there should be *more* categories of sex crimes, and that existing sex-crime laws should be more strictly and frequently enforced.<sup>66</sup> Although there is an emerging academic consensus that SORN should be abolished, given the powerful evidence that it is criminogenic, inhumane, and costly,<sup>67</sup> this has yet to translate widely into policy.<sup>68</sup> Public officials have too much to gain from being tough on "predators."<sup>69</sup>

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each other, adults who sell sex to other adults, and kids who expose themselves as a prank are required to register as sex offenders."); Chanakya Sethi, *The Ridiculous Laws That Put People on the Sex Offender List*, SLATE (Aug. 12, 2014, 11:41 AM), <https://perma.cc/G2T3-4MWA> (noting that at least twelve states require registration for "peeing in public").

64. See also Rosenbury & Rothman, *supra* note 21, at 818 (noting that "the general silence of legal scholars" enables the "sex-negative legal regime").
65. See James Forman, Jr., *Racial Critiques of Mass Incarceration: Beyond the New Jim Crow*, 87 N.Y.U. L. REV. 21, 45-49 (2012) (critiquing the idea that mass incarceration is primarily due to overincarceration of nonviolent drug offenders).
66. See, e.g., Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, § 3, 132 Stat. 1253 (2018) (codified as amended at 18 U.S.C. § 2421A) (criminalizing hosting online sex-work advertising); Melissa Marie Blanco, Comment, *Sex Trend or Sexual Assault?: The Dangers of "Stealth" and the Concept of Conditional Consent*, 123 PENN ST. L. REV. 217, 245 (2018) (discussing criminalizing condom removal without consent during sex). The Stopping Harmful Image Exploitation and Limiting Distribution Act of 2022, H.R. 6998, 117th Cong. § 2 (2022) would make it a federal felony to show a private nude photo of an adult individual to anyone (using a cell phone or the internet) if the person who shows the photo has "reckless disregard for . . . the lack of consent of the individual to the distribution." This breathtakingly broad felony law was championed by a Democratic congresswoman and hailed as a potential feminist milestone. See Press Release, Rep. Jackie Speier, Speier, Katko, Klobuchar, Burr Reintroduce Bipartisan Bill to Address Online Exploitation of Private Images on International Women's Day (Mar. 8, 2022), <https://perma.cc/ZC8N-9X5E>.
67. See MODEL PENAL CODE § 213.11 reporters' notes (AM. L. INST., Tentative Draft No. 6, 2022) (recognizing the "widely acknowledged" agreement among criminal-justice professionals that SORN laws are "seriously counterproductive"). See generally Logan, *supra* note 28 (surveying state and federal cases that focus on SORN laws' overly punitive nature).
68. The Sex Offender Registration and Notification Act continues to require states to maintain sex-offender registries open to public access, and all fifty states and the federal government currently do so. Sex Offender Registration and Notification Act, 34 U.S.C. §§ 20912, 20920; see also Haley Snarr & Susan Parnas Frederick, *The Complexities of Sex Offender Registries*, NAT'L CONF. STATE LEGISLATURES: 26 LEGISBRIEF 19 (May 2018), <https://perma.cc/7V34-D2CY>. There is a modest deregulation movement in the juvenile arena. See, e.g., Megan Verlee & Paolo Zialcita, *Both the Courts and Lawmakers Have Ruled That Juvenile Sex Offenders Will No Longer Be Automatically Registered for Life*, COLO. PUB. RADIO (June 29, 2021, 4:00 AM), <https://perma.cc/848K-KHB4>.
69. See ROGER N. LANCASTER, SEX PANIC AND THE PUNITIVE STATE 86-89 (2011). Notably, the predator language is mostly reserved for sex offenders, not other predatory bad actors. See Amy Adler, *To Catch a Predator*, 21 COLUM. J. GENDER & L., no. 2, 2011, at 130, 132-33.

Unlike social conservatives, whose sex-exceptionalist impulses stem from deep-seated views about sex and sin, progressives' exceptionalist stance toward sex crimes is often undergirded not by biblical faith but by faith in a progressive folk history. In this history, sex was exceptional—not because it was uniquely tracked down for extirpation, as Foucault alludes,<sup>70</sup> but because it was exceptionally tolerated, even celebrated, as a weapon of male domination.<sup>71</sup> This history of sexuality is one of ubiquitous predatory male libido celebrated by a sexist society and enabled by feckless law enforcement.<sup>72</sup>

This account presumes that criminal rape laws were a force for good—constructed to protect women against sexual injury—but were underenforced due to sexism.<sup>73</sup> Sexist lawmakers riddled them with exceptions, sexist state actors refused to enforce them, and sexist social arrangements discouraged victims from reporting.<sup>74</sup> In this account, *the* historical problem was that sexist actors undercut the potential of women-protecting rape laws to license wanton male sexuality.<sup>75</sup> In turn, the enlightened and feminist response is to ensure that rape laws are vigorously enforced, cover a wide array of sexual misconduct, and carry severe—therefore “meaningful”—punishments.<sup>76</sup>

This understanding of rape law resonates precisely because it reflects a *modern* conception of rape law as a subset of assault law meant to protect people from private violence.<sup>77</sup> Within this paradigm, the harm of rape is

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70. See FOUCAULT, *supra* note 26, at 20-21.

71. See, e.g., BROWNMILLER, *supra* note 50, at 18 (suggesting that rape was permitted because “ancient patriarchs . . . used the rape of women to forge their own male power”); Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 65-66 (2002) (arguing that U.S. law and policy “afforded men a broad sexual license”); Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. REV. 1287, 1290 (2016) (asserting that “[u]nremedied injuries suffered by women, in particular, have historically been the norm”).

72. Today, variations of this thesis frequently appear as one-liners in rape-related articles. E.g., Deborah Zalesne, *Sexual Harassment Law in the United States and South Africa: Facilitating the Transition from Legal Standards to Social Norms*, 25 HARV. WOMEN'S L.J. 143, 209 (2002) (“Historically, American law has condoned violence against women.”).

73. See, e.g., Tuerkheimer, *supra* note 71, at 1299 (discussing weak enforcement of rape laws).

74. See, e.g., Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 956-60 (2004) (discussing state lawmakers and state actors); Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 588-94 (2009) [hereinafter Gruber, *Rape, Feminism*] (discussing sexist social norms' effect on rape reporting).

75. See *supra* note 71 (discussing the underenforcement argument); see also GRUBER, *FEMINIST WAR*, *supra* note 4, at 19-40 (examining this canonical account through an analysis of eighteenth- and nineteenth-century rape law and reform).

76. E.g., Zalesne, *supra* note 72, at 148; see also Nickie D. Phillips & Nicholas Chagnon, “Six Months Is a Joke”: *Carceral Feminism and Penal Populism in the Wake of the Stanford Sexual Assault Case*, 15 FEMINIST CRIMINOLOGY 47, 54-59 (2020).

77. See *infra* Part II.A.1 (discussing this modern conception).

physical and psychological injury, and sex operates like any other aggravating factor that increases the severity of a physical assault.<sup>78</sup> Indeed, the logic of battery law—that individuals have a right to be free from physical harm—is relatively uncontroversial.<sup>79</sup> Slightly more controversial is the bodily integrity paradigm that focuses on whether contact was “unwanted.” Policing uncomfortable contacts, rather than injurious ones, requires the law to navigate the thorny issue of casual touches like back-pats and handshakes.<sup>80</sup> Accordingly, several jurisdictions require physical injury in their definition of simple assault, and where they do not, people accept that state actors often honor the ban on unwanted minor contacts in the breach.<sup>81</sup> In any case, people accept assault law’s basic goals of preventing intentional inflictions of physical harm. This body of law generally scales penalty to harm, such that the worse the injury, the higher the sentence.<sup>82</sup>

But sex-crime law at its inception was separate from assault law, with a different structure and different core principles. Illegal sexual conduct was not “assault” at all; it was “rape,” “deviate sexual intercourse,” “sodomy,” “fornication,” “adultery,” “lewdness,” etc.<sup>83</sup> In fact, prior to the nineteenth century, legal discourse favored words like “outraged” or “ravished” over “raped.”<sup>84</sup> The crux of sex-crime law was not preventing physical injury but an array of other goals, including vindicating religious morality, constricting nonmarital sex and reproduction, and cabining women’s sexual

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78. See *infra* notes 305-08 and accompanying text.

79. However, domestic assault has been the subject of serious contention, activism, and reform. See generally GRUBER, *FEMINIST WAR*, *supra* note 4, at 41-93 (exploring domestic violence reform during the second wave of feminism); LEIGH GOODMARK, *A TROUBLED MARRIAGE: DOMESTIC VIOLENCE AND THE LEGAL SYSTEM* (2012) (presenting a comprehensive analysis of domestic violence law).

80. Emotional harm is an even trickier issue. See Avlana K. Eisenberg, *Criminal Infliction of Emotional Distress*, 113 MICH. L. REV. 607, 610-12 (2015) (discussing the problems of tethering criminal liability to victims’ emotions).

81. See *supra* notes 58, 60.

82. See, e.g., IOWA CODE § 708.2 (2023) (providing that “[p]enalties for assault” range from a simple misdemeanor to an aggravated misdemeanor to a class “C” felony); MICH. COMP. LAWS § 750.83 (2022) (providing for up to a life sentence for assault with intent to murder); see also *supra* note 61.

83. See *infra* notes 259-60 and accompanying text (explaining that, despite the ideological shift from understanding crimes like sodomy as immoral to understanding them as assault, the Model Penal Code continued to label them as “deviate sexual intercourse”).

84. See Barbara S. Lindemann, “To Ravish and Carnally Know”: *Rape in Eighteenth-Century Massachusetts*, 10 SIGNS: J. WOMEN CULTURE & SOC’Y 63, 64 (1984) (noting that, in eighteenth-century indictments, “rape” was called “ravishment” and sexual penetration was called “carnal knowledge”); Cyril J. Smith, *History of Rape and Rape Laws*, 60 WOMEN LAWS. J. 188, 190-91 (1974) (discussing the use of “carnal knowledge” in English common law).

independence.<sup>85</sup> After the Civil War, controlling Black people's sexuality and preventing race mixing also became primary purposes.<sup>86</sup> Historically, sex-crime penalties corresponded not to the level of force or physical injury, but to the degree to which the sex upset the moral and marital order.<sup>87</sup>

Far from being a device to control male violence and liberate women, criminal rape law was born of the patriarchy and structured to control female sexuality. Indeed, when legal actors dismissed the rape claims of "unchaste" women, they did not fail to enforce rape law; they *enforced* it, consistent with its purpose of policing female virtue. It was not until the latter half of the twentieth century that lawmakers and theorists began to rename "rape" and "deviate behavior" as "sexual assault" and reconceptualize sex crime as nongendered physical violence.<sup>88</sup> Civil libertarians and liberal feminists initially championed these changes to *separate* sex-crime law from its patriarchal roots.<sup>89</sup>

## A. Rape

### 1. Morality and marriage in early American rape law

From the founding of the United States, rape has been the gravest sexual offense, traditionally punishable by death.<sup>90</sup> Early American rape law prohibited a man from forcibly obtaining "carnal knowledge" of a woman other than his

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85. See *infra* notes 96-99 and accompanying text (marriage); *infra* notes 99-100 and accompanying text (reproduction); *infra* notes 105-07 and accompanying text (morality); *infra* notes 101-10 and accompanying text (chastity).

86. See generally FREEDMAN, *supra* note 50, at 89-103 (discussing race in rape law enforcement); GRUBER, FEMINIST WAR, *supra* note 4, at 19-40 (discussing rape law enforcement in the postbellum South); Hazel V. Carby, "On the Threshold of Woman's Era": Lynching, Empire, and Sexuality in Black Feminist Theory, 12 CRITICAL INQUIRY 262, 270 (1985) (discussing the role of Black sexuality in rape enforcement and lynching); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 600 (1990) (discussing rape enforcement's use as a tool of racial oppression); Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 118-21 (1983) (discussing racial disparities in rape penalties); MARTHA HODES, WHITE WOMEN, BLACK MEN: ILLICIT SEX IN THE 19TH-CENTURY SOUTH 9-14 (1997) (discussing rape and other criminal cases involving white women and Black men).

87. See Smith, *supra* note 84, at 190-91 (noting that, under English common law, rape penalties increased with the victim's social status); Lindemann, *supra* note 84, at 80 (observing connection between class and rape liability); *infra* notes 90-116.

88. See *infra* Part II.A.1.a.

89. See *infra* Part II.A.1.d.

90. See Lindemann, *supra* note 84, at 64; see also D'EMILIO & FREEDMAN, *supra* note 31, at 31 (noting that colonial punishments also included whipping, being burned alive, and castration).

wife.<sup>91</sup> “Carnal knowledge” meant sexual intercourse—the kind that “deflowered” a woman and risked pregnancy.<sup>92</sup> Rape was a horrific crime, whether or not it caused physical injury, because it deprived women and their husbands (or parents) of the woman’s chastity and risked illegitimate children.<sup>93</sup> Rape thus necessarily involved a penile penetration of the vagina, and some American courts even adopted the English rule that it also required seminal emission.<sup>94</sup>

A man could not be raped, nor could boys.<sup>95</sup> Injurious and invasive sexual conduct that did not involve devirginization and potential impregnation of the victim might be criminal, but it was not rape.<sup>96</sup> A husband, by *definition*, could not commit rape against his spouse, no matter how violently he forced sex, because he could not offend his wife’s chastity or create illegitimate children.<sup>97</sup> In fact, the greater legal affront in the forced-marital-sex scenario was the wife denying the man his conjugal rights. One late-nineteenth-century treatise explained, “Living in the same house, but willfully declining matrimonial intimacy and companionship, is per se a breach of duty, tending to subvert the true ends of marriage.”<sup>98</sup>

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91. See Smith, *supra* note 84, at 191 (citing a definition of rape at English common law as “unlawful carnal knowledge of a female over ten years of age by a man not her husband by force and against her will,” and noting that “[a]ll jurisdictions based on the English common law follow[ed] this definition with minor variations”).

92. See *id.* (discussing the use of the term “carnal knowledge” to signify intercourse).

93. See Anderson, *supra* note 71, at 66-69; D’EMILIO & FREEDMAN, *supra* note 31, at 32-34 (discussing colonial law’s preoccupation with “bastardy”).

94. Smith, *supra* note 84, at 191; JOHN JERVIS, ARCHBOLD’S SUMMARY OF THE LAW RELATING TO PLEADING AND EVIDENCE IN CRIMINAL CASES \*483 (W.N. Welsby ed., 5th Am. ed., New York, Banks, Gould & Co. 1846); Matthew L. Williams, “To Lay Violent Hands”: Prosecuting Sexual Violence in Colonial New York, 95 N.Y. HIST. 172, 173 n.3 (2014). Typically, “penetration” is defined as any penetration of the vulva. See *infra* note 274 and accompanying text.

95. Smith, *supra* note 84, at 191.

96. Alletta Brenner, Note, *Resisting Simple Dichotomies: Critiquing Narratives of Victims, Perpetrators, and Harm in Feminist Theories of Rape*, 36 HARV. J.L. & GENDER 503, 507-08 (2013) (noting states’ historical treatment of rape as “abhorrent” but tolerance of “sexual violence in many other forms”).

97. See Murray, *supra* note 21, at 1260-62 (noting that lawmakers resisted the idea of “marital rape” because marital sex was consensual per se); Lindemann, *supra* note 84, at 79. For historical accounts of the marital rape exemption, see Rebecca M. Ryan, *The Sex Right: A Legal History of the Marital Rape Exemption*, 20 L. & SOC. INQUIRY 941, 943-51 (1995); Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1377 (2000); and see, for example, 1 MATTHEW HALE, HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN 629 (Sollom Emlyn ed., London, E. & R. Nutt & R. Gosling 1736) (“[T]he husband cannot be guilty of a rape committed by himself upon his lawful wife . . .”).

98. Ryan, *supra* note 97, at 953 (quoting JAMES SCHOULER, A TREATISE ON THE LAW OF THE DOMESTIC RELATIONS: EMBRACING HUSBAND AND WIFE, PARENT AND CHILD, GUARDIAN

*footnote continued on next page*

Much consensual sex was also criminalized, further underscoring that sex-crime law was about controlling sexuality and not outlawing violence. Consensual sex could likewise affront chastity, fidelity, and marital reproduction, and it was accordingly criminalized as fornication, adultery, sodomy, lewdness, and other offenses.<sup>99</sup> As Patricia Donat and John D’Emilio explain, “Sexuality was channeled into marriage for the procreation of legitimate offspring. Nonmarital sexual intercourse was immoral, an offense against both family and community.”<sup>100</sup>

a. Chastity was key

Rape, unlike sodomy and fornication, required force. This requirement reflected less the law’s desire to protect women from physical injury than its goals of promoting morality, marriage, and chastity. The force requirement served an important chastity-policing purpose by enabling legal actors to determine whether the nonmarital sex at issue involved one or two perpetrators—whether the woman was a victim or a co-conspirator. If there was sufficient force, rape was an “outrage” that wrongly deprived the victim and her family of a valuable property in her chastity and “ruined” her.<sup>101</sup> If force was lacking, the woman was herself complicit in upsetting the moral and marital order, rendering her an appropriate subject of social condemnation and even prosecution for adultery or fornication.<sup>102</sup> Indeed, the sexist legal parameters of rape developed partly in the context of women *defending* themselves against sex-crime charges.<sup>103</sup>

Society’s keen desire to ensure that women who claimed to be ravished were not unchaste sexual co-conspirators strongly influenced other contours of rape law.<sup>104</sup> Criminal sex law and those who enforced it displayed an

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AND WARD, *INFANCY, AND MASTER AND SERVANT* § 36, at 67 (Boston, Little, Brown & Co. 5th ed. 1895)).

99. See *infra* Part I.B.

100. Patricia L. N. Donat & John D’Emilio, *A Feminist Redefinition of Rape and Sexual Assault: Historical Foundations and Change*, 48 J. SOC. ISSUES, Spring 1992, at 9, 10.

101. See Anderson, *supra* note 71, at 65 n.72 (“Rape was punished with death because the spoilage of a victim’s chastity ruined that which constituted her value as a woman.”); Donat & D’Emilio, *supra* note 100, at 10 (“A woman’s value within society was based on her ability to marry and to produce legitimate heirs. . . . A raped woman could not expect to marry into a respectable family and might very well remain the economic liability of the father.”).

102. D’EMILIO & FREEDMAN, *supra* note 31, at 5 (“[C]hurch and society dealt more harshly with women who engaged in pre- or extramarital sexuality than with male transgressors, for female chastity and fidelity assured men of the legitimacy of their children.”); Anne M. Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1, 29-30 (1998).

103. See Coughlin, *supra* note 102, at 30-32; GRUBER, *FEMINIST WAR*, *supra* note 4, at 21-22.

104. See Anderson, *supra* note 71, at 53 (observing that rape law required “that women maintain an ideal of sexual abstinence in order to obtain legal protection”).

obsession with policing the sexual character of female complainants. Traditionally, rape law contained a defense for men who raped “promiscuous” women and included a requirement that women resist to the “utmost” to demonstrate that they truly valued their chastity.<sup>105</sup> A virtuous woman, the logic went, would fight to the death to retain her most valuable asset and avoid ruin.<sup>106</sup> Male lawmakers and jurists expressed particular concern over the potential for unchaste women to “cry rape” to cover up reputation-destroying indiscretions, deflect from their own sex crimes (adultery, fornication, prostitution), or grift rich men.<sup>107</sup> Rape law thus required the prosecution to introduce special evidence of women’s credibility, including the requirement of a “prompt complaint” and independent “corroboration.”<sup>108</sup>

Criminal law scholars often refer to these requirements as confirmation that lawmakers generally regarded women as liars or pretended to do so in order to license men to rape.<sup>109</sup> But such descriptions are too facile. It is true that the law’s—and society’s—intense scrutiny of victims whose chastity could conceivably be called into question permitted many men to get away with rape. However, the law tolerated these rapes not so much to license male profligacy as to penalize unvirtuous women. Legal actors were particularly skeptical of the credibility of female defendants who argued that they were not guilty because the charged adultery or fornication was really a rape. Such women were presumed unchaste and also faced the “ordinary hostility towards defendants who seek to be excused from criminal liability.”<sup>110</sup> Moreover, a rape complainant’s credibility was inextricably linked with her appearance of chastity, which was often a function of marital status, reputation, class, and race. Similarly, the determination of whether an accused man was credible or licensed to impose sex also depended on such factors.<sup>111</sup> A middle-class married

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105. For promiscuity as a defense, see, for example, *McQuirk v. State*, 4 So. 775, 776 (Ala. 1888); and *Carney v. State*, 21 N.E. 48, 48 (Ind. 1889). For the requirement of utmost resistance, see, for example, *Kinselle v. People*, 227 P. 823, 825 (Colo. 1924); *People v. Geddes*, 3 N.W.2d 266, 267 (Mich. 1942); *State v. Hunt*, 135 N.W.2d 475, 479 (Neb. 1965); *Purpero v. State*, 208 N.W. 475, 475 (Wis. 1926); and *McLain v. State*, 149 N.W. 771, 771 (Wis. 1914).

106. See Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1130 (1986).

107. See Jane E. Larson, “Even a Worm Will Turn at Last”: *Rape Reform in Late Nineteenth-Century America*, 9 YALE J.L. & HUMANS. 1, 53-54 (1997).

108. See Anderson, *supra* note 74, at 953; GRUBER, FEMINIST WAR, *supra* note 4, at 20-22; see, e.g., *Commonwealth v. Cleary*, 51 N.E. 746, 747 (Mass. 1898) (prompt complaint); *State v. Jonas*, 92 P. 899, 899 (Wash. 1907) (corroboration).

109. See, e.g., BROWNMILLER, *supra* note 50, at 369 (noting “the cherished male assumption that female persons tend to lie”).

110. Coughlin, *supra* note 102, at 41; see also Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1781-83 (1992).

111. See Lindemann, *supra* note 84, at 80.

woman who claimed to be raped by a laborer or member of a minority group thus faced little hostility, and the man could expect the gallows.<sup>112</sup>

Of course, this regime that harshly disciplined unchastity and channeled all sex into marriage (where men exercised total domination) was extremely oppressive. As Deborah Rhode reminds us, “for much of American history, the dominant culture has . . . imposed substantial costs on premarital sexual activity and those costs have been paid largely by women.”<sup>113</sup> The many sexual assault victims placed within the broad, indeterminate, and shifting category of “unchaste woman” had no protection, so men could prey on them with abandon. Designated by law and society as inherently unchaste, Black women suffered the greatest burden of this chastity obsession and male impunity.<sup>114</sup> It is this impunity that underlies the contemporary sense that rape law was “underenforced” to license men to rape.

But the early rape story is not a lack-of-enforcement story. State actors’ mistreatment of “unchaste” rape complainants was not the misapplication of rape law, but the proper application of a regime *created* to police chastity and morality. The categorical exemption of married women was not the underenforcement of rape law, but the enforcement of a regime *created* to channel sex into marriage. Early American rape law was deeply misogynistic, but it was not the straightforward misogyny of licensing indiscriminate male sexual violence to keep “*all* women in a [perpetual] state of fear,” as the simple historical thesis suggests.<sup>115</sup> Morality and marriage controlled rape’s contours, creating a simple dichotomy: A man who outraged a chaste woman (not his wife) was a horrific rapist, while a man who violently forced sex on an unchaste woman was perhaps a reprobate, but not a criminal.<sup>116</sup>

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112. See *id.*; SHARON BLOCK, RAPE AND SEXUAL POWER IN EARLY AMERICA 4 (2006).

113. Deborah L. Rhode, *Politics and Pregnancy: Adolescent Mothers and Public Policy*, 1 S. CAL. REV. L. & WOMEN’S STUD. 99, 105 (1992).

114. BLOCK, *supra* note 112, at 177-78; GRUBER, FEMINIST WAR, *supra* note 4, at 22; Wriggins, *supra* note 86, at 117-23; Harris, *supra* note 86, at 599.

115. BROWNMILLER, *supra* note 50, at 15 (emphasis in original). Brownmiller’s conclusory decree is followed by an even bolder statement: “Rape is to women as lynching was to blacks.” *Id.* at 254.

116. See Sharon Block, *How Should We Look at Rape in Early America?*, 4 HIST. COMPASS 603, 608-09 (2006) (“Late eighteenth-century novels regularly set upstanding honorable men against deceitful villains whose sexual assaults on virtuous women proved their villainy.”).



2. Race takes center stage in the postbellum era<sup>117</sup>

In the postbellum South, Black men's perceived dangerous sexuality took center stage in rape law and policy. The image of the "bestial" Black man and his sexual danger—and irresistible magnetism—shaped lawmakers' and society's views of rape.<sup>118</sup> Couched in concern for women's safety, Southern whites terrorized Black men in a systematic campaign of lynching.<sup>119</sup> Frederick Douglass opined in 1894, "[N]ow that Negro insurrection and Negro domination are no longer defensible as an excuse for Negro persecution, there has come in due course another suited to the occasion, and that is the heart-rending cry of the white women."<sup>120</sup>

Southern racists' invocation of rape to justify lynching was particularly effective because it appealed to Northern liberals. These liberals condemned Southern lynching as barbaric, but their antiracist sympathies ran out when it came to rape committed by "bestial savages."<sup>121</sup> One *New York Times* opinion writer ruminated, "It is a peculiar fact that the crime for which negroes have frequently been lynched . . . is a crime to which negroes are particularly prone. . . . [T]he existence of a large element of a race especially disposed to this crime makes it a matter of public concern that every possible deterrent should be interposed to the commission of it."<sup>122</sup> Indeed, Northerners—no less than Southerners—feared the presumed sexual prowess of the newly emancipated Black man and the miscegenation that it could bring.<sup>123</sup>

Black women were likewise saddled with an irrebuttable presumption of promiscuity, while Southern white women were painted with a purity that was equated to an *aversion* to sex. Illustrating this perspective, bell hooks

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117. This is an extremely abbreviated snapshot of the rich historical analysis of race and rape law in sources cited in note 86 above. See also D'EMILIO & FREEDMAN, *supra* note 31, at 85-108. See generally DANIELLE L. MCGUIRE, *AT THE DARK END OF THE STREET: BLACK WOMEN, RAPE, AND RESISTANCE—A NEW HISTORY OF THE CIVIL RIGHTS MOVEMENT FROM ROSA PARKS TO THE RISE OF BLACK POWER* (2010) (discussing the long history of Black women speaking out in opposition to sexual violence).

118. See, e.g., *British Anti-Lynchers*, N.Y. TIMES, Aug. 2, 1894, at 4, <https://perma.cc/HXD6-4PPQ> (to locate, select "View the live page") (invoking the image of "bestial" Black men).

119. See IDA B. WELLS, *SOUTHERN HORRORS: LYNCH LAW IN ALL ITS PHASES*, in *SOUTHERN HORRORS AND OTHER WRITINGS: THE ANTI-LYNCHING CAMPAIGN OF IDA B. WELLS, 1892-1900*, at 55-56 (Jacqueline Jones Royster ed., 2d ed. 2016) (discussing rape-based lynching); Carby, *supra* note 86, at 270.

120. FREDERICK DOUGLASS: *SELECTED SPEECHES AND WRITINGS* 759 (Philip S. Foner ed., 1999).

121. *British Anti-Lynchers*, *supra* note 118.

122. *Id.*

123. See JANE DAILEY, *WHITE FRIGHT: THE SEXUAL PANIC AT THE HEART OF AMERICA'S RACIST HISTORY* 6 (2020) ("Th[e] fixation on interracial sex . . . became a powerful political disposition crafted in opposition to African American liberty and political power after the Civil War.").

highlights the reflections of a segregation-era Southern white man on his burgeoning understanding of the opposite sex: “[N]ot until I was twelve years old did I know that [sex] was performed with white women for pleasure; I had thought that only Negro women engaged in the act of love with white men just for fun, because they were the only ones with the animal desire to submit that way.”<sup>124</sup> In interracial rape cases, the general rule was that race determined deviancy and purity.<sup>125</sup> When a white man raped a Black woman, her impeccable reputation, fresh complaint, and corroborating injuries were immaterial, overshadowed by her presumed unchastity. By contrast, when a Black man stood accused of raping a white woman, all the chastity tests generally foisted upon female victims no longer applied. In that scenario, the white woman was unquestionably chaste by virtue of her whiteness, and a Black defendant’s suggestion otherwise warranted immediate repudiation.<sup>126</sup>

Equating Blackness with debauchery and whiteness with chastity proved enduring. Historian Danielle McGuire recounts the 1951 case of Willie McGee, who submitted to a sexual relationship with his white female employer “after she threatened to cry rape if he refused her flirtatious advances.”<sup>127</sup> The relationship eventually broke down, and McGee was charged with rape.<sup>128</sup> The chief justice of the Mississippi Supreme Court summarily rejected McGee’s claim of a mutual affair, calling it a “revolting insinuation.”<sup>129</sup> The judge affirmed McGee’s conviction, emphasizing that the gravity of his act necessitated death.<sup>130</sup> On May 8, 1951, state officials brought a portable electric chair to the courthouse. At midnight, they executed McGee in front of “an ecstatic, almost all-white audience of five hundred, men, women, and children.”<sup>131</sup>

Prior to the Civil War, moral reprehension, marriage norms, and chastity concerns established rape as a heinous offense. But then race entered the picture, and Southern lawmakers and state actors elevated rape to the gravest of all criminal offenses—a true fate worse than death for white women. This tethering of rape to Blackness and concurrent declaration of rape as worse than

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124. BELL HOOKS, *AIN’T I A WOMAN? BLACK WOMEN AND FEMINISM* 63 (Routledge 2015) (1981).

125. Of course, each individual case that lay at intersection of racism and sexism had complex dynamics. See HODES, *supra* note 86, at 39-43 (illustrating this complexity through the story of Polly Lane and “Slave Jim”).

126. See IDA B. WELLS, *A RED RECORD: TABULATED STATISTICS AND ALLEGED CAUSES OF LYNCHING IN THE UNITED STATES, 1892-1893-1894*, in *SOUTHERN HORRORS AND OTHER WRITINGS: THE ANTI-LYNCHING CAMPAIGN OF IDA B. WELLS, 1892-1900*, at 112-25 (Jacqueline Jones Royster ed., 2d ed. 2016).

127. MCGUIRE, *supra* note 117, at 48.

128. *Id.* at 49.

129. *Id.*

130. *Id.*

131. *Id.* at 49-50.

murder was no accident. Following a practice dating back thousands of years, where nations used the specter of their women's defilement to rile up the public against enemies,<sup>132</sup> Southern states used rape discourse, law, and policy to violently control newly enfranchised Black men.<sup>133</sup> In 1895, legislators in South Carolina carefully crafted their disenfranchisement rules to cover "negro crimes" such as wife-beating and attempted rape.<sup>134</sup> Notably absent were crimes then associated with whites, including fighting and *murder*.<sup>135</sup>

Invoking rape remained a winning strategy for maintaining white supremacy for decades (and remains one today).<sup>136</sup> McGuire writes that, after World War II, Black soldiers returned with a sense of civic pride and political activism, which caused a white backlash in the form of rape accusations: "Black activists in the post-World War II period often joked that 'the closer a black man got to a ballot box, the more he looked like a rapist.'"<sup>137</sup> Any account of the historical structure and meaning of American sex-crime law must acknowledge the critical roles played by patriarchy and white supremacy in establishing the exceptional status of rape.<sup>138</sup>

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132. See Block, *supra* note 116, at 609-10 (discussing accusations of rape in anti-British propaganda in colonial America); BROWN MILLER, *supra* note 50, at 44 (calling rape narratives an effective tool of war propaganda).

133. D'EMILIO & FREEDMAN, *supra* note 31, at 220 (discussing the role of rape discourse and law in maintaining white supremacy).

134. FRANCIS BUTLER SIMKINS, PITCHFORK BEN TILLMAN: SOUTH CAROLINIAN 297 (1944) ("Among the disqualifying crimes were those to which [the Black man] was especially prone: thievery, adultery, arson, wife-beating, housebreaking, and attempted rape. Such crimes as murder and fighting, to which the white man was as disposed as the Negro, were significantly omitted from the list."); see also John C. Rose, *Negro Suffrage: The Constitutional Point of View*, 1 AM. POL. SCI. REV. 17, 25 (1906); Andrew L. Shapiro, Note, *Challenging Criminal Disenfranchisement Under the Voting Rights Act: A New Strategy*, 103 YALE L.J. 537, 566 (1993).

135. SIMKINS, *supra* note 134, at 297.

136. D'EMILIO & FREEDMAN, *supra* note 31, at 35-37, 104-08, 216-21, 297-98 (tracing relationship of rape law to racism in colonial, post-Civil War, mid-century, and modern eras); see, e.g., Janell Ross, *From Mexican Rapists to Bad Hombres, the Trump Campaign in Two Moments*, WASH. POST (Oct. 20, 2016, 12:31 PM EDT), <https://perma.cc/APA4-UJ7L> (discussing Trump's use of a racist trope of Mexican rapists to foment anti-immigrant sentiments).

137. MCGUIRE, *supra* note 117, at 45; see also Wriggins, *supra* note 86, at 112-13 (observing that, between 1930 and 1967, 36% of Black men convicted of raping white women were executed, compared with 2% of all other defendants convicted of rape, with Black men accounting for 89% of all executions for rape).

138. See FREEDMAN, *supra* note 50, at 2 (noting "the centrality of race to the political history of rape").

B. Other Sex Offenses

The second broad category of sex crimes punished sexual conduct other than forced vaginal penetration. Sodomy, “crime[s] against nature,” and other deviant sexual behaviors offended moral norms and challenged the marital order.<sup>139</sup> Historians note that “Puritan leaders in the New England colonies were especially vigorous in their denunciation of sodomitical sins as contrary to God’s will, but their condemnation was also motivated by the pressing need to increase the population and to secure the stability of the family.”<sup>140</sup> That era saw one of the few sodomy executions in American history: that of William Plaine.<sup>141</sup> The court described Plaine in terms that are all too familiar in contemporary “predator” discourse: He was a “monster in human shape, exceeding all human rules.”<sup>142</sup> Plaine’s “*horrendum facinus* [a dreadful crime]” involved not just “sodomy” but “masturbations, which he had committed, and provoked others to.”<sup>143</sup> As William Eskridge notes, the court raised marital as well as moral objections by emphasizing that Plaine’s masturbatory behavior “tended to the frustrating of the ordinance of marriage and the hindering of the generation of mankind.”<sup>144</sup>

Deviate sex laws existed to protect morality and procreation, not to prevent assaults, so they did not require force.<sup>145</sup> They criminalized consensual sex acts considered to be immoral or against nature.<sup>146</sup> The point of the legal regime was to regulate norm-defying sex—forcible or not. That said, eighteenth-century and early nineteenth-century prosecutors were not extremely zealous about enforcing laws against deviate sex and generally only

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139. See STONE, *supra* note 50, at 76-80 (discussing sodomy laws and marital norms in Puritan New England); Stephen Robertson, *Shifting the Scene of the Crime: Sodomy and the American History of Sexual Violence*, 19 J. HIST. SEXUALITY 223, 231 (2010) (mentioning that colonial sodomy laws were cast “in opposition to nonprocreative and nonmarital sexual activity”).

140. Brief of Professors of History George Chauncey et al. as Amici Curiae in Support of Petitioners at 6, *Lawrence v. Texas*, 539 U.S. 558 (No. 02-102), 2003 WL 152350, at \*6.

141. ESKRIDGE, *DISHONORABLE PASSIONS*, *supra* note 50, at 18.

142. *Id.*

143. *Id.*

144. *Id.*

145. See Ephraim Heiliczer, *Dying Criminal Laws: Sodomy and Adultery from the Bible to Demise*, 7 VA. J. CRIM. L. 48, 66 (2019) (quoting a colonial-era sodomy law that prohibited the “abominable and detestable crime against nature”); ESKRIDGE, *DISHONORABLE PASSIONS*, *supra* note 50, at 1-6; STONE, *supra* note 50, at 76-80.

146. See ESKRIDGE, *DISHONORABLE PASSIONS*, *supra* note 50, at 1-6; ANNA LVOVSKY, *VICE PATROL: COPS, COURTS, AND THE STRUGGLE OVER URBAN GAY LIFE BEFORE STONEWALL* 2-3 (2021).

brought charges if the activity was “flagrant” or forcible.<sup>147</sup> But a nineteenth-century culture clash over sexuality was in the making, and criminalization would play a lead role in it.

1. Evangelicalism versus free love

Historian Helen Horowitz illustrates this clash through the fascinating tale of the sex war between Victoria Woodhull and Anthony Comstock.<sup>148</sup> In the 1830s and 1840s, the nation was swept up in a Christian evangelical revival that proved so influential that it “provide[d] the first framework undergirding nineteenth-century Americans’ understanding of sexuality.”<sup>149</sup> Yet around the same time, freethinkers influenced by the European Enlightenment began to espouse an ideal of sexual expression less constrained by morality, and progressive physicians started shifting the medical understanding of sex from vapors and demons to physiology.<sup>150</sup> Following this trend, feminists, Woodhull most prominent among them, championed the radical idea of free love.<sup>151</sup> Now, this was not the 1960s free love of sex on demand. Rather, its radicalness laid in the revolutionary idea “that women have the power of choice about sexual relations.”<sup>152</sup> So utterly blasphemous was this idea that it soon became the very definition of “obscenity.”<sup>153</sup>

Anthony Comstock grew up in that evangelical revival and became the era’s fiercest opponent of vice, particularly the distribution of erotica.<sup>154</sup> Comstock set his sights on Woodhull and her free-love writings in *Woodhull & Claflin’s Weekly*, which he characterized as “leprosy” and “vile trash.”<sup>155</sup> Comstock’s efforts culminated in Woodhull’s 1872 arrest and incarceration.<sup>156</sup> Woodhull was later acquitted, but “her American career was crushed.”<sup>157</sup> Middle-class progressives and feminists were unwilling to cross swords with Comstock and

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147. ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 50, at 17-18, 21; LVOVSKY, *supra* note 146, at 4.

148. Helen Lefkowitz Horowitz, *Victoria Woodhull, Anthony Comstock, and Conflict over Sex in the United States in the 1870s*, 87 J. AM. HIST. 403, 403 (2000).

149. *Id.* at 405.

150. *See id.* at 406-07.

151. *Id.* at 414-16; *see also* D’EMILIO & FREEDMAN, *supra* note 31, 161-65 (discussing free love).

152. Horowitz, *supra* note 148, at 408.

153. *Id.* at 420 (“A special target of [Comstock’s] indignation was the words being forth by the purveyors of ‘free-lust’—Victoria Woodhull above all.”).

154. *Id.* at 417-20.

155. *Id.* at 419.

156. *Id.* at 426.

157. *Id.* at 431.

appear to align with dirty booksellers and red-light unruliness.<sup>158</sup> Defeated, Woodhull abandoned free love and retreated to England.<sup>159</sup>

Meanwhile, Comstock's stock had risen. He went on to successfully lobby Congress to pass the sweeping "Act for the Suppression of Trade in, and Circulation of, obscene Literature and Articles of immoral Use," today known as the infamous "Comstock Law."<sup>160</sup> From 1873 until his death in 1915, Comstock was a powerful vice enforcer, overseeing the arrests of "publishers and sellers of print and pictorial erotica, writers of books of popular medicine that dealt with reproduction and birth control, abortionists, art gallery dealers, and advocates of free love and free thought."<sup>161</sup> This crusade had far-reaching implications. "[D]istorted by state and federal censorship," Horowitz observes, "the American public conversation about sex took a truncated shape within new and narrower boundaries."<sup>162</sup> On April 7, 2023, Comstock's anti-woman agenda made a stunning comeback when a conservative federal judge in Texas relied on the Act to order a nationwide injunction against the distribution through the mail of mifepristone, a progesterone-blocking drug that, among other uses, stops pregnancies from advancing.<sup>163</sup>

This evangelical victory shaped much of the feminist advocacy that followed. By the turn of the century, the Women's Christian Temperance Union, remembered today for its religious and regulatory approach to sex and alcohol, was America's largest feminist organization, with "branches in every state, all major cities, and thousands of localities," as well as "ten times the members of the National Women's Suffrage Association."<sup>164</sup> Temperance feminists worked to strengthen rape, prostitution, and lewdness laws for both progressive and regressive reasons: the feminist goal of protecting women from sex that could physically harm and socially ruin them, and the moralistic goal of eradicating licentiousness.<sup>165</sup>

Against the backdrop of these cultural changes and the anxieties over interracial sex discussed above, many states revised their criminal codes. Legislatures clarified and broadened the vague laws prohibiting "crime[s]

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158. *See id.* at 429.

159. *Id.* at 431.

160. Comstock Act, Mar. 3, 1873, ch. 258, 17 Stat. 598 (codified as amended at 18 U.S.C. §§ 1461, 1465).

161. Horowitz, *supra* note 148, at 433.

162. *Id.* at 434.

163. *See Alliance for Hippocratic Medicine v. FDA*, No. 22-cv-00223-Z, 2023 WL 2825871, at \*35 (N.D. Tex. Apr. 27, 2023) (citing 18 U.S.C. § 1461).

164. GRUBER, *FEMINIST WAR*, *supra* note 4 at 24; *see* KENNETH D. ROSE, *AMERICAN WOMEN AND THE REPEAL OF PROHIBITION* 22-23 & 159 n.63 (1996).

165. GRUBER, *FEMINIST WAR*, *supra* note 4, at 23-28; Larson, *supra* note 107, at 5-10; DuBois & Gordon, *supra* note 50, at 143.

against nature,” specifying the acts that constituted sodomy, including oral sex.<sup>166</sup> This contributed to an uptick in sodomy enforcement against consenting adults.<sup>167</sup> The turn of the century also ushered in the era of social hygiene and medicalization of social issues, with deviant sexuality figuring prominently in narratives of disease and degradation.<sup>168</sup> Beginning in the late-nineteenth century, medical, scholarly, and activist literature introduced the concept of a “homosexual” class of persons with the fixed trait of “sexual inversion,” and, in the ensuing years, this concept wended its way into public discourse and policymaking.<sup>169</sup>

These developments set the stage for a paradigm shift in the understanding of sex offenses. Sexual deviance moved from a characterization of particular acts—or even individuals with a predilection to commit them—to one of a fixed category of people with inverted sexuality.<sup>170</sup> Foucault famously observed that the “homosexual became a personage, a past, a case history, and a childhood, in addition to being a type of life, a life form, and a morphology . . . The sodomite had been a temporary aberration; the homosexual was now a

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166. ESKRIDGE, *DISHONORABLE PASSIONS*, *supra* note 50, at 56.

167. *See id.* at 50-57 (connecting the expansion of sodomy laws to an uptick in enforcement against same-sex sexual activity).

168. *See* PLILEY, *supra* note 50, at 31 (discussing the coalition between the Victorian social-purity movement and the progressive social-hygiene movement in controlling vice and venereal disease); D’EMILIO & FREEDMAN, *supra* note 31, at 203-07 (discussing the social hygiene movement); ESKRIDGE, *DISHONORABLE PASSIONS*, *supra* note 50, at 48 (noting turn-of-the-century doctors’ view that sexual “[d]egeneracy was a social disease that could be passed on to the next generation, through both inheritable characteristics and the bad example set by degenerates for the young”).

169. *See* STONE, *supra* note 50, at 216 (“By the turn of the century, this new concept of homosexuality [as a trait of sexual inversion] began to take hold, although the terms ‘homosexual’ and ‘heterosexual’ did not enter the popular lexicon for several more decades.”). Nineteenth-century liberal German theorists and gay rights activists, notably Magnus Hirschfeld, introduced the idea that gays were a “third sex.” *See* SIMON LEVAY, *QUEER SCIENCE: THE USE AND ABUSE OF RESEARCH INTO HOMOSEXUALITY* 11-26 (1996). An 1869 anonymous pamphlet introduced the word homosexual in its German form, “homosexualität.” Manfred Herzer, *Kertbeny and the Nameless Love*, *J. HOMOSEXUALITY*, Fall 1985, at 1, 1 (attributing the pamphlet to journalist and gay rights advocate Karl Maria Kertbeny). These writers formulated homosexuality as an identity in order to free LGBTQ people from the criminal laws that saw their intimate acts as aberrant crimes committed by heterosexual people. LEVAY, *supra* note 169, at 13, 20. But there was an anti-liberationist gloss on this categorization, mostly in the medical literature, where the idea of a homosexual class was a means to identify and eradicate the deviant trait or identify and suppress the deviant class. And it was this gloss that was adopted within mainstream American public discourse and governmental policy. ESKRIDGE, *DISHONORABLE PASSIONS*, *supra* note 50, at 45-48.

170. *See* STONE, *supra* note 50, at 212; D’EMILIO & FREEDMAN, *supra* note 31, at 121-29 (noting that colonial Americans had no concept of homosexuality as an identity and the change in the 1800s).

species.”<sup>171</sup> This newfound category of “homosexual” met a burgeoning masculinity paradigm in the 1920s, rendering the “effeminate” man a particular threat to prevailing social sensibilities.<sup>172</sup> In the 1930s, there was a powerful moralistic backlash to the open sexual culture that had been growing in cities during the post-World War I era. By ramping up the surveillance and policing of homosexuality, George Chauncey writes, “the state built a closet . . . and forced gay people to hide in it.”<sup>173</sup>

## 2. Enter the “sexual deviant”

The creation of “the homosexual” is perhaps the best example of the paradigm shift from defining sexual deviance as a practice to defining sexual deviants as a people, but there are more examples. In the decades surrounding the turn of the century, criminal lawmakers and enforcers targeted many other groups associated with immorality and sexual nonconformity: juveniles, tramps, commercial sex workers, migrants, and minorities.<sup>174</sup> The massive demographic and social shifts of the late nineteenth century—emancipation, industrialization, the northern migration of Black people, an influx of immigrants, and the demise of the family as the primary unit of economic productivity—created social anxieties that fed efforts to preserve the moral and cultural order.<sup>175</sup> These anxieties were frequently packaged as *sexual*. Indeed, as Rubin notes, “Disputes over sexual behavior often become the vehicles for displacing social anxieties . . .”<sup>176</sup> The criminal law adapted accordingly.

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171. FOUCAULT, *supra* note 26, at 43. Foucault understood this paradigm shift as a result of a deliberate effort of nineteenth-century moralistic medical elites to create a degraded class. *See id.* at 36-49. Historians, however, cast doubt on the claims that the shift was deliberate and that it occurred at a distinct moment in time. *See* Robert Beachy, *The German Invention of Homosexuality*, 82 J. MOD. HIST. 801, 803-05 (2010) (observing critiques of Foucault’s framing and timeline); *see, e.g.*, GEORGE CHAUNCEY, *GAY NEW YORK: GENDER, URBAN CULTURE, AND THE MAKING OF THE GAY MALE WORLD, 1890-1940*, at 26-27 (1994) (contesting Foucault’s narrow understanding of the development of gay identity and his narrow timeframe of the shift).

172. *See* D’EMILIO & FREEDMAN, *supra* note 31, at vi.

173. CHAUNCEY, *supra* note 171, at 9.

174. *See* Risa L. Goluboff & Adam Sorensen, *United States Vagrancy Laws*, in OXFORD RESEARCH ENCYCLOPEDIA OF AMERICAN HISTORY 3-5 (Jane Dailey ed., 2018), <https://perma.cc/325Y-MB6J>; *infra* notes 177-204 and accompanying text.

175. *See* Goluboff & Sorensen, *supra* note 174, at 3-5; Hazel V. Carby, *Policing the Black Woman’s Body in an Urban Context*, 18 CRITICAL INQUIRY 738, 738-40 (1992); MARGOT CANADAY, *THE STRAIGHT STATE: SEXUALITY AND CITIZENSHIP IN TWENTIETH-CENTURY AMERICA* 38-39 (2009); ESKRIDGE, *DISHONORABLE PASSIONS*, *supra* note 50, at 27.

176. Rubin, *supra* note 1, at 267.



a. The “vag lewd” regime

From the late nineteenth to the mid-twentieth century, states broadly enforced “lewd vagrancy” laws, shorthanded as “vag lewd,” which were constructed to control public disorder and “debauchery.”<sup>177</sup> Scholars have widely documented the peril for LGBTQ individuals under the vag lewd regime.<sup>178</sup> In 1923, the New York legislature made it a crime to “frequent[] or loiter[] about any public place soliciting men for the purpose of committing a crime against nature or other lewdness.”<sup>179</sup> Chauncey and coauthors observe that, “[b]etween 1923 and 1967, when Mayor John Lindsay ordered the police to stop using entrapment to secure arrests of gay men, more than 50,000 men had been arrested on this charge in New York City.”<sup>180</sup> Indeed, “[m]any more men were arrested and prosecuted under this misdemeanor charge than for sodomy.”<sup>181</sup> Eskridge confirms that vag lewd “became the most deployed criminal sanction against same-sex intimacy.”<sup>182</sup>

Vagrancy laws had long enabled oppressive state control of Black people, immigrants, and the poor. After emancipation, Southern lawmakers created an expansive set of vagrancy laws, called “Black Codes,” that empowered plantation owners to maintain an economic model of production dependent on the forcible extraction of labor from Black bodies.<sup>183</sup> William Cohen writes that, at harvest time, police “rounded up idlers and vagrants and drove them into the cotton fields.”<sup>184</sup> He goes on, “So common were such practices that the *Atlanta Constitution* could quip to the police: ‘Cotton is ripening. See that the “vags” get busy.’”<sup>185</sup> In the North, vagrancy laws aimed to channel migrants from the South and abroad into heterosexual, racially homogenous patriarchal family units that would provide ideal male workers for a rapidly

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177. See RISA GOLUBOFF, *VAGRANT NATION: POLICE POWER, CONSTITUTIONAL CHANGE, AND THE MAKING OF THE 1960S*, at 149 (2016) (noting “the most basic vagrancy concept” was “the immorality of idle poverty”); *id.* at 150 (“Many working-class, ethnic, and minority women who neither subscribed to the chastity ideal nor had the luxury of staying out of public spaces found themselves policed by vagrancy laws.”).

178. ESKRIDGE, *GAYLAW*, *supra* note 50, at 30-31; Brief of Professors of History, *supra* note 140, at 13.

179. Brief of Professors of History, *supra* note 140, at 14 (quoting CHAUNCEY, *supra* note 171, at 172).

180. *Id.*

181. *Id.*

182. ESKRIDGE, *GAYLAW*, *supra* note 50, at 31.

183. See LINDA K. KERBER, *NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP* 56-57 (1998); William Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis*, 42 J.S. HIST. 31, 33-34 (1976).

184. Cohen, *supra* note 183, at 50 (internal quotation marks omitted).

185. *Id.*

industrializing society.<sup>186</sup> Well into the twentieth century, the vagrancy regime underlay the exploitative capitalist order. Vagrancy laws effectively suppressed the rights and wages of workers, male and female, by making jail the alternative to working under the conditions dictated by industry.<sup>187</sup>

Proponents of vagrancy enforcement invoked the threat of sexual danger to justify this authoritarian regime. In turn, the characteristics society associated with vagrants—poor, Black, “ethnic,” nonconforming—came to define sexual danger.<sup>188</sup> Jonathan Bell remarks that “police officials used an array of vagrancy laws, including the charge of ‘lewd vagrancy’ or ‘vag lewd’ in police shorthand, to arrest and charge people thought of as sexual dissidents.” He adds, “[p]olitical notions of degeneracy in the early twentieth century lumped together sexual non-conformity, race, and economic marginality into a broad ‘immorality of the poor’ paradigm.”<sup>189</sup>

b. Vag lewd laws and women

Vagrancy laws were a formidable tool for controlling women’s sexuality and status. Public lewdness laws proliferated alongside the anti-prostitution and statutory rape laws championed by feminists and moralists crusading against “white slavery.”<sup>190</sup> Efforts to control underage sex presaged an alarming wave of girls’ incarceration in reformatories.<sup>191</sup> In addition, “Nineteenth-century reformers devoted enormous attention to the problem of the fallen woman[.] A broad category including prostitutes, tramps, and nearly

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186. See Jonathan Bell, *Queering the “Welfare Queen”: Poverty Politics and the Shaping of Sexual Citizenship in the Twentieth-Century United States*, ECCLES CTR. AM. STUD. 6-7 (2020), <https://perma.cc/DRS3-YLMX> (stating that behind “degeneracy” policing “was the ever-growing state desire for the nurturing of heteronormative citizens who would assume employed breadwinner roles and support nuclear families”); Goluboff & Sorensen, *supra* note 174, at 1 (explaining that vagrancy laws “served as a ubiquitous tool for maintaining hierarchy and order in American society . . . [by] targeting the unemployed, labor activists, radical orators, cultural and sexual nonconformists, racial and religious minorities, civil rights protesters, and the poor”).

187. See GOLUBOFF, *supra* note 177, at 15-18; Ahmed A. White, *A Different Kind of Labor Law: Vagrancy Law and the Regulation of Harvest Labor, 1913-1924*, 75 U. COLO. L. REV. 667, 683-85 (2004) (discussing the use of criminal vagrancy laws to control labor); SIDNEY L. HARRING, *POLICING A CLASS SOCIETY: THE EXPERIENCE OF AMERICAN CITIES, 1865-1915*, at 201 (1983) (exploring the use of “tramp acts” to police workers).

188. See Bell, *supra* note 186, at 6.

189. *Id.*

190. See, e.g., White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421-2424); see also PLILEY, *supra* note 50, at 20-24 (detailing a feminist moral purity campaign against white slavery); GRUBER, *FEMINIST WAR*, *supra* note 4, at 32.

191. See Mae C. Quinn, *From Turkey Trot to Twitter: Policing Puberty, Purity, and Sex-Positivity*, 38 N.Y.U. REV. L. & SOC. CHANGE 51, 74 (2014).

every adult woman who challenged middle-class assumptions about domesticity and sexual restraint,” Jeffrey Adler observes.<sup>192</sup> To be idle in public was to be dissolute and, for women, to be dissolute was to be “lewd.”<sup>193</sup> The vagrancy regime hit female workers especially hard because they already had limited employment bargaining power.<sup>194</sup>

Vag lewd enforcement may very well have planted the seeds of the race- and gender-based wage gaps that persist today.<sup>195</sup> Linda Kerber writes that, after the Civil War, Southern households lost the valuable ability to extract labor by force from Black women’s bodies, to the dismay of white mothers.<sup>196</sup> Given this market situation, formerly enslaved Black women might have been able to charge a premium for returning to work—a prospect that deeply vexed white housewives.<sup>197</sup> But under the authority of vag lewd laws, police could arrest unemployed Black women, designating them as risks of prostitution and public sexual disorder, thus further inscribing sexual unruliness onto the Black female body.<sup>198</sup> With the threat of jail looming, Black women had to accede to working in deplorable conditions, both in Southern households and in the fields, that rivaled or surpassed those of enslavement.<sup>199</sup> The white public regarded Black women as manly or even “sexually inverted,” and thus appropriately subjected to punishment and backbreaking labor fit for a man.<sup>200</sup>

Married white women could be “idle”—that is, not employed outside the home—but they nonetheless had to negotiate public spaces with care.<sup>201</sup> One could conduct herself in a manner indicating her proper marital status, mostly by avoiding sexually charged male spaces and friendly behavior, or she could exercise movement more freely, at the risk of triggering “the assumption that a

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192. Jeffrey S. Adler, *Streetwalkers, Degraded Outcasts, and Good-for-Nothing Huzzies: Women and the Dangerous Class in Antebellum St. Louis*, 25 J. SOC. HIST. 737, 740 (1992).

193. *Id.* at 743-44; GOLUBOFF, *supra* note 177, at 150-51.

194. See JOANNE J. MEYEROWITZ, *WOMEN ADRIFT: INDEPENDENT WAGE EARNERS IN CHICAGO, 1880-1930*, at 27-41 (1988).

195. KERBER, *supra* note 183, at 60-78.

196. *See id.* at 62-64.

197. *Id.* at 63.

198. *See id.* at 59; SARAH HALEY, *NO MERCY HERE: GENDER, PUNISHMENT, AND THE MAKING OF JIM CROW MODERNITY* 6, 80-81 (2016).

199. HALEY, *supra* note 198, at 6, 73-76; KERBER, *supra* note 183, at 68-70.

200. *See* KERBER, *supra* note 183, at 62-63 (discussing how Black women were obligated to perform labor fit for men); SIOBHAN B. SOMERVILLE, *QUEERING THE COLOR LINE: RACE AND THE INVENTION OF HOMOSEXUALITY IN AMERICAN CULTURE* 37-40 (2000) (discussing whites’ perception of Black women’s “inverted” sexuality); HALEY, *supra* note 198, at 5-6, 187 (observing Black women’s construction as “queer” and “defined by deviant motherhood, physical grotesqueness, the capacity for hard labor, the impossibility of sexual, emotional, and physical injury, mental inferiority, and disposability”).

201. *See* KERBER, *supra* note 183, at 66.

woman out of place has made herself sexually available.”<sup>202</sup> Women could occupy only two possible personas in public: an unruly sexual actor arrestable under the vag lewd regime or a potential victim perpetually endangered in the sexually charged city space.<sup>203</sup> To preserve their tenuous status, women needed to avoid the public and rely on men to protect them from the ominous sexuality all around. This highly gendered spatial-sexual regime indelibly marked women’s relationship to the public streets.<sup>204</sup>

Well into the twentieth century, states punished a wide range of public behaviors and private consensual sex acts as “deviant” and “immoral.” In the post-World War II era, there was a widespread social and legal preoccupation with—and even panic over—“sexual psychopathy,” a category that often included consensual same-sex acts.<sup>205</sup> By one estimate, from 1946 to 1961, criminal punishment was imposed on up to one million LGBTQ people.<sup>206</sup> During that time, surveillance of gay men in private and semi-private spaces was so ubiquitous and unseemly that it sparked public criticism and, according to David Sklansky, influenced the Warren Court to expand Fourth Amendment privacy rights.<sup>207</sup> Nevertheless, until midcentury, the architecture of American sex-crime law—built by patriarchy, evangelicalism, economic inequality, and racism—remained solid.

But change was coming.

## II. Sex Exceptionalism in Retreat and Retrenchment

In the latter half of the twentieth century, American society entered the “sexual revolution.”<sup>208</sup> Amid a politically motivated younger generation, a growing body of social science on sexuality, and the increased popularity of liberal theory, the old sexual order began to fall away. In the late 1960s, “free love” meant pursuing sexual relations unshackled by conventional mores regarding morality and marriage. The cultural and social shifts heralded major legal

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202. *See id.*

203. GOLUBOFF, *supra* note 177, at 150-51; Elizabeth Sepper & Deborah Dinner, *Sex in Public*, 129 YALE L.J. 78, 90-93 (2019).

204. Molly Miller Brookfield, *Watching the Girls Go By: Sexual Harassment in the American Street, 1850-1980*, at 7 (2020) (Ph.D. dissertation, University of Michigan), <https://perma.cc/2U37-3MND>. *See generally* Sepper & Dinner, *supra* note 203 (providing a history of women’s constructed relationship to public space).

205. ESKRIDGE, *DISHONORABLE PASSIONS*, *supra* note 50, at 94-96.

206. ESKRIDGE, *GAYLAW*, *supra* note 50, at 60.

207. David Alan Sklansky, “*One Train May Hide Another*”: Katz, Stonewall, and the Secret Subtext of *Criminal Procedure*, 41 U.C. DAVIS L. REV. 875, 891-95 (2008).

208. *See generally* D’EMILIO & FREEDMAN, *supra* note 31, at 302-08, 327-38 (discussing the sexual revolution).

changes, many of which were *deregulatory*. States decriminalized or legalized sodomy, adultery, fornication, obscenity, contraception, and abortion.<sup>209</sup> The Supreme Court created heightened protections for personal decisions related to family and reproduction.<sup>210</sup> The law's lionization of marriage was challenged on many fronts, especially by the rise of no-fault divorce.<sup>211</sup>

Criminal law became less sex-exceptional, as legislatures began to harmonize sex-crime laws with other prohibitions.<sup>212</sup> Inspired by liberal theory, feminism, and sex research, lawmakers rebranded the harm of sex as personal injury rather than unchastity, marital disruption, and immorality. In this liberalized view, sex was not itself the problem, and “harmless” sex—adult, private, consensual sex—was not an appropriate subject of criminal prohibition.<sup>213</sup> At the same time, forcible and nonconsensual sex remained a grave offense to bodily integrity, consonant with modern notions of autonomy.<sup>214</sup> This attempt to retrofit criminal sex law with an assault frame included renaming rape and related offenses “assaults” and “batteries.”<sup>215</sup>

Despite these reforms, much of sex law's moral- and marital-based architecture remained, as did the narrative that many forms of harmful sex<sup>216</sup> are life-ruining events for women. Moreover, the liberal reform project broadened many sex-crime prohibitions and even introduced new areas of exceptionalism. Sexual liberation quickly garnered an intense backlash from very strange and powerful bedfellows. Family-values conservatives and a

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209. *See id.* at 315-16, 324-25.

210. *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (protecting the right of married people to use contraception); *Eisenstadt v. Baird*, 405 U.S. 438, 443 (1972) (protecting the right of unmarried people to use contraception); *Roe v. Wade*, 410 U.S. 113, 153-54 (1973) (protecting the right to abortion), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022); *see* Susan Frelich Appleton, *Sex-Positive Feminism's Values in Search of the Law of Pleasure*, in *THE OXFORD HANDBOOK OF FEMINISM AND LAW IN THE UNITED STATES* (Deborah Brake, Martha Chamallas & Verna Williams eds., 2021), <https://perma.cc/9LBH-GAZ9>.

211. ROBIN WEST, *MARRIAGE, SEXUALITY, AND GENDER* 5-8 (2007).

212. *See infra* Part II.A.1.

213. *See* JOHN WOLFENDEN ET AL., *REPORT OF THE DEPARTMENTAL COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION* 21 (reprt. 1962) (1957) [hereinafter 1957 WOLFENDEN REPORT].

214. *See infra* notes 223-29 and accompanying text.

215. *See State ex rel. M.T.S.*, 609 A.2d 1266, 1275-76 (N.J. 1992) (discussing this name change). The ALI drafters recast obscenity laws from protecting “souls” from being “depraved or corrupted” to “the right of the general public not to be subjected to violent psychological affront.” Louis B. Schwartz, *Morals Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669, 681 (1963).

216. I struggle to find a term that neither dismisses such sex as “no big deal” when many feel it is nor participates in the discourse that constructs such sex as necessarily criminal and devastating.

prominent group of feminists united in support of a robust role for the government in disciplining sex. There also emerged a new public preoccupation with sexual psychopaths, spurred by relentless media coverage of rare but horrific child killings. The end result was expanded sex-crime prohibitions in an exceptionally and virtually inalterably hyper-punitive regime built by panic.

## A. Sex Exceptionalism's Retreat

### 1. The liberal turn: harmonization and deregulation

Four critical events helped propel the late twentieth-century paradigm shift in American sex-crime law from chastity and morality to injury: the 1948 and 1953 Kinsey Reports,<sup>217</sup> the 1957 Wolfenden Report,<sup>218</sup> the Hart-Devlin debates of the early 1960s,<sup>219</sup> and the drafting of the Model Penal Codes (MPC) in the late 1950s.<sup>220</sup> The Kinsey reports exposed that the sexual behaviors the law deemed immoral and criminally punishable—most notably, adultery and same-sex intimacy—were quite common.<sup>221</sup> They also revealed the phenomenon, persistent to this day, that people often violate in private the sexual rules they extoll in public.<sup>222</sup> The reports shattered the illusion of an American moral consensus on sex.

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217. ALFRED C. KINSEY, WARDELL B. POMEROY & CLYDE E. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* (1948) [hereinafter 1948 KINSEY]; ALFRED C. KINSEY, WARDELL B. POMEROY, CLYDE E. MARTIN & PAUL H. GEBHARD, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* (1953) [hereinafter 1953 KINSEY].

218. 1957 WOLFENDEN REPORT, *supra* note 213; *see also* Claude J. Summers, *gltbq Encyclopedia Project, Wolfenden Report 1-2* (2004), <https://perma.cc/W5CP-9NK2> (providing background on the report).

219. *See generally* PATRICK DEVLIN, *THE ENFORCEMENT OF MORALS* (1965) (offering a defense of morals policing); H. L. A. HART, *LAW, LIBERTY AND MORALITY* (1963) (making the case that morals policing violates liberty principles).

220. MODEL PENAL CODE § 207.1 cmt. at 207 (AM. L. INST., Tentative Draft No. 4, 1955). The MPC was finalized in 1962, and commentaries were added in 1980. MODEL PENAL CODE AND COMMENTARIES § 213.6 cmt. at 436-37 (AM. L. INST., Official Draft and Revised Comments, 1980).

221. *See* 1948 KINSEY, *supra* note 218, at 584-89 (adultery); *id.* at 623-36 (homosexuality); 1953 KINSEY, *supra* note 218, at 416-21 (adultery); *id.* at 452-58 (homosexuality).

222. For example, in public, students say that affirmative consent is required, but they do not fully understand and do not actually obtain affirmative consent in practice. *See generally* Jena Nicols Curtis & Susan Burnett, *Affirmative Consent: What Do College Student Leaders Think About "Yes Means Yes" as the Standard for Sexual Behavior?*, 12 AM. J. SEXUALITY EDUC. 201 (2017); Annika M. Johnson & Stephanie M. Hoover, *The Potential of Sexual Consent Interventions on College Campuses: A Literature Review on the Barriers to Establishing Affirmative Sexual Consent*, 4 PURE INSIGHTS (2015), <https://perma.cc/NVN7-BQKP>. *See also* Terry P. Humphreys & Mélanie M. Brousseau, *The Sexual Consent Scale—Revised: Development, Reliability, and Preliminary Validity*, 47 J. SEX RSCH. 420, 420-21 (2010)

*footnote continued on next page*

The Wolfenden Report, officially entitled the “Report of the Departmental Committee on Homosexual Offences and Prostitution,” was the product of a three-year study by a committee appointed by the Conservative British government that included a number of prominent Conservative politicians.<sup>223</sup> The Report, released in 1957 to great public anticipation, surprisingly recommended decriminalizing homosexuality.<sup>224</sup> It also made waves in the United States, coming on the heels of McCarthy-era homosexual purges and notorious vag lewd policing.<sup>225</sup> The purpose of criminal law, the committee wrote, is “to protect the citizen from what is offensive or injurious . . . not, in our view . . . to intervene in the private life of citizens.”<sup>226</sup> The Report did not call for legally or culturally condoning homosexuality; it merely championed tolerance of private same-sex intimacy.<sup>227</sup> But it was clear that the law should not “equate the sphere of crime with that of sin.”<sup>228</sup> The Report adopted the principle that Samuel Warren and Louis Brandeis endorsed decades earlier: People have a “right to be let alone.”<sup>229</sup>

The shift in the legal treatment of sex was furthered by a famous debate between H.L.A. Hart and Lord Patrick Devlin. Devlin, responding to the Wolfenden Report in his 1958 Maccabean Lecture on Jurisprudence, offered the counterargument that the government could validly regulate morality as determined by the “viewpoint of the man in the street.”<sup>230</sup> For Devlin, sexual regulation was more than just a moral imperative; it was necessary to preserve liberal democracy itself: “A nation of debauchees would not in 1940 have responded satisfactorily to Winston Churchill’s call to blood and toil and sweat and tears.”<sup>231</sup> Hart responded in his own series of lectures. Drawing on John Stuart Mill’s harm principle, he argued that sexual acts that triggered moral offense—even reasonable offense—but did not produce harm did not warrant

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(providing background on studies finding that subjects preferred nonverbal and indirect consent communication, despite the larger discourse of affirmative consent).

223. 1957 WOLFENDEN REPORT, *supra* note 213, at 7-9; Summers, *supra* note 218, at 1.

224. Summers, *supra* note 218, at 2.

225. See ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 50, at 101-04 (discussing McCarthy-era purges); *supra* Part I.B.2.a (discussing vag lewd policing).

226. 1957 WOLFENDEN REPORT, *supra* note 213, at 9-10.

227. *Id.* at 21.

228. *Id.* at 24.

229. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

230. DEVLIN, *supra* note 219, at 15.

231. *Id.* at 111.

criminal sanction.<sup>232</sup> Hart, however, made an exception for moral offenses that constituted a public nuisance.<sup>233</sup>

As early as 1955, the drafters of the MPC adopted a Wolfenden/Hart-style presumption against morals offenses: “We deem it inappropriate for the government to attempt to control behavior that has no substantial significance except as to the morality of the actor. Such matters are best left to religious, educational, and other social influences.”<sup>234</sup> Contemporary commentators regard this statement as a pivotal moment, ushering in “a half-century of sexual liberty jurisprudence [that] strengthened the perceived separation of sin and crime, morality and liberty, tradition and modernity.”<sup>235</sup>

a. Adopting an assault paradigm

The MPC drafters made their stand against morals offenses in their analysis of whether the MPC should adopt provisions that criminalized nonmarital relations, reflecting the state laws of the time. An early proposal made it a crime to “cohabit[] or ha[ve] sexual intercourse with a person of the opposite sex other than his spouse.”<sup>236</sup> Recognizing that due to “Biblical” mores, “[s]exual intercourse outside the bounds of lawful matrimony is widely, but not universally, criminal in the United States,” the 1955 drafters nonetheless endorsed the contrary position.<sup>237</sup> They rejected the majority rule forbidding adultery both because it often went unenforced and because the Kinsey reports had revealed that a “large proportion of the population is guilty at one time or another of this breach of sexual mores.”<sup>238</sup> The drafters further noted that criminalizing common sex practices could lead to “discriminatory enforcement, *e.g.*, where the parties involved are of different races.”<sup>239</sup> They pointed to the 1910 Mann Act, also known as the “White Slavery Act,” which prohibited the interstate transportation of women and girls “for any . . .

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232. See HART, *supra* note 219, at 4-5.

233. *Id.* at 39-43. Interestingly, even bigamy was a public crime because obtaining a marriage license was a “public” act. *Id.* at 39-41.

234. MODEL PENAL CODE § 207.1 cmt. at 207 (AM. L. INST., Tentative Draft No. 4, 1955); see also Schwartz, *supra* note 215, at 674.

235. John Witte, Jr., *Church, State, and Sex Crimes: What Place for Traditional Sexual Morality in Modern Liberal Societies?*, 68 EMORY L.J. 837, 859 (2019).

236. MODEL PENAL CODE § 207.1 (AM. L. INST., Tentative Draft No. 4, 1955). The language was bracketed to give the general American Law Institute membership a chance to consider it. MODEL PENAL CODE AND COMMENTARIES § 213.6 note on adultery and fornication, at 436 (AM. L. INST., Official Draft and Revised Comments, 1980).

237. MODEL PENAL CODE § 207.1 cmt. at 204 (AM. L. INST., Tentative Draft No. 4, 1955).

238. *Id.* at 206.

239. *Id.* at 205.



immoral purpose” and was frequently used for political purposes and to punish interracial intimacy.<sup>240</sup>

Buried in the MPC draft’s dense explanation for decriminalizing adultery were two points that had, and still have, the potential to collapse sex exceptionalism’s empire. The drafters considered various policy arguments for adultery and fornication laws, including that they reduced the number of “illegitima[te]” children and prevented disease.<sup>241</sup> The MPC drafters rejected the disease rationale because adultery and fornication laws did “not discriminate between healthy and diseased actors.”<sup>242</sup> But by this logic, preventing disease also cannot justify anti-prostitution laws, because they too fail to distinguish between healthy and diseased commercial sexual actors. The 1955 draft, however, did criminalize prostitution, threading the needle by defaulting to the vag lewd-type logic that sex workers were a *diseased* “class.”<sup>243</sup>

Stating that the laws were “ill designed” to prevent illegitimacy, the drafters articulated the revolutionary view that *sex is separable from pregnancy*. Observing that “[b]astardy is rare compared to the frequency of illicit intercourse,” the drafters suggested that states concerned with illegitimacy could restrict liability “to cases where the undesirable result materialized.”<sup>244</sup> Nevertheless, contemporary feminists continue to point to the potential of pregnancy as a reason why rape is exceptionally serious.<sup>245</sup> Interestingly, people rarely argue that the lack of this potential is reason to treat, for example, forced anal sex as relatively benign.

As this article was being edited, the Supreme Court handed down *Dobbs v. Jackson Women’s Health Organization*, overturning *Roe v. Wade*.<sup>246</sup> One might ask whether rape should be considered an even graver offense now that states can force pregnancies and births. Although this topic certainly deserves a longer discussion on another day, my initial reaction is that *Dobbs* gives us *more* reason to reject the legal conflation of sex and pregnancy. As explained in Part

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240. White-Slave Traffic (Mann) Act, ch. 395, § 2, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. § 2421); see MODEL PENAL CODE § 207.1 cmt. at 205-06 (AM. L. INST., Tentative Draft No. 4, 1955) (warning that the Act’s provisions could “easily be turned against other vulnerable individuals or groups”).

241. MODEL PENAL CODE § 207.1 cmt. at 207, 209 (AM. L. INST., Tentative Draft No. 4, 1955).

242. *Id.* at 209.

243. *Id.* (rejecting the disease rationale because the adultery law applied equally to “individuals involved in a forbidden love episode and . . . the Don Juan or prostitute”); see MODEL PENAL CODE AND COMMENTARIES § 251.2 (AM. L. INST., Official Draft and Revised Comments, 1980) (defining prostitution as a petty misdemeanor).

244. MODEL PENAL CODE § 207.1 cmt. at 209 (AM. L. INST., Tentative Draft No. 4, 1955).

245. See, e.g., Blanco, *supra* note 66, at 223.

246. *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022).

I, the state's keen desire to regulate reproduction drove the misogynistic rape law regime that denied women sexual freedom.<sup>247</sup> Reproduction-regulatory (or rather, nonreproduction-prohibitionist) sentiments and policy actions are at a generational high, and they may yet produce prohibitions on birth control, abstinence requirements, stronger disciplining of teens for consensual sex, and the like.<sup>248</sup>

The past several years has seen mainstream feminists train their focus on under-regulation, advocating for greater state control of sexual wrongdoing, when perhaps greater attention should have been paid to the powerful campaign to reestablish states' long historical practice of strictly cabinning individuals' sexual and procreative choices.<sup>249</sup> Today, whole new classes of actors have become criminals based on a segment of society's moral and disgust-based intuitions about sex, reproduction, and ideas about female trauma—ideas that are now forged into law.<sup>250</sup> Perhaps, then, the moment is ripe for progressives to entertain a more general and sustained skepticism of broad criminal regulation in the sexual and reproductive realm.<sup>251</sup>

One might nonetheless look at the risk of state-forced birth in calculating the “injury” of sexual assault.<sup>252</sup> Indeed, all potentially reproductive sex now comes with added stress and danger because of the current governing regime. Yet changes in governmental policies that, for example, make it nearly impossible for some people to obtain medical care do not generally affect assessments of the gravity of physical assaults. Moreover, the rape-pregnancy

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247. *Supra* notes 96-116 and accompanying text. Most feminists strongly rejected the Supreme Court's connection of sex and pregnancy in *Michael M. v. Superior Court*, 450 U.S. 464, 470-73 (1981) (plurality opinion) (upholding a statutory rape provision that applied only to male defendants with female victims on the ground that it was aimed to prevent teen pregnancy); see Note, *Feminist Legal Analysis and Sexual Autonomy: Using Statutory Rape Laws as an Illustration*, 112 HARV. L. REV. 1065, 1076-80 (1999) (cataloging feminist critiques of *Michael M.*).

248. See, e.g., Abigail Higgins, *Abortion Rights Advocates Fear Access to Birth Control Could Be Curtailed*, WASH. POST (June 24, 2022, 4:05 PM EDT), <https://perma.cc/5PXH-FJWA>.

249. See *supra* note 55 and accompanying text (discussing #MeToo); *infra* Part III.C.1 (examining anti-hassling movement); *supra* Part I (recounting historical efforts).

250. See, e.g., Eleanor Klibanoff, *Texas Who Perform Abortions Now Face up to Life in Prison, \$100,000 Fine*, TEX. TRIB. (Aug. 25, 2022, 5:00 AM CT), <https://perma.cc/KB3D-ZL26>. See also Jeannie Suk, *The Trajectory of Trauma: Bodies and Minds of Abortion Discourse*, 110 COLUM. L. REV. 1193, 1194-95 (2010) (discussing the antiabortion camp's use of the feminist trauma framework).

251. This would be like prison abolitionists' sustained and unchanging skepticism of carceral remedies. See Thomas Mathiesen, *The Politics of Abolition*, 10 CONTEMP. CRISES 81, 84, 87 (1986), <https://perma.cc/J847-CT4F>.

252. Cf. MODEL PENAL CODE AND COMMENTARIES § 213.6 note on adultery and fornication, at 437 (AM. L. INST., Official Draft and Revised Comments, 1980) (urging a focus on injury, not morals). See *supra* text accompanying notes 31 & 78 (arguing it is not necessarily exceptionalist to see sexual assault as more injurious than nonsexual assault).

connection raises the thorny issue of pregnancy exceptionalism.<sup>253</sup> Feminists have developed a rich critical literature on the various, often harmful, legal regimes that rely on the idea that pregnancy is completely distinct from and disanalogous to other physical conditions.<sup>254</sup> In many areas of law, pregnancy is not an injury at all, while in rape law, the potential for pregnancy, even if it mostly does not come to pass, is treated as a super-injury. When it comes to sexual assault, pregnancy risk is a categorical harm that finds no analogue in those physical assaults that have the potential to cause lifelong debilitation but do not.<sup>255</sup>

But let us return to the 1955 MPC. We see in the drafters' discussion of cohabitation, nonmarital sex, and adultery a concerted effort to diminish what had long rendered sex exceptional: immorality, chastity, marriage, disease, and procreation. In 1962, the finalized MPC made clear that criminal law could regulate sex "to prevent injury" but not to control "private immorality."<sup>256</sup> The code also separated rape law from its ancient rationales by extending liability to nonvaginal, and thus nonprocreative, penetration, as well as by grading rape along a force/injury axis, with injurious forcible sex punished more than non-injurious nonconsensual sex.<sup>257</sup>

The code also shifted from punishing sodomy and other "deviate" acts as crimes of immorality to punishing them as assaults when they involved force or coercion.<sup>258</sup> Yet as a testament to the tenacity of the older order, the MPC still labeled the offenses "deviate sexual intercourse"—and will do so until new draft provisions are finalized—although they were purportedly no longer about deviance.<sup>259</sup> Larry Catá Backer remarks that, however "well-meaning"

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253. See generally Courtney Megan Cahill, *Reproductive Exceptionalism in and Beyond Birth Rights*, 100 B.U. L. REV. ONLINE 152 (2020) (detailing the law's exceptional treatment of pregnancy and reproduction) (reviewing DOV FOX, *BIRTH RIGHTS AND WRONGS: HOW MEDICINE AND TECHNOLOGY ARE REMAKING REPRODUCTION AND THE LAW* (2019)); *Developments in the Law—Intersection of Healthcare and Legal Rights*, 134 HARV. L. REV. 2209 (2021) (discussing health law and pregnancy exceptionalism); sources cited *infra* notes 254-55.

254. See, e.g., Nora Christie Sandstad, *Pregnant Women and the Fourteenth Amendment: A Feminist Examination of the Trend to Eliminate Women's Rights During Pregnancy*, 26 L. & INEQ. 171, 194 (2008); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279, 1327-28 (1987); Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 196, 200 (1982).

255. See Khiara M. Bridges, *When Pregnancy Is an Injury: Rape, Law, and Culture*, 65 STAN. L. REV. 457, 490-91 (2013).

256. MODEL PENAL CODE AND COMMENTARIES § 213.6 note on adultery and fornication, at 437 (AM. L. INST., Official Draft and Revised Comments, 1980).

257. *Id.* § 213.1 cmt. 8(d) at 346-48.

258. *Id.* § 213.2.

259. *Id.* In May 2022, the American Law Institute membership approved a revised model penal code that jettisoned the 1962 provisions and terminology on rape and related

*footnote continued on next page*

the reforms, the drafters “consciously used . . . words [designed] to insult, carrying over the meaning from traditional (moral) legislation” and rendering the MPC “a toleration chained to a nausea born of disgust.”<sup>260</sup>

b. Limits to the harmonization project

Indeed, for all its efforts to harmonize sex-crime law with assault law, the 1962 MPC scheme remained extremely sex-exceptional, retained much of the structure of the old sex-regulatory regime, and continued to reflect marriage, chastity, and morality rationales. Penetration remained the pinnacle of the sex-crime pyramid,<sup>261</sup> but that was not the most exceptional feature. Rape was a crime that could be committed *only* by men against women.<sup>262</sup> The commentaries to the 1962 code, published in 1980, betrayed the drafters’ discomfort that this facet of the code was inconsistent with the new liberal understanding of rape as physical assault: “If the Model Code were being redrafted today,” they ruminated, “it might . . . describ[e] the entire offense of rape in gender-neutral terms.”<sup>263</sup> Such a move might “help to abrogate certain sex stereotypes that our society is appropriately beginning to address.”<sup>264</sup>

To be sure, the drafters took pains to note that deviate sexual intercourse was gender neutral and could apply to, for example, forcible male-on-male penetration.<sup>265</sup> Still, they had to admit that “[c]oerced vaginal intercourse by a female upon a male is not explicitly covered by any of the provisions.”<sup>266</sup> Tellingly, in rationalizing rape’s gender specificity by denying that the “harm accomplished by female aggression is sufficiently similar to that which occurs in the usual [rape] context,”<sup>267</sup> the drafters defaulted to the old rationales of pregnancy and chastity: “[T]he potential consequences of coercive intimacy do not seem so grave” for men, they argued, because “there is no prospect of

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offenses. It must still go through a few hoops until it is finalized. *See Model Penal Code: Sexual Assault and Related Offenses*, AM. L. INST., <https://perma.cc/5988-WLN4> (archived Jan. 25, 2023). In full disclosure, I was an advisor to the revision project from the outset.

260. Larry Catá Backer, *Exposing the Perversions of Toleration: The Decriminalization of Private Sexual Conduct, the Model Penal Code, and the Oxymoron of Liberal Toleration*, 45 FLA. L. REV. 755, 778 (1993).

261. MODEL PENAL CODE AND COMMENTARIES § 213.1 (AM. L. INST., Official Draft and Explanatory Notes, 1985).

262. MODEL PENAL CODE AND COMMENTARIES § 213.1 cmt. 8(a) at 337 (AM. L. INST., Official Draft and Revised Comments, 1980).

263. *Id.*

264. *Id.*

265. *Id.* at 335.

266. *Id.* at 336.

267. *Id.* at 338.

unwanted pregnancy. And however devalued virginity has become for the modern woman, it is difficult to believe that its loss constitutes a comparable injury to the male.”<sup>268</sup>

Although some jurisdictions retain the “vaginal intercourse” language,<sup>269</sup> most states moved away from that paradigm. They have added to the definition of rape gender-neutral conduct unrelated to reproduction, such as oral sex and anal and digital penetration.<sup>270</sup> This move was anti-exceptionalist, but it was also extremely carceral. Lawmakers often “leveled up” and expanded the most serious sexual felonies to include new behaviors, while leaving untouched the extreme penalties that reflected old concerns about ruining a woman’s (and her husband’s) property in chastity.<sup>271</sup> Under reformed laws, devirginization and pregnancy no longer determined penetration’s gravity, so what did? The answer appears to be scholars’ and lawmakers’ intuitions—gendered ones—about the level of “invasiveness” or “intimacy” of given sexual activities.<sup>272</sup> But if a sexual activity’s level of “intimacy,” as determined by some idea of a public consensus on sex, is the basis for its grade of offense, then it should not matter whether that activity is a “penetration” or not.

But it still matters. Vestiges of the old penetration model remain, limiting codes’ aspirations toward true gender neutrality.<sup>273</sup> In the 2021 Model Penal Code draft, for example, “penetration” includes *any* touching that penetrates the vulva (not vagina), “however slight,” which means that penetrative rape includes “fingering” without insertion.<sup>274</sup> By contrast, touching a male victim’s penis—including through full vaginal or anal intercourse—is a lesser contact offense subject to lesser penalties, even if the intercourse is forced on the male victim at gunpoint.<sup>275</sup> The draft justifies this very gendered distinction by

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268. *Id.*

269. *See, e.g.*, N.C. GEN. STAT. § 14-27.22(a) (2022). Several states have moved to include other very intimate but nonprocreative contacts like “oral sexual contact.” *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1406(A) (2022); MD. CODE ANN., CRIM. LAW § 3-304 (LexisNexis 2022) (criminalizing nonconsensual “vaginal intercourse or a sexual act”).

270. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-1406 (2022); LA. STAT. ANN. § 14:42 (2022); IND. CODE § 35-42-4-1 (2022); CAL. PENAL CODE § 289 (2023).

271. *See supra* note 90 and accompanying text (discussing penalties).

272. *See* MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.0 cmt. 6 at 40 (AM. L. INST., Tentative Draft No. 5, 2021) (stating that the measure is “degree of intrusion or intimacy”). One could make the case that these intuitions of “seriousness” overlap with how much physical *pleasure* the sex act could give—pleasure that in the old days was excoriated as immoral or strictly confined to the marital bed.

273. *Id.* § 213.0(2)(a) & cmt. 6 at 40.

274. *Id.* This is a typical formulation of penetration.

275. *Id.* at cmt. 6 at 41.

referring to “the longstanding definition of ‘sexual penetration,’ which has proved both workable and wise for a century.”<sup>276</sup>

In addition to the penetration requirement, the 1962 code preserved many other sex-exceptionalist features, including the special prosecution rules that policed victims’ chastity and the marital exemption.<sup>277</sup> The drafters attempted to explain rules like corroboration in modern liberal terms. They dismissed the sexist argument that corroboration is necessary because women frequently lie about rape to salvage their reputation or for revenge.<sup>278</sup> The drafters gave a little more credence to the argument that corroboration is a counterweight to jurors’ innate distaste for rape defendants, especially Black defendants.<sup>279</sup> But their main rationale was distinctly civil libertarian. Rape, the argument went, is a crime that often boils down to the word of the victim against the word of the defendant, and “[t]he corroboration requirement is an attempt to skew resolution of such disputes in favor of the defendant,” not because women lie, but because “uncertainty should be resolved in favor of the accused.”<sup>280</sup> The drafters went on, “[t]he criminal trial is not a sporting contest in which each side is guaranteed an equal opportunity of success. It is a coercive proceeding in which the state should assume full responsibility for demonstrating a basis for punishing the individual defendant.”<sup>281</sup>

The MPC similarly attempted a non-exceptionalist, consent-based explanation of the marital exemption, although the drafters signaled the need to rethink the blanket rule: “[M]arriage . . . , while not amounting to a legal waiver of the woman’s right to say ‘no,’” they explained, “does imply a kind of generalized consent that distinguishes some versions of the crime of rape from parallel behavior by a husband.”<sup>282</sup> Now, one might say there is some logic to these liberal justifications of the old sexist rules. Perhaps corroboration should be required when cases rest solely on the word of prosecution witnesses. Indeed, scholars have signaled the need for a corroboration requirement in, for example,

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276. *Id.*

277. MODEL PENAL CODE AND COMMENTARIES § 213.6 (AM. L. INST., Official Draft and Explanatory Notes, 1985).

278. MODEL PENAL CODE AND COMMENTARIES § 213.6 cmt. 6 at 426-27 (AM. L. INST., Official Draft and Revised Comments, 1980).

279. *Id.* at 427-28 (explaining that “[t]he idea is that rape is so heinous an event that judge and jury will be moved too quickly to express their outrage by conviction,” especially in the “trial of a [B]lack defendant for rape of a white woman”).

280. *Id.* at 428-29.

281. *Id.* at 429.

282. *Id.* § 213.1 cmt. 8(c) at 344.

cases based on inherently unreliable eye-witness testimony.<sup>283</sup> Perhaps married or established couples should have more room to presume consent than first-daters. The law, however, generally does not require corroborative evidence for non-rape crimes, and, although true that spouses are not like dates, such does not justify a blanket exemption. As a result, in the years following, most liberal scholars rejected these rationalizations and, notwithstanding the MPC, states systematically eliminated them from their codes.<sup>284</sup>

c. Liberal reform and public morals

The liberal and deregulatory sentiments that prompted reform of the sex-crime regime also propelled changes in the law governing public sexuality, most prominently in vagrancy law. As with the rape harmonization project, the effort to liberalize rules governing public behavior was never fully realized. Early on, proponents of liberalization consciously confined their sexual-liberty arguments to nonpublic behavior; the constitutional jurisprudence of that period similarly relied on privacy, not liberty, to protect individual sexual and reproductive choices.<sup>285</sup> Still, examining Supreme Court jurisprudence, and especially the liberal justices' views in that period, we see that the moment was ripe with possibility.

Between 1965 and 1973, the Supreme Court protected individuals' rights to take and distribute contraception in *Griswold v. Connecticut*<sup>286</sup> and *Eisenstadt v. Baird*,<sup>287</sup> and to choose an abortion in *Roe v. Wade*.<sup>288</sup> It was not entirely clear at the time that the Court aimed to heighten protections for sexual as well as reproductive decisions, and again, the linchpin of these decisions was personal privacy, not liberty.<sup>289</sup> Nevertheless, in the same period, the Supreme Court took up its most consequential vagrancy case of all time, 1972's *Papachristou v.*

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283. See, e.g., Sandra Guerra Thompson, *Beyond A Reasonable Doubt? Reconsidering Uncorroborated Eyewitness Identification Testimony*, 41 U.C. DAVIS L. REV. 1487, 1493-95 (2008).

284. See MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES 86-91 (AM. L. INST., Tentative Draft No. 1, 2014) (surveying current state and federal law on these doctrines); see also Gruber, *Rape, Feminism, supra* note 74, at 593 (noting how states have abandoned corroboration and resistance requirements); Estrich, *supra* note 106, at 1123-24 (describing the elimination of the "utmost resistance" requirement).

285. See *supra* note 233 and accompanying text; see also Katherine M. Franke, Commentary, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1404 (2004) ("Early privacy law was both relational . . . and spatially domesticated . . .").

286. 381 U.S. 479, 485 (1965).

287. 405 U.S. 438, 454-55 (1972).

288. 410 U.S. 113, 164-66 (1973).

289. See *id.* at 153-54; *Griswold*, 381 U.S. at 485; *Eisenstadt*, 405 U.S. at 454-55.

*City of Jacksonville*.<sup>290</sup> And although most do not regard it as a sex case, on closer inspection, the sexual subtext is apparent.

*Papachristou* involved the arrest, under a Jacksonville vagrancy ordinance, of two white women and two Black men riding in a car on a double date.<sup>291</sup> Although the police denied that the racial makeup of the group was the reason for the arrest, an officer later called Margaret Papachristou's parents to tell them she had been "out with a negro."<sup>292</sup> Jacksonville's ordinance criminalized, among other groups, "rogues and vagabonds," "dissolute persons," "common night walkers," "lewd, wanton and lascivious persons," "persons wandering or strolling around from place to place," and "disorderly persons."<sup>293</sup> The Court struck it down as "void for vagueness, both in the sense that it 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute' and because it encourages arbitrary and erratic arrests and convictions."<sup>294</sup>

Risa Goluboff, examining court archives from this period, argues that the vagrancy and sexual privacy cases were not as separate as commonly believed and that together they point to a legal road not taken: a right to be left alone in private *and* public life.<sup>295</sup> Justice Douglas's drafts show him flirting with a fundamental right *to* unruly behavior, which would include the interracial, sex-tinged nonconforming behavior involved in the *Papachristou* case.<sup>296</sup> Goluboff remarks: "[Douglas] suggests that the rights at issue in *Papachristou*, rights he would deem fundamental and worthy of heightened judicial protection, included rights to 'dissent,' 'nonconformity,' and defiance of 'submissiveness.'"<sup>297</sup>

Although defiance of racial hierarchies and oppression was one obvious aspect of what Justice Douglas had in mind, his preoccupation with nonconformity did not end there. The other *Papachristou* defendants, each in his own way, were also "vaguely undesirable in the eyes of police and prosecution."<sup>298</sup> Through the vagrancy ordinance, they could "be required to

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290. 405 U.S. 156, 156 n.1 (1972) (analyzing JACKSONVILLE, FLA. ORDINANCE CODE § 26-57 (1965)).

291. *Id.* at 158-59; see also GOLUBOFF, *supra* note 177, at 304.

292. Petitioners' Brief at 7, *Papachristou*, 405 U.S. 156 (No. 70-5030), 1971 WL 133167, at \*7.

293. *Papachristou*, 405 U.S. at 156 n.1.

294. *Id.* at 162 (citation omitted) (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954)).

295. See Risa L. Goluboff, Essay, *Dispatch from the Supreme Court Archives: Vagrancy, Abortion, and What the Links Between Them Reveal About the History of Fundamental Rights*, 62 STAN. L. REV. 1361, 1368 (2010).

296. *Id.* (discussing drafts of *Papachristou*).

297. *Id.*

298. *Id.* (quoting *Papachristou*, 405 U.S. at 166).



comport themselves according to the life style deemed appropriate by the Jacksonville police and the courts.”<sup>299</sup> If these sentiments had ruled the day, the revolutionary upshot, Goluboff argues, would have been “rights to engage in unconventional behavior—or simply to be an unconventional, even ‘undesirable,’ person—precisely where others could, and likely would, encounter such behavior and such people.”<sup>300</sup>

In correspondence with Justice Douglas, Justice Brennan indicated his own view that *Papachristou* and *Roe* were of a piece. Justice Brennan was developing his own “systematic framework for the ‘fundamental freedoms’ that he deemed within the meaning of ‘liberty,’” including “freedom from bodily restraint or inspection, freedom to do with one’s body as one likes, and freedom to care for one’s health and person.”<sup>301</sup> Goluboff concludes that the “suggestion that alternative ‘life style[s]’ might receive constitutional protection . . . had some traction in the early to mid 1970s.”<sup>302</sup> Nevertheless, it was not until 2003’s *Lawrence v. Texas* that the Court embraced the Hart-Wolfenden-MPC logic, by then a half-century old, and articulated a right to sexual liberty.<sup>303</sup>

d. Feminists’ complicated relationship with liberalization

Initially, second-wave liberal feminists<sup>304</sup> were at the very forefront of the effort to divest sex of its exceptional status. In her groundbreaking 1975 book *Against Our Will*, Susan Brownmiller urged that the law place rape “where it truly belongs, within the context of modern criminal violence and not within the purview of ancient masculine codes.”<sup>305</sup> In fact, liberal feminists of the time emphasized that traditional “rape laws are not designed, nor they do function, to protect a women’s interest in physical integrity.”<sup>306</sup> Leigh Bienen, for example, criticized the existing rape scheme that prioritized “the taking of a husband’s or father’s property” and “loss of virginity or exclusivity,” and

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299. *Id.* (quoting *Papachristou*, 405 U.S. at 170).

300. *Id.* at 1368–69.

301. *Id.* at 1380 (quoting Memorandum from Justice William J. Brennan to Justice William O. Douglas, Re: Abortion Cases (Dec. 30, 1971) (on file with William J. Brennan Papers, Library of Congress, Box I-285)).

302. *Id.* at 1369 (first alteration in original).

303. 539 U.S. 558, 572 (2003).

304. See Martha Chamallas, *Past as Prologue: Old and New Feminisms*, 17 MICH. J. GENDER & L. 157, 158 (2010) (describing the “big three” schools of “older” legal feminism: liberal, cultural, and dominance feminism); Aya Gruber, *Neofeminism*, 50 HOUS. L. REV. 1325, 1331–44 (2013) (describing these schools).

305. BROWNMILLER, *supra* note 50, at 377.

306. Camille E. LeGrand, Comment, *Rape and Rape Laws: Sexism in Society and Law*, 61 CALIF. L. REV. 919, 919 (1973).

instead championed laws that focused on physical and psychological harm.<sup>307</sup> These views rejected sex exceptionalism, but they did not necessarily call for complete symmetry between sexual and nonsexual assaults. Brownmiller, for example, remarked that rape had “unique dimensions, falling midway between robbery and assault” because it involves the “‘taking’ of sex through the use or threat of force.”<sup>308</sup> Despite the use of “unique,” Brownmiller determined the gravity of rape not by presuming sex is exceptional (for moral or procreative reasons or because it is inherently oppressive) but through a more ordinary criminological determination of harm.

Feminist rape reformers thus, in theory, rejected old sex exceptionalism. In practice, however, they targeted only the *lenient* (i.e., favorable to defendants) parts of the older legal order, mostly exempting the exceptional moral-outrage-driven rape penalties from their analyses.<sup>309</sup> For example, feminists successfully fought the corroboration, fresh complaint, and resistance requirements, characterizing them as exceptionally sexist and archaic.<sup>310</sup> They rejected the MPC drafters’ rationalization that the requirements were merely about protecting defendants from prejudice or presuming innocence.<sup>311</sup> And in an interesting twist, feminists then successfully championed their own exceptional evidence rules in rape cases—rape-shield laws that excluded victim-witnesses’ past sexual conduct, even if arguably relevant.<sup>312</sup>

Like the MPC drafters, feminists offered a non-exceptionalist liberal rationale for rape shield laws: They were not about protecting victims’ appearance of chastity but about balancing the scales by countering rape

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307. Leigh Bienen, *Rape Reform Legislation in the United States: A Look at Some Practical Effects*, 8 VICTIMOLOGY 139, 149 (1983).

308. BROWNMILLER, *supra* note 50, at 377. While the doctrinal criminal law analysis may be a little off, the point is that this is not a sex-exceptionalist argument.

309. See generally Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981 (2008) (laying out the carceral rape reform movement); GRUBER, FEMINIST WAR, *supra* note 4, at 130-31, 137-41 (examining reforms including the move to consent and affirmative consent, rape shield laws, evidentiary exceptions, and expert testimony); Kristin Bumiller, *Feminist Collaboration with the State in Response to Sexual Violence: Lessons from the American Experience*, in GENDER, VIOLENCE, AND HUMAN SECURITY: CRITICAL FEMINIST PERSPECTIVES 191, 197 (Aili Mari Tripp, Myra Marx Ferree & Christina Ewig eds., 2013) (describing feminist efforts in the latter half of the twentieth-century to impose more certain and severe punishment for crimes against women).

310. See, e.g., Anderson, *supra* note 74, at 964; Klein, *supra* note 309, at 986-88, 1020-21.

311. See, e.g., Anderson, *supra* note 74, at 961-64; Deborah W. Denno, *Why the Model Penal Code’s Sexual Offense Provisions Should Be Pulled and Replaced*, 1 OHIO ST. J. CRIM. L. 207, 213-15 (2003).

312. See, e.g., FED. R. EVID. 412; GA. CODE ANN. § 24-4-412 (2022) (“[E]vidence of past sexual behavior includes, but is not limited to, evidence of the complaining witness’s marital history, mode of dress . . . .”); see Bienen, *supra* note 307, at 139.

defendants' natural advantages with sexist jurors skeptical of women's rape claims.<sup>313</sup> Rape shield laws thus put rape defendants on the same footing as other defendants and made rape *less* exceptional.<sup>314</sup> The novel idea was that, in sex cases alone, it was the coercive state and not the individual defendant that required the evidentiary advantage.<sup>315</sup> This idea of a required prosecutorial advantage in sex cases peaked in the 1990s with the passage of laws exempting sex-crime defendants from evidence rules that otherwise prohibit the admission of defendants' prior crimes and bad acts.<sup>316</sup>

While many feminists made liberal arguments, some early rape-shield proponents, often the male ones, justified rape-shield laws by advancing sex-exceptionalist and even sexist arguments. They argued that questioning female victim-witnesses about their past sexual behavior was "almost as degrading as the rape itself."<sup>317</sup> According to this argument, the suffering endured by female witnesses from the public revelation of their past sexual behaviors is categorically worse than any other witness's suffering (i.e., a parent examined about his child's murder or an accused daycare worker questioned about ritualistic child abuse). Notice also that rape reformers did not advocate for robust jury screenings to weed out chauvinist jurors or jury instructions making clear that chastity-based decision-making is illegal.<sup>318</sup> Rather, the preferred reform was to shield jurors from knowing whether *this* victim was unchaste, thereby allowing patriarchal chastity norms to continue to rule and sexist jurors to convict in blissful ignorance.<sup>319</sup>

In addition, rape law reformers worried that decriminalizing morality crimes like sodomy, adultery, fornication, and the like would leave gaps in the

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313. See, e.g., Diane M. Daane, *Rape Law Reform: How Far Have We Come?*, PRISON J., Fall-Winter 1988, at 3, 7-8; see Anderson, *supra* note 71, at 94.

314. See Anderson, *supra* note 71, at 107-08; Klein, *supra* note 309, at 990-91.

315. MODEL PENAL CODE AND COMMENTARIES § 213.6 cmt. 6 at 429 (AM. L. INST., Official Draft and Explanatory Notes, 1985) ("sporting contest").

316. See FED. R. EVID. 413.

317. 124 CONG. REC. 36,256 (1978) (statement of Sen. Joe Biden). For a critique of this position, see Anderson, note 71 above, at 93-94; I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 856-58 (2013); and GRUBER, FEMINIST WAR, note 4 above, at 137-39.

318. For one such rare proposal, see Aya Gruber, *Pink Elephants in the Rape Trial: The Problem of Tort-Type Defenses in the Criminal Law of Rape*, 4 WM. & MARY J. WOMEN & L. 203, 256-57, 261-62 (1997).

319. The evidence does not bear out that juries are bent on acquitting men charged with sexual assault. Although it is true that juries harbor prejudices against women they consider to be "bad victims," they also harbor prejudice against the men sitting in front of them being called rapists by the state, especially if they "look the part." It turns out that juries convict rape defendants at the same rate as other violent felony defendants (97-98%). See GRUBER, FEMINIST WAR, *supra* note 4, at 129-30 (citing studies and statistics).

law's coverage of some nonconsensual sex acts. As a result, reformers *added* new sites of sex exceptionalism into the law. For example, without the older deviance prohibitions, minor sexual contacts could be prosecuted only as simple assaults or batteries.<sup>320</sup> However, many codes' formulations of misdemeanor assault and battery, including the 1962 MPC's, required some physical injury or intent to injure in addition to the offensive contact.<sup>321</sup> In the absence of special sexual contact provisions, unwelcome but non-injurious touches, including sexual touches, were not crimes.

To address this gap, the 1962 Code minted a brand new crime, "sexual assault," which criminalized the touching of an "intimate part[...]" regardless of injury, but only if the touch "arous[ed] or gratif[ied] sexual desire."<sup>322</sup> The drafters explained that "[t]he basketball coach who pats his players on the bottom is merely fulfilling a ritual of congratulation" and is therefore not liable, "[e]ven if such contact proves unwelcome."<sup>323</sup> They rationalized this parsing of butt pats because only sexually gratifying touches offend "personal dignity."<sup>324</sup> This dignitary interest was left vague, lest the drafters admit to a moralist belief that sexual intentions are inherently worse than other intentions (i.e., exercising hierarchical authority or compelled homosocial bonding).<sup>325</sup> Today, few quarrel with the notion that a random touch, hug, or pat on the back is "gross" or, more formally, "violating," if motivated by undisclosed sexual satisfaction.<sup>326</sup> Those who commit "sexual assault" by touch, a misdemeanor of modern creation, now face exceptional punishments, including being placed within the deviance-preoccupied SORN system.<sup>327</sup>

In a similar vein, feminist reformers worried that the existing rape laws, which largely required the use of force, failed to sufficiently criminalize

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320. See MODEL PENAL CODE AND COMMENTARIES § 213.4 cmt. 1 at 398-99 (AM. L. INST., Official Draft and Explanatory Notes, 1985) ("Prior to the drafting of the Model Penal Code, American legislation had not generally differentiated sexual from other assaults, except that assault with intent to rape or to commit sodomy had been classified as an aggravated form of the offense.")

321. See, e.g., ALA. CODE § 13A-6-22 (2022); KY. REV. STAT. ANN. § 508.030 (West 2022); CONN. GEN. STAT. § 53a-61 (2021) (all requiring unwanted touching *and* actual or intended injury for misdemeanor assault/battery). Again, for the purposes of this article it is not necessary to distinguish "assault" from "battery."

322. MODEL PENAL CODE § 213.4 (AM. L. INST., Official Draft and Explanatory Notes, 1985); *id.* cmt. at 399 n.2, 400.

323. *Id.* cmt. at 401.

324. *Id.*

325. The drafters were nonetheless dangerously close to a morality argument. See *id.* at 399 (pointing to the "nature of community norms at stake").

326. See *supra* notes 11 & 16 (discussing disgust); *infra* Part III.C.1.b. (examining such intuitions).

327. See *supra* note 63.

nonconsensual sex and subtly coerced intercourse.<sup>328</sup> In amending the most serious adult sex offenses to encompass nonconsensual and insufficiently authorized sex, so long as they involved sexual penetration, reformers ended up strengthening the old paradigm that the penetrative nature of the sex, rather than the level of violence or force, determines the offense's gravity.<sup>329</sup> Feminists like Brownmiller had rejected the law's treatment of "forc[ed] genital copulation [as] the 'worst possible' sex assault a person can sustain . . . equated in some states with the penalties for murder, while all other manner of sexual assaults are lumped together under the label of sodomy and draw lesser penalties" as reflecting "an outdated masculine concept that no longer applies to modern crime."<sup>330</sup> Brownmiller thus endorsed a "gender-free, non-activity-specific" sexual assault law.<sup>331</sup>

Nevertheless, for reformers, countering such exceptionalism took a back seat to convincing society that sex under a broader range of conditions, particularly unwanted sex on a date, should be considered "real rape."<sup>332</sup> Feminists were concerned, with good reason, that, despite legal changes, cultural chastity norms prevented legislatures, courts, and society from viewing women who had romantic contact with defendants as victims.<sup>333</sup> In response, they forcefully argued that nonconsensual sex with a date is as bad as, or worse than, violent rape by a stranger, and should be met with the same condemnation.<sup>334</sup> Liberal feminists spent much of their time pursuing reforms to ensure that more types of sexual interactions counted as rape (or high-level "sexual assault").<sup>335</sup>

This "real rape" reform overshadowed efforts to rethink the older chastity-based penalty scheme. Back in 1976, young civil rights lawyer Ruth Bader Ginsburg filed a brief in the Supreme Court "on behalf of a large segment of the women's legal community who oppose the death penalty for rape as a vestige

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328. See, e.g., Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 8 (1977); Estrich, *supra* note 106, at 1093; SUSAN ESTRICH, REAL RAPE 62-71 (1987); see also GRUBER, FEMINIST WAR, *supra* note 4, at 126 (describing the move to consent).

329. See *supra* notes 93-98 and accompanying text (discussing this paradigm).

330. BROWNMILLER, *supra* note 50, at 378.

331. *Id.*

332. See ESTRICH, *supra* note 328, at 62-71.

333. See Gruber, *Rape, Feminism*, *supra* note 74, at 589-600 & 597 n.85 (discussing these norms).

334. See, e.g., CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 177 (1989) ("Women often feel as or more traumatized from being raped by someone known or trusted, someone with whom at least an illusion of mutuality has been shared, than by some stranger.").

335. See Robin L. West, *Legitimizing the Illegitimate: A Comment on Beyond Rape*, 93 COLUM. L. REV. 1442, 1445 (1993) (noting that many experts advocated "dropping . . . the force requirement altogether" to address "underenforcement" of sexual assault laws).

of an ancient, patriarchal view of women as the property of men.”<sup>336</sup> But the idea that *countering* high sentences was a feminist cause never picked up steam outside of the death penalty context. Instead, feminists urged that rape, along with its penalties, be a big-tent category housing forcible penetration, emotionally coercive penetration, noncoercive but nonconsensual penetration, and, eventually, any penetration without affirmative consent.<sup>337</sup>

Consider the well-known 1992 case, *State of New Jersey ex rel. M.T.S.*, in which the Supreme Court of New Jersey heeded feminists’ call to treat nonconsensual but nonforcible penetration as the serious felony of “sexual assault,” defined in the statute as penetration when “the actor uses physical force or coercion, but the victim does not sustain severe personal injury.”<sup>338</sup> Two teens, M.T.S. and C.G., had sexual intercourse, and C.G. claimed that she was asleep during the sex.<sup>339</sup> M.T.S. said they engaged in consensual foreplay, and then he “stuck it in.”<sup>340</sup> The juvenile judge credited M.T.S.’s claim “that the couple had been kissing and petting, had undressed and had gotten into the victim’s bed,” but held that intercourse “just went too far” because C.G. had not consented “to the sexual act [of penetration] itself.”<sup>341</sup>

The court was tasked with determining whether M.T.S.’s actions constituted sex compelled by “physical force.”<sup>342</sup> In answering the question, the court stressed that the crime was about assault, not sex: “Since the 1978 reform, the Code has referred to the crime that was once known as ‘rape’ as ‘sexual assault.’”<sup>343</sup> It went on: “Consistent with the assaultive character, as opposed to

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336. Brief Amici Curiae of the American Civil Liberties Union et al. at 9, *Coker v. Georgia*, 433 U.S. 584 (1977) (No. 75-5444), 1976 WL 181482, at \*9.

337. See, e.g., STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 271 (1998) (advocating for expanding the definition of rape to include a lack of affirmative consent); Lani Anne Remick, Comment, *Read Her Lips: An Argument for a Verbal Consent Standard in Rape*, 141 U. PA. L. REV. 1103, 1116 (1993) (urging the adoption of a verbal consent standard); Lois Pineau, *Date Rape: A Feminist Analysis*, 8 L. & PHIL. 217, 238-39 (1989) (defining rape by lack of affirmative consent); Michelle J. Anderson, *Negotiating Sex*, 78 S. CAL. L. REV. 1401, 1422 (2005) (proposing a negotiation model of consent). Even the feminist anti-death penalty arguments were few and far between. See Stephen Rohde, *The Feminist Case for Ending the Death Penalty*, MS. MAG. (July 13, 2021), <https://perma.cc/B6TV-85SW>.

338. *State ex rel. M.T.S.*, 609 A.2d 1266, 1269 n.1, 1277 (N.J. 1992) (emphasis omitted); N.J. STAT. ANN. § 2C:14-2(c)(1) (West 1992). “Sexual assault” was the highest degree of general (not aggravated) sexual assault; aggravating factors included use of a weapon, severe injury, young age, and rape in the course of a felony. *Id.* § 2C:14-2(a).

339. *M.T.S.*, 609 A.2d at 1268.

340. *Id.*

341. *State ex rel. M.T.S.*, 588 A.2d 1282, 1283 (N.J. Super. Ct. App. Div. 1991), *rev’d*, 609 A.2d 1266 (N.J. 1992).

342. *M.T.S.*, 609 A.2d at 1267.

343. *Id.* at 1275.

the traditional sexual character, of the offense, the statute also renders the crime gender-neutral: both males and females can be actors or victims.”<sup>344</sup>

Nevertheless, concerned that maintaining an independent force requirement would insufficiently punish nonconsensual sex, the court ruled that “physical force” required no more than the very act of penetration.<sup>345</sup> The victim’s lack of consent rendered intercourse forceful in itself. At the same time, feminists had educated the court that directing juries to focus not on the defendant’s forceful acts but on the victim’s state of mind—whether the victim was willing to have sex—put the “victim on trial.”<sup>346</sup> In turn, the court further broadened the crime: Instead of focusing on the victim’s state of mind, the sexual assault inquiry would turn on whether the victim expressed sufficient “authorization” for the sex.<sup>347</sup> But this put nonforcible and even subjectively consensual penetration without proper authorization on the same footing as forced penetration, which seems inconsistent with the Court’s insistence that the “assaultive character” rather than the “sexual character” is the crux of the crime.<sup>348</sup>

The court tried to downplay the “authorization” requirement as a run-of-the-mill battery rule, claiming that, pursuant to the New Jersey case *Perna v. Pirozzi*, “[a]ny ‘unauthorized touching of another [is] a battery,’” and therefore unauthorized sex is sexual battery.<sup>349</sup> But *Perna* was a *civil* lawsuit about consent to a surgery.<sup>350</sup> In New Jersey, *criminal* battery had always been defined as an “offensive” touching, not merely an “unauthorized” one.<sup>351</sup> What’s more, the very 1978 reform that the *M.T.S.* court referenced made clear that even “offensive touching is not sufficiently serious to be made criminal” and required bodily injury for criminal liability for battery.<sup>352</sup>

As a consequence, New Jersey criminal law treated, and still treats, most offensive and nonconsensual contact that does not produce injury as *nothing*, and offensive contact that injures as the misdemeanor offense of simple

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344. *Id.*

345. *Id.* at 1277.

346. *Id.* at 1272; *see also id.* at 1272-74 (citing feminist literature on the topic).

347. *Id.* at 1277.

348. *Id.* at 1275.

349. *Id.* at 1276 (alteration in original) (quoting *Perna v. Pirozzi*, 457 A.2d 431, 439 (N.J. 1983)).

350. *Perna*, 457 A.2d at 439.

351. *See State v. Cabana*, 716 A.2d 576, 578 (N.J. Super. Ct. Law Div. 1997).

352. *Id.* (“Prior to the Code, at common law, bodily injury was unnecessary. The slightest touching or offensive contact was a battery. The Code rejected this view for the stricter standard of bodily injury. In explanation, the Criminal Law Revision Commission Commentary to N.J.S.A. 2C:12-1 asserts that mere offensive touching is not sufficiently serious to be made criminal.” (internal citations omitted)).

assault.<sup>353</sup> But after *M.T.S.*, if the contact is a sexual penetration, it is a serious felony carrying a maximum sentence of ten years in prison—even it produces no injuries, is not coerced, and is not subjectively offensive.<sup>354</sup> The only requirement for liability is that the victim did not sufficiently authorize the penetration by “affirmative and freely-given permission.”<sup>355</sup> To borrow Sharon Marcus’s concept, the feminist reform agenda collapsed the “continuum” between inadequate preauthorization and physical force, but only for sexual penetration.<sup>356</sup>

This funneling of forcible and nonforcible conduct into the rape category—the worst of the sex crimes—came at a time when sexual punishments became more draconian than they had been in decades. In the years to come, a sex-crime conviction would brand a person a “predator” and guarantee certain social death.<sup>357</sup> The mainstream feminist narrative of sex crimes would move from the burgeoning liberal view of sexual assault as a crime “midway between robbery and assault,” in Brownmiller’s words,<sup>358</sup> to a “dominance feminist” view that reinvigorated the notion that sexual penetration is the problem and is ruinous for women.<sup>359</sup>

## B. Sex Exceptionalism’s Resurgence

### 1. The demise of sexual liberation

#### a. Strange bedfellows: moralists and dominance feminists

The backlash to sexual liberation came quickly and spiked during the Reagan era. Christian conservatives condemned states’ dismantling of the older moral and marital order and coalesced into a powerful “family values” movement.<sup>360</sup> Following in the footsteps of predecessors like the William

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353. N.J. STAT. ANN. § 2C:12-1 (West 2023).

354. N.J. STAT. ANN. §§ 2C:14-2, 2C:43-6 (West 2023).

355. *M.T.S.*, 609 A.2d at 1279.

356. Sharon Marcus, *Fighting Bodies, Fighting Words: A Theory and Politics of Rape Prevention*, in *GENDER STRUGGLES: PRACTICAL APPROACHES TO CONTEMPORARY FEMINISM* 166, 170-171 (Constance L. Mui & Julien S. Murphy eds., 2002); see also JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 199 (2006) (examining the frame of “collapsed continuum” in rape law).

357. See *infra* notes 409-11 and accompanying text (discussing the antipredator movement). For critiques of sex offender registration and notification requirements, see sources cited in note 28 above.

358. BROWN MILLER, *supra* note 50, at 377.

359. See *infra* notes 365-72 and accompanying text (dominance feminism).

360. See generally SETH DOWLAND, *FAMILY VALUES AND THE RISE OF THE CHRISTIAN RIGHT* (2015) (discussing the family values movement).



Plaine-era Puritans and Anthony Comstock, late twentieth-century family-values advocates identified two primary enemies of biblical and familial morality: “deviants,” defined as LGBTQ people, and feminists.<sup>361</sup> Still, women frequently occupied positions of power within the family-values movement, representing some of its most powerful advocates against sexual and women’s liberation, birth control, and abortion. Beverly LaHaye, the founder of Concerned Women of America, said she was “stirred to action” by Betty Freidan’s “anti-God, anti-family rhetoric [that] did not represent [the] beliefs . . . of the vast majority of women.”<sup>362</sup> “Feminism is more than an illness,” LaHaye quipped, “[i]t is a philosophy of death.”<sup>363</sup>

How remarkable it was that some of the era’s most powerful feminists united with family-values moralists—Andrea Dworkin alongside Jerry Falwell—to fight prostitution and pornography.<sup>364</sup> In the 1970s and 1980s, a new school of feminist legal theory, dominance feminism, challenged the prevailing liberal view that sex was not itself the problem.<sup>365</sup> Dominance feminists like Dworkin and Catherine MacKinnon offered a structural account of gender inequality involving an overarching and underlying patriarchy that subtly, insidiously, and often silently structures legal, social, and cultural norms to keep men dominant and women subordinate.<sup>366</sup> MacKinnon, who laid out the theory in several writings, did not regard sexual imposition as merely one of many manifestations of patriarchy, but instead held that “sexuality is the linchpin of gender

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361. See D’EMILIO & FREEDMAN, *supra* note 31, at 352.

362. *Our History*, CONCERNED WOMEN FOR AM. LEGIS. ACTION COMM., <https://perma.cc/Q5F6-3NHM> (archived Jan. 27, 2023).

363. SUSAN FALUDI, *BACKLASH: THE UNDECLARED WAR AGAINST AMERICAN WOMEN* 239 (1991).

364. Judy Klemesrud, *Joining Hands in the Fight Against Pornography*, N.Y. TIMES, Aug. 26, 1985, at B7, <https://perma.cc/SBV7-PQ8M>.

365. See, e.g., Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS: J. WOMEN CULTURE & SOC’Y 635, 646-47 (1983) [hereinafter MacKinnon, *Feminist Jurisprudence*]; CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 5-8 (1987) [hereinafter MACKINNON, *DISCOURSES*]; MACKINNON, *supra* note 334, at 109; ANDREA DWORKIN, *INTERCOURSE* 14-17 (1987). See generally Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995) (thoroughly analyzing the promises and pitfalls of dominance feminism). For critiques of dominance feminism, see generally Katherine M. Franke, *Essay, Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181 (2001) (critiquing dominance feminism’s construction of female sexuality); and Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (critiquing dominance feminism’s treatment of race). See also Ian Halley, *Queer Theory by Men*, 11 DUKE J. GENDER L. & POL’Y 7, 11 (2004) (critiquing dominance feminism’s epistemology of sexuality).

366. See MACKINNON, *supra* note 334, at 128.

inequality.”<sup>367</sup> To her, “the organized expropriation of the sexuality of some for the use of others defines the sex, woman.”<sup>368</sup>

Defining women’s social standing by the sex they experienced fit very well within Western society’s millennia-long obsession with female sexuality. In the old scheme, rape was worse than death because it saddled the woman and her family with an insurmountable personal and economic disability—unchastity.<sup>369</sup> Dominance feminism similarly characterized sexual harm as ruinous, but its reasons for doing so were more opaque. Why exactly was sex, as opposed to all other conduct that men engage in to subordinate women, the root of women’s oppression? Rather than grappling with sex’s comparative role in female subordination (or empowerment), MacKinnon provided a “laundry list of sexual horrors men inflict upon women.”<sup>370</sup> According to her, the idea that sex *itself* is the root of subordination stems from “our [women’s] own reality” that “we live” every day.<sup>371</sup> But what about the women who disagree with this account of lived sexual experience? Such women, “MacKinnon was willing to suggest, have been co-opted by male consciousness.”<sup>372</sup>

Dominance feminists argued that sex is so inherently imbued with male domination that “it is difficult to distinguish” ordinary sex from rape.<sup>373</sup> Dworkin indeed maintained that vaginal penetration was an act of male dominance in itself.<sup>374</sup> For dominance feminists, even consent and affirmative authorization were not enough to rid sex of the taint of male domination.<sup>375</sup> Although the dominance feminist position that most sex under conditions of “gender inequality” constituted rape was nearly impossible to translate to

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367. *Id.* at 113.

368. MACKINNON, DISCOURSES, *supra* note 365, at 49.

369. *See* Anderson, *supra* note 71, at 61-62; D’EMILIO & FREEDMAN, *supra* note 31, at 5.

370. Aya Gruber, *Sex Wars as Proxy Wars*, 6 CRITICAL ANALYSIS L. 102, 112 (2019); *see also* Halley, *supra* note 365, at 11 (“Rape, sexual harassment, domestic abuse, pornography—all the lurid catalog of sexual nastiness—these are the core elements in [MacKinnon’s account of] male domination.”). *See* generally Abrams, *supra* note 365, whose piece brilliantly grapples with this question and develops a theory of partial agency under oppression.

371. Catharine A. MacKinnon, *Points Against Postmodernism*, 75 CHI.-KENT L. REV. 687, 692 (2000).

372. Halley, *supra* note 365, at 11.

373. MacKinnon, *Feminist Jurisprudence*, *supra* note 365, at 647.

374. DWORKIN, *supra* note 365, at 123 (“The slit between [a woman’s] legs . . . which means entry into her—intercourse—appears to be the key to women’s lower human status.”).

375. *See* Catharine A. MacKinnon, *Essay, Rape Redefined*, 10 HARV. L. & POL’Y REV. 431, 465 (2016) (arguing that “[c]onsent is a pathetic standard of equal sex” because “[u]nder unequal conditions, many women acquiesce in or tolerate sex they cannot as a practical matter avoid or evade”).

doctrine, the theory nonetheless greatly influenced the discourse and direction of criminal law.<sup>376</sup>

The reinvigorated chastity paradigm and new male-dominance paradigm both stood in stark contrast to the liberal notion that the crux of the crime of sexual assault is gender-neutral personal injury. Moralists and dominance feminists found the liberal idea that sex should mostly be unregulated to be untenable, because they did not regard sex as value-neutral. Unrestrained sexuality posed a grave threat to their preferred social order—a moral order for Christians<sup>377</sup> and an antipatriarchal order for feminists. This resurgence of sex exceptionalism posed a serious challenge to the burgeoning project of liberating private and public sexuality that began with the Supreme Court’s reproduction cases and *Papachristou*.<sup>378</sup>

b. Limiting sexual liberty

Recall that the 1970s saw a revolution in the deregulation of private and public life, and Supreme Court justices even toyed with the development of rights to public nonconformity and “freedom to do with one’s body as one likes.”<sup>379</sup> That liberationist moment, however, passed quickly into the renewed skepticism of sex of the 1980s. To this day, the Court has not taken up Douglas’s suggestion of a right to public nonconformity. And it was not until 2003’s *Lawrence v. Texas* that the Court began to embrace the Hart-Wolfenden-MPC logic, by then a half-century old, that liberty protects consensual adult sexual behavior.<sup>380</sup>

Amid a softening of public attitudes toward homosexuality, the Supreme Court took up the question of the constitutionality of laws prohibiting same-sex “sodomy.” Overruling the 1986 case *Bowers v. Hardwick*, the Court found such laws unconstitutional.<sup>381</sup> Declining to adopt the position urged by LGBTQ-rights advocates that the laws denied equal protection to sexual minorities,<sup>382</sup> the Court instead articulated a liberty right to engage in private, adult, consensual

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376. See Chamallas, *supra* note 304, at 162-65.

377. See, e.g., Robert P. George, *The Concept of Public Morality*, 45 AM. J. JURIS. 17, 17-18 (2000) (defending morals regulations).

378. See *supra* notes 291-303 and accompanying text.

379. See Goluboff, *supra* note 295, at 1380 (quoting Memorandum from Justice William J. Brennan to Justice William O. Douglas, Re: Abortion Cases (Dec. 30, 1971) (on file with William J. Brennan Papers, Library of Congress, Box I-285)).

380. See *Lawrence v. Texas*, 539 U.S. 558, 564-79 (2003).

381. *Id.* at 578 (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

382. See Andrew J. Seligsohn, *Choosing Liberty Over Equality and Sacrificing Both: Equal Protection and Due Process in Lawrence v. Texas*, 10 CARDOZO WOMEN’S L.J. 411, 413-20 (2004).

sex.<sup>383</sup> The Court opined that, even if “the governing majority in a State” morally objected to sodomy, such was “not a sufficient reason for upholding a law prohibiting the practice.”<sup>384</sup> Justice Scalia warned ominously:

State laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are likewise sustainable only in light of *Bowers*' validation of laws based on moral choices. Every single one of these laws is called into question by today's decision . . . .<sup>385</sup>

Scalia had reason to see the writing on the wall for same-sex marriage, but he needn't have worried too much about prostitution. First, although *Lawrence*'s holding does not rely on privacy, the opinion makes clear that the sexual liberty right is about “intimate,” even relationship-based, sex, and certainly not public conduct.<sup>386</sup> The Court did “a thorough job of domesticating John Lawrence and Tyron Garner—Lawrence an older white man, Garner a younger black man, who for all we know from the opinion, might have just been tricking with each other.”<sup>387</sup> In addition, by 2003, the project to reverse morals regulations had not only the old conservative foes but also the new feminist ones. Feminist arguments would come to play a critical role in confining *Lawrence*'s sexual liberty right.

Relying on *Lawrence*, sex-worker-rights advocates initiated (ultimately unsuccessful) lawsuits arguing that, if morality is not a reason to regulate sodomy, it is not a reason to regulate private, consensual, adult commercial sex.<sup>388</sup> However, the foundation had already been laid, through the early dominance-feminist-conservative alliance, that the problem with commercial sex was not just immorality but the subordination of women. Throughout the 2000s and 2010s, sex-work litigation proceeded amid media coverage and discourse involving spectacular and horrifying tales of women and children trafficked into the sex trade and kept in physical bondage.<sup>389</sup> And prostitution-

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383. *Lawrence*, 539 U.S. at 564.

384. *Id.* at 577-78 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

385. *Id.* at 590 (Scalia, J., dissenting).

386. *See id.* at 578 (majority opinion).

387. Katherine M. Franke, Commentary, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1408 (2004).

388. *See Erotic Serv. Provider Legal Educ. & Rsch. Project v. Gascon*, 880 F.3d 450, 455-57 (9th Cir. 2018) (declining to apply *Lawrence* to commercial sex).

389. *See, e.g.*, Kristen Welker, *Obama Calls to Fight Human Trafficking*, NBC NEWS (Sept. 25, 2012, 12:46 PM PDT), <https://perma.cc/74NM-LEFZ>; Catharine A. MacKinnon, *Trafficking, Prostitution, and Inequality*, 46 HARV. C.R.-C.L. L. REV. 271, 281, 288 (2011) (using spectacular examples, including comparing the trauma of prostitution to that of “a war zone or a torture chamber, needing drugs to keep doing it”); Aya Gruber, Amy J. Cohen & Kate Mogulescu, *Penal Welfare and the New Human Trafficking Intervention Courts*, 68 FLA. L. REV. 1333, 1350-53 (2016) (discussing the shifting focus of media coverage).

abolitionist activists insisted that prostitution *is* human trafficking. In 2018, the Ninth Circuit Court of Appeals rejected sex-worker-rights advocates' challenge to California's anti-prostitution laws.<sup>390</sup> Noting that "a prostitute and a client . . . [are not likely in] an intimate relationship," the Court ruled that the state could regulate *their* private adult consensual sex in the name of "discouraging human trafficking and violence against women . . . and preventing contagious and infectious diseases."<sup>391</sup>

## 2. Reenter the "sexual deviant"

### a. Predator panic

In the 1980s and 1990s, a public panic over sexual predators gave new life to sex exceptionalism in criminal law.<sup>392</sup> Stories of horrific child murders and devastated parents, publicized incessantly by opportunistic politicians and profit-driven media outlets, fueled outsized parental fears of a large and emboldened group of child rapists lurking in the shadows.<sup>393</sup> This panic cemented the image of an exceptional class of homicidal and morally evil deviants.<sup>394</sup> The renewed concern with predators recalled the earlier homosexual panics, as lawmakers dusted off the sexual-psychopath registries that had been created in part to manage gays and applied them to a broad group of people convicted of sex crimes, including misdemeanants and juveniles.<sup>395</sup> The SORN system went along with other draconian, questionably constitutional, and criminogenic policies like indefinite civil commitment and extensive residency restrictions.<sup>396</sup>

Although lawmakers had taken a page out of the old sexual-psychopathy playbook, mainstream gay rights activists largely did not protest these new

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390. *Erotic Serv. Provider*, 880 F.3d at 454, 461.

391. *See id.* at 457-59.

392. *See* PHILIP JENKINS, MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA 12-17 (1998); Roger N. Lancaster, *The New Pariahs: Sex, Crime, and Punishment in America*, in *THE WAR ON SEX* 76-78 (David M. Halperin & Trevor Hoppe eds., 2017); LEVINE & MEINERS, *supra* note 28, at 10-12.

393. *See* GRUBER, FEMINIST WAR, *supra* note 4, at 110-19. *See generally* Elayne Rapping, *Television, Melodrama, and the Rise of the Victims' Rights Movement*, 43 N.Y.L. SCH. L. REV. 665 (1999) (discussing media-driven panic).

394. *See* LEVINE & MEINERS, *supra* note 28, at 10.

395. *See* Scott De Orio, *The Creation of the Modern Sex Offender*, in *THE WAR ON SEX*, *supra* note 393, at 247, 247-48.

396. *See* Stillman, *supra* note 18; Logan, *supra* note 28, at 454-57; Janus & Logan, *supra* note 28, at 382-83.

registries.<sup>397</sup> They reasoned that it was better to draw a sharp distinction between LGBTQ individuals and the sex offenders occupying the popular imagination than to question the law's embrace of indefinite detention, banishment, and inhumane "therapeutic" treatment.<sup>398</sup> To a large extent, the strategy worked. The class of "deviant sex offenders" to be managed through SORN remained, including everyone from serial rapists to unhoused public urinators,<sup>399</sup> but being gay did not automatically put one in that class. Still, the mainstream gay rights movement's tolerance of the continued existence of a broad "sexual deviant" category was always a gamble. As open homophobia becomes increasingly popular on the right,<sup>400</sup> LGBTQ people's reprieve from sexual-deviant status may be more tenuous than one might have expected even just a few years ago.

In 2022, Florida's "Don't Say Gay" bill became law, having been touted by Governor Ron DeSantis's spokesperson as an "anti-grooming" measure. Florida historians felt a disturbing sense of *déjà vu*.<sup>401</sup> In the 1950s, the Florida legislature established the "Johns Committee" to investigate communism, but amid the wave of national homophobia discussed earlier, the members instead focused on ferreting out gays, especially in schools.<sup>402</sup> The Committee's investigation of the University of Florida resulted in the resignation of the president and the dean of students and led hundreds of students to drop out or transfer away from the state university system.<sup>403</sup> In 1964, the Committee published its report, *Homosexuality and Citizenship in Florida*, which purported

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397. See De Orio, *supra* note 395, at 247-48 (noting that gay rights activists' "broad consensus that registration was appropriate for the 'real' sex offenders" overshadowed anti-registry arguments).

398. See *id.* at 260 ("In the context of a political culture in which conservatives were vigorously promoting sex offender registration and ambivalent liberals either agreed with them or lacked an alternative policy to put forward, gay activists, too, capitulated to conservatives in order to shift the registry's focus away from gay men's behavior."); Stillman, *supra* note 18 (discussing such "therapeutic" treatment).

399. See *supra* note 63 (citing SORN statutes requiring registration for minor sex crimes).

400. See, e.g., Brandon Tensley, *How Age-old Homophobic Language Is Being Used to Miseducate Voters*, CNN (updated Oct. 27, 2022, 12:58 PM EDT), <https://perma.cc/ZYC8-PE22>; Jeet Heer, *Brace Yourself for a New Surge of Republican Homophobia*, NATION (June 21, 2022), <https://perma.cc/G8LJ-FBFW>.

401. See Kathryn Varn, *Historians Draw Parallels Between 'Don't Say Gay' Legislation and Purge of Gay Teachers Decades Ago*, SARASOTA HERALD-TRIB. (Mar. 14, 2022, 6:30 AM ET), <https://perma.cc/YLR2-HNX5> (to locate, click "View the live page"); see also Omar G. Encarnación, *Florida's 'Don't Say Gay' Bill Is Part of the State's Long, Shameful History*, TIME (May 12, 2022, 3:51 PM EDT), <https://perma.cc/EE8P-3BLT>; Brian Fehler, *The Purple Pamphlet—A Shadowy History in the Sunshine State*, MEDIUM (July 6, 2020), <https://perma.cc/LZ75-HCW9>.

402. ESKRIDGE, DISHONORABLE PASSIONS, *supra* note 50, at 83-84, 103-04.

403. *Id.* at 103-04.

to be the culmination of an in-depth study of gay culture.<sup>404</sup> Its purple cover “portrayed two young naked men in a lascivious embrace, and inside was a depiction of a blond boy in bondage.”<sup>405</sup> Concluding that “the Biblical view of homosexuality as an ‘abomination’ has stood well the test of time,” the report provided lurid descriptions of homosexuals’ “insatiable appetite for sexual activities” and “addiction to youth.”<sup>406</sup> Toward the end of its term, the Johns Committee announced that its efforts had resulted in seventy-one teachers having their certificates revoked by the state board of education, fourteen state university professors being removed from their posts, and thirty-seven federal employees being terminated.<sup>407</sup> The “Don’t Say Gay” bill, historian Gillian Frank opines, is “straight out of this playbook to demonize [and] pathologize . . . people, and deem them a threat to children.”<sup>408</sup>

The SORN system that arose in the 1980s and 1990s from society’s reignited fear and loathing of deviants has proven to be a human rights and public policy disaster. Today, there is a “widespread [realization] among criminal-justice professionals’ that SORN policies “*aggravate* recidivism and *jeopardize* public safety” and accomplish “the very opposite of the results that lawmakers and the general public expect.”<sup>409</sup> While conservatives continue to lionize the system as necessary to control predators, feminists tend to deny any complicity in the carceral and criminogenic SORN system.<sup>410</sup> And yet early dominance feminists’ fiery descriptions of murderous rapists is virtually indistinguishable from conservative antipredator rhetoric. As Dworkin told the crowd at a 1979 Take Back the Night rally, “[o]utside are the predators who will crawl in the windows, climb down drainpipes . . . They bring with them sex and death. . . . Once the victim has fully submitted, the night holds no more terror, because the victim is dead.”<sup>411</sup>

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404. FLA. LEGIS. INVESTIGATION COMM., *HOMOSEXUALITY AND CITIZENSHIP IN FLORIDA* 5 (1964).

405. ESKRIDGE, *DISHONORABLE PASSIONS*, *supra* note 50, at 83 (describing *id.*).

406. FLA. LEGIS. INVESTIGATION COMM., *supra* note 404, at 7, 12.

407. ESKRIDGE, *DISHONORABLE PASSIONS*, *supra* note 50, at 103.

408. Varn, *supra* note 401.

409. MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.9 cmt. at 514 (AM. L. INST., Tentative Draft No. 5, 2021); *see also supra* note 28 (collecting critiques of SORN).

410. *See, e.g.,* Michelle J. Anderson, Feature, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 1958-59 (2016) (distinguishing between the “draconian [SORN] movement, developed and steered by non-feminists” and “feminist reform efforts”).

411. ANDREA DWORKIN, *The Night and Danger*, in *LETTERS FROM A WAR ZONE: WRITINGS 1976-1987*, at 13, 14 (1988).

b. The modern privileged predator

In the last decade, a reinvigorated feminist antirape movement has embraced the dominance-feminism narrative of sexual wrongdoing as a form of female subordination that causes lifelong trauma.<sup>412</sup> This has produced a taste on the left for severe sentences and SORN. Both campus antirape activism in the early 2010s and the subsequent #MeToo movement sparked renewed feminist efforts to expand the list of harmful sexual behaviors that counted as “rape.”<sup>413</sup> But unlike early liberal feminists, who expressed discomfort with the construction of sexual assault as woman-ruining, many contemporary feminists leaned into the rape, rapist, and rape victim labels, with all their freighted meanings of old.<sup>414</sup>

In 2016, the case of Brock Turner, a Stanford student convicted of sexual assault for digitally penetrating an unconscious female victim, Chanel Miller, ignited a firestorm of feminist and public criticism.<sup>415</sup> The public was outraged that the judge, following the recommendation of the probation department,<sup>416</sup> sentenced Turner to a mere six months in prison (with fifteen years of probation and lifetime registration).<sup>417</sup> Reflecting these popular sentiments, antirape activist and blogger Jenn Hoffman wrote that, despite the sentencing judge’s “disregard . . . for justice,” the world is “fairer than we think” because Turner “must register as a sex offender.”<sup>418</sup> Hoffman’s greatest source of comfort was the thought of Turner’s permanent civic death:

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412. See GRUBER, *FEMINIST WAR*, *supra* note 4, at 164-66 (examining the concept of trauma in the campus sexual assault context). For a comprehensive genealogy of the feminist trauma framework, see generally Suk, *supra* note 250.

413. See Gruber, *Consent Confusion*, *supra* note 20, at 416-19, 425 (examining the broadening definition of nonconsent in college codes).

414. See, e.g., David Lisak, *Predators: Uncomfortable Truths About Campus Rapists*, CONNECTIONS: J. NEW ENG. BD. HIGHER EDUC., Summer 2004, at 19, 19-20 (“[S]exual predator’ aptly describes the men who are responsible for the vast majority of sexual violence on our campuses . . . .”); THE HUNTING GROUND (Kirby Dick dir., 2015) (suggesting that college campuses are “a hunting ground” for sexual predators); see GRUBER, *FEMINIST WAR*, *supra* note 4, at 161-63 (discussing campus predator rhetoric).

415. See Emily Shapiro, ‘Humiliated’: Chanel Miller, Survivor in Brock Turner Sex Assault Case, Shares Her Story of Trauma and Recovery, ABC NEWS (Sept. 24, 2019, 2:31 PM), <https://perma.cc/D6AS-MEDP>.

416. Probation departments typically prepare pre-sentencing reports and recommend sentences. See CAL. R. CT. 4.411.5(11).

417. Alex Dobuzinskis & Amy Tennery, *Pressure Builds on Judge over California Sexual Assault Case*, REUTERS (June 7, 2016, 5:28 PM), <https://perma.cc/PC5Y-GQ3D>; Andrew Welsh-Huggins, *Ex-Swimmer in Rape Case Joins Thousands in Ohio Sex Database*, AP NEWS (Sept. 11, 2016), <https://perma.cc/VS2D-SGYJ>.

418. Jenn Hoffman, *Brock Turner Going Free Is the Best Thing to Happen to Rape Awareness*, XOJANE (Sept. 5, 2016), <https://perma.cc/4JQH-QSA4>.



In the outside world, he is screwed. . . . Everywhere he goes, he will be known as the poster boy for rape. . . . ‘My name is Brock Turner. I’m a rapist’ posters have been popping up in cities across the U.S. ‘Brock Turner is a rapist’ memes exist.<sup>419</sup>

Some critics maintained that their outrage was not a punitive reaction but instead reflected a concern about the racial dynamics of the sentence: Namely, the white judge treated Turner, who is also white, leniently compared to the way similarly situated men of color are treated.<sup>420</sup> Critics compared Turner to Corey Batey, a Black college student sentenced to a mandatory fifteen years in prison for having sex with an unconscious student.<sup>421</sup> Notably, however, when Batey was sentenced, activists *also* objected to the leniency they saw in his punishment. The executive director of the Tennessee Coalition to End Domestic and Sexual Violence lamented, “While Batey has been given a 15-year sentence, the victim has been given a life sentence . . . She will have to cope with the trauma of this experience for the rest of her life.”<sup>422</sup> One blogger summed it up: “Rape is rape. It doesn’t matter if the rapist is African American, Hispanic or white; they need to sit in jail for the maximum sentence. The maximum sentence is life—then they will not be a threat to other women in any community.”<sup>423</sup> Prompted by the Turner controversy, the liberal California legislature passed, and Democratic governor Jerry Brown signed, legislation that established a new mandatory minimum sentence for sex with an incapacitated person and rebranded digital penetration as “rape.”<sup>424</sup>

On the heels of the Turner case, a Boulder, Colorado jury convicted former University of Colorado student Austin Wilkerson of felony sexual assault for having sex with fellow student Kendra Heuer while she was highly intoxicated.<sup>425</sup> Boulder County judge Patrick Butler, also following the recommendation of the probation department, sentenced Wilkerson to two years of work release (release for work during the day and jail at night), twenty

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419. *Id.*

420. See, e.g., Sam Levin, *Stanford Trial Judge Overseeing Much Harsher Sentence for Similar Assault Case*, GUARDIAN (June 27, 2016, 7:22 AM EDT), <https://perma.cc/9BWP-2XCS>.

421. Stacey Barchenger, *What Message Does Vanderbilt Rape Case Send?*, TENNESSEAN (July 16, 2016, 4:43 PM CT), <https://perma.cc/U2ND-H4VN>.

422. *Id.* (quoting executive director).

423. Irene Hooks, *Brock Turner and Corey Batey: Same Crime, Different Sentence*, ODYSSEY (June 13, 2016), <https://perma.cc/E279-8HJ5>.

424. See Act of Feb. 29, 2016, 2016 Cal. Stat. ch. 863 (codified at CAL. PENAL CODE § 1203.065 (West 2022)); Act of Feb. 28, 2015, 2016 Cal. Stat. ch. 848 (codified at CAL. PENAL CODE § 263.1 (West 2022)).

425. Mitchell Byars, *Former CU Student Convicted of Boulder Rape Spared Prison Sentence*, BOULDER DAILY CAMERA (Aug. 10, 2016, 11:50 AM), <https://perma.cc/X95D-VAEN>; Caitlin Keating, *University of Colorado Campus Sexual Assault Victim Reveals Her Identity: ‘I’m a Survivor’*, PEOPLE (updated Nov. 3, 2016, 3:08 PM), <https://perma.cc/QH3H-RFHV>.

years to life on probation, and SORN registration.<sup>426</sup> Heuer later garnered nationwide attention because of “[h]er powerful [victim-impact] statement—and the judge’s sentence of no prison time,” as noted in her *People* magazine profile.<sup>427</sup>

Commentators condemned Judge Butler for his lenient sentence, but made no mention of why he had levied it.<sup>428</sup> Under Colorado’s sex-offense sentencing scheme, created during predator panic, any jail sentence he imposed would have to be a *life* sentence.<sup>429</sup> Colorado’s novel 1998 Sex Offender Lifetime Supervision Act dictates that jail sentences for most felony sex offenses, including nonconsensual and intoxicated sex, must be indeterminate life sentences.<sup>430</sup> These days, “lenient” sex-offense sentences remain a popular concern among the liberal Boulder community, but many do not know or do not care that the alternative is life imprisonment.<sup>431</sup>

On January 15, 2021, Boulder judge Thomas Mulvahill presided over the sentencing of twenty-one-year-old Zachary Roper, another former University of Colorado student.<sup>432</sup> Roper, when nineteen years old, attended a sorority party where he was “set up with” the victim.<sup>433</sup> Both drank, and the victim was severely intoxicated by the time they had sex. Roper was convicted of sexual assault of a victim incapable of appraising her conduct.<sup>434</sup> Like in Wilkerson’s case, the sentencing report recommended probation, but the victim requested prison.<sup>435</sup> Like Judge Butler, now of media infamy,<sup>436</sup>

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426. Byars, *supra* note 425.

427. Kate Hogan, *Meet PEOPLE’s 25 Women Changing the World*, PEOPLE (updated Nov. 3, 2016, 10:15 AM), <https://perma.cc/46A4-QWUG>.

428. See Michael Roberts, *Number Who Want CU Rapist Austin Wilkerson’s Judge Removed: 68K-Plus*, WESTWORD (Aug. 16, 2016, 5:36 AM), <https://perma.cc/G59M-LLQ2>.

429. COLO. REV. STAT. § 18-1.3-1004 (2022) (requiring a judge to sentence defendant to life, with parole eligibility contingent on completion of sex-offender treatment).

430. *See id.*

431. *See, e.g.*, Emma Athena, ‘Truth Is, It Does Happen Here,’ BOULDER WEEKLY (May 19, 2022), <https://perma.cc/Q5Y5-P7AQ> (criticizing a one-year plea deal reached following acquittal on most counts in a case against a high-schooler and also expressing disappointment in an acquittal in a University of Colorado case, but failing to mention the Lifetime Supervision Act).

432. Mitchell Byars, *Former CU Boulder Student Sentenced to Prison for Sex Assault*, BOULDER DAILY CAMERA (updated Jan. 15, 2021, 5:51 PM), <https://perma.cc/P7Q7-JVLE>.

433. *Id.*

434. *Id.*

435. *Id.*

436. A petition for the judge’s removal garnered over 80,000 signatures. *Remove Judge Butler From the Bench for Giving Rapist Austin Wilkerson Zero Prison Time*, CARE2, <https://perma.cc/7UCU-QGT6> / (archived Jan. 28, 2023).

Judge Mulvahill had to choose between a harsh probationary sentence or life imprisonment. This time, the judge chose life.<sup>437</sup>

### III. Sex Exceptionalism in Contemporary Practice

The liberal harmonization project had barely gotten off the ground when morality-based sex exceptionalism came roaring back. In addition, in their quest for gender justice, powerful subgroups of feminists unintentionally and deliberately shored up sex-exceptionalist principles in criminal law. Today, the sex-is-different instinct is firmly entrenched, resting on some combination of moralistic common sense and gender equity sentiments.

#### A. Sex Blinders

Sex has the amazing ability to induce an acute form of analytic myopia in even the most thoughtful of analysts. If there is sex in a criminal law scenario, it becomes the center of analysis, leaving all else under-analyzed or ignored.<sup>438</sup> Imagine a case where a man uses his economic power to extract sex from a woman. To many, that man is a sexual predator who should be imprisoned.<sup>439</sup> But if that same man uses that same economic power to extract unremunerated back-breaking physical labor from workers, he is, well, a boss. In the sexual harassment scenario, the sex makes the conduct disgusting and discriminatory, warranting discipline, even incarceration. The highly unequal economic structure that enables employers to exploit workers in myriad sexual and nonsexual ways—especially female workers of color—that’s just *life*. Sex exceptionalism can thus cause overregulation of the sex in sexual wrongdoing

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437. Byars, *supra* note 433 (noting Judge Mulvahill imposed a sentence of ten years to life, with parole eligibility after ten years and completion of sex-offender treatment).

438. Cf. Vicki Schultz, *The Sanitized Workplace*, 112 YALE L.J. 2061, 2064, 2074-87, 2091-94 (2003) (observing that—in the context of employment law—the effect of sexual harassment law has been to “sanitize[e]” the workplace rather than to prevent gender discrimination and harassment).

439. See Michael Gormley, *NY Weighs Making Sexual Harassment a Crime; Would Be Nation’s First*, NEWSDAY (Apr. 18, 2021) <https://perma.cc/K4D3-U9DC>; Michal Buchhandler-Raphael, *Criminalizing Coerced Submission in the Workplace and in the Academy*, 19 COLUM. J. GENDER & L. 409, 411 (2010) (suggesting criminalizing all forms of sexual harassment). On January 26, 2022, President Biden signed an executive order making “sexual harassment”—engaging in “unwelcome” sexual conduct that is “so severe, repetitive, or pervasive that a reasonable person would perceive” a hostile working environment—a military criminal offense with up to a two-year sentence. Exec. Order No. 14,062, 87 Fed. Reg. 4763, 4784-86 (Jan. 31, 2022).

and underregulation, even unawareness, of all the other structures that underlie sexual and nonsexual injustices.<sup>440</sup>

Nevertheless, there is a sense that “everyone agrees” that sex is particularly important, grave, dangerous, and in need of preconditions and exacting regulation. But as the Kinsey reports showed decades ago, the sexual norms touted by legal elites and others who purport to speak for the public often depart significantly from people’s actual beliefs and private practices.<sup>441</sup> Just as the Kinsey reports undermined society’s presumed aversion to “immoral” sex, contemporary studies undermine the presumption that young people, including women, are invariably averse to passive and nonverbal sexual communication and drunken sex.<sup>442</sup>

Contemporary discourse treats all sex as an important life event, and a range of imperfect, improper, and harmful sexual experiences as defining ones.<sup>443</sup> However, “empirical sex researchers repeatedly encounter the fact that for many people sex is not very important at all,” researcher Juliet Richters notes.<sup>444</sup> People nevertheless “obey the social injunction to care about sex.”<sup>445</sup> In college surveys, students say that they did not report incidents the surveys categorize as “sexual assault” because the incidents were not “serious enough.”<sup>446</sup> In turn, college administrators seek to “educate” students about the array of sexual scenarios that they *should* regard as momentous events.<sup>447</sup>

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440. See generally Schultz, *supra* note 438 (arguing that anti-sexual harassment laws and policies have led to overregulation of workplace sexuality and underregulation of nonsexual workplace gender discrimination).

441. See *supra* note 217 and accompanying text.

442. See, e.g., Humphreys & Brousseau, *supra* note 222, at 42; David S. Hall, *Consent for Sexual Behavior in a College Student Population*, 1 ELEC. J. HUM. SEXUALITY (Aug. 10, 1998), <https://perma.cc/TJF3-U48B>; Thomas Vander Ven & Jeffrey Beck, *Getting Drunk and Hooking Up: An Exploratory Study of the Relationship between Alcohol Intoxication and Casual Coupling in a University Sample*, 29 SOCIO.SPECTRUM 626, 634-36 (2009).

443. See Juliet Richters, *Bodies, Pleasure and Displeasure*, 11 CULTURE, HEALTH & SEXUALITY 225, 234 (2009) (discussing social norms around sex); see also Janet Halley, *The Politics of Injury: A Review of Robin West’s Caring for Justice*, 1 UNBOUND: HARV. J. LEGAL LEFT 65, 89 (2005) (noting the feminist position that sex “under the ubiquitous conditions of patriarchal threat” is a “soul-destroying harm.”).

444. Richters, *supra* note 443, at 234.

445. *Id.*

446. See, e.g., DAVID CANTOR ET AL., ASS’N AM. UNIV., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT, at xxi (2015), <https://perma.cc/888T-NBYH>; CHRISTOPHER P. KREBS ET AL., NAT’L INST. JUST., THE CAMPUS SEXUAL ASSAULT (CSA) STUDY: FINAL REPORT 5-25 (2007) <https://perma.cc/M3U6-ZFR6> (“The most commonly reported response . . . was that [the victims] did not think it was serious enough to report . . .”).

447. See, e.g., 2015 CU Boulder Sexual Misconduct Survey Results: Phase Two - July 2016, UNIV. COLO. BOULDER OFF. OF INSTITUTIONAL EQUITY & COMPLIANCE (July 2016), <https://perma.cc/4GCJ-QJGB>. For in-depth discussions of campus sexual assault and  
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The contemporary norm counseling women to take sex very seriously and be on perpetual high alert because sexual mishaps are life-destroying, like the nineteenth-century conception of “woman-ruining” sex, has costs. Janet Halley warns that society’s “discursive production of [sexual] pain . . . may be responsible for at least some of the trauma that real women really experience in their real lives.”<sup>448</sup> Consider the victim statement that preceded Judge Mulvahill’s decision to impose an indeterminate life sentence on Zachary Roper.<sup>449</sup> The victim stated, in part: “The labels ‘victim’ and ‘survivor’ are now forever attached to me. . . . Just as I have come to terms with the new aspect of my identity, he need[s] to come to terms that due to his actions he is labeled ‘criminal,’ ‘rapist’ and ‘guilty.’”<sup>450</sup> Roper’s imposition of sex on the incapacitated victim became much more than a terrible harm requiring redress and punishment; it was the production of two lifelong, immutable, traumatized identities.

But it is not just feminists whose critical gaze tends to pass over the dangers of spectacularized narratives of sexual harm and the reactionary policies they engender. Sex dazzles theorists and policymakers of all stripes, creating analytical blind spots and no-go zones where preexisting philosophical commitments need not apply.<sup>451</sup> Criminal law analysts attuned to retributive and utilitarian concerns accept exorbitant sentences for sex crimes and expensive and ineffective punishment of sex offenders.<sup>452</sup> To be sure, sex has the unique quality of provoking “negative sanctions,” as Carole Vance explains.<sup>453</sup> Legal actors, squeamish about delving into the sexual world, treat prohibition as their preferred mode of sexual regulation.<sup>454</sup>

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the production of cultural knowledge about sex and trauma, see GRUBER, FEMINIST WAR, *supra* note 4, at 159-61, Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 883-86 (2016), and Suk, *supra* note 250, at 1200 (emphasizing that since the 1970s, trauma and psychological harm have been “central to feminist efforts against gender violence”).

448. Halley, *supra* note 443, at 82.

449. Byars, *supra* note 433.

450. *Id.*

451. See FRANKLIN E. ZIMRING, AN AMERICAN TRAVESTY: LEGAL RESPONSES TO ADOLESCENT SEXUAL OFFENDING, at xiii (2004) (observing that “[p]olicies are crafted in fearful haste, often as symbolic gestures” and that “[s]cholarship and evaluation associated with sex offenders and offenses is weaker by far than mainstream empirical criminology”).

452. See De Orio, *supra* note 395, at 248 (observing liberal and progressive support for sex offender registries despite their penological issues).

453. See Carole S. Vance, *Pleasure and Danger: Toward a Politics of Sexuality*, in PLEASURE AND DANGER, *supra* note 1, at 1, 7.

454. See Murray, *supra* note 21, at 1256 (“[C]riminal law and family law have worked in tandem to produce a binary view of intimate life that categorizes intimate acts and choices as *either* legitimate marital behavior *or* illegitimate criminal behavior.”). Kaiponanea T. Matsumura notes that states prohibit private intimate contracting  
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From time immemorial, sex has existed in a dark limbo of discretionary state tolerance in the shadow of criminal prohibition. The law permits but administratively regulates (often poorly) so much harmful activity—think payday loans and slaughterhouses—but sex is different. While the obvious example of this is lawmakers’ insistence on prohibiting prostitution,<sup>455</sup> Courtney Cahill provides a fascinating case of sex exceptionalism from family law: The law permits men to freely sell their sperm for reproduction without creating parental obligations, but only when the reproduction is clinical and not sexual. If the sperm donation involves sexual intercourse, it is not merely a transaction; instead, it creates a *family*.<sup>456</sup> And exchanging money for that sexual sperm transfer may violate criminal law.<sup>457</sup>

The sex-exceptionalist injunction prevents many theorists from openly analyzing the sexual realm, compelling them to instead deflect, “I don’t want to touch that.” This tendency to exempt sexual regulations from critical analysis is particularly dangerous at a time when the sexual privacy and liberty rights minted by the liberal-minded justices of the 1960s and 1970s face annihilation.<sup>458</sup> If experts can barely talk about sexual impropriety and harm other than to condemn it in the strongest terms, whether due to discomfort or fear of offending imagined feminist sensibilities, they cannot be thoughtful governors in the difficult realm of sexuality.

## B. Carceral Sex Exceptionalism

### 1. The politically salient predator

Perhaps the starkest example of the sex-blinders phenomenon is the tendency of progressives to ignore their own anti-carceral precommitments when it comes to sex-crime law and policy. In recent years, George Floyd’s murder, Black Lives Matter protests, and other developments have led to a collective sense among progressives that the American policing and imprisonment system should be radically overhauled, even abolished.<sup>459</sup> Yet

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because of the “interest in upholding the sanctity of the marital relationship and regulating morality in matters of sex and intimacy.” *Public Policing of Intimate Agreements*, 25 YALE J.L. & FEMINISM 159, 173 (2013).

455. See *supra* note 19.

456. See Cahill, *supra* note 21, at 625-35.

457. See Murray, *supra* note 21, at 1256-57.

458. See Erik Larson & Emma Kinery, *Same-Sex Marriage, Contraception at Risk After Roe Ruling (3)*, BLOOMBERG L. (June 24, 2022, 12:54 PM), <https://perma.cc/282F-RV6W> (warning that the *Dobbs* decision may pave the way for a larger reversal of substantive due process and privacy rights in the sexual and reproductive realm).

459. See, e.g., *supra* note 34 (citing anti-carceral sources).

contemporary commentators frequently carve sex offenses out of this analysis.<sup>460</sup> Whatever the state of the larger penal state, they argue, justice demands that the sex-crime portion of it be strengthened to reflect the seriousness of sexual misconduct.<sup>461</sup> For every other crime, including *murder*, the incarceration-skeptical stance remains the forward-thinking default.<sup>462</sup>

In the 2010s, even as broader public sentiments shifted toward some measure of discomfort with mass incarceration, raising the specter of sex offenders running rampant remained a winning political strategy. In the 1980s and 1990s, blighted “ghettos” justified violent policing and high sentences,<sup>463</sup> but in recent years such rhetoric has not resonated as strongly. In turn, crime fearmongering has largely retired the “superpredator”<sup>464</sup> in favor of the “sex predator.” As public scrutiny of policing and imprisonment increased, policymakers and pundits touted sex crimes as the reasons for why bail reform goes too far, jails should not release COVID-19 vulnerable detainees, police departments should be extra-funded, and prosecutors need more power.<sup>465</sup>

In 2020, publicizing the danger of sex offenders was an integral part of the winning campaign launched by New York police, prosecutors, and conservative politicians to gut the state’s ambitious 2019 bail reform law. After years of pressure from grassroots activists, the legislature passed a landmark bill eliminating cash bail for most misdemeanors and some low-level felonies.<sup>466</sup> The bill contained a predictable sex-exceptionalist caveat: It

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460. See Levine, *supra* note 34 at 1227-28; Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 362 (2014) (acknowledging “general concerns” about mass incarceration but urging the creation of new sex-crime laws).

461. See *supra* note 56 and accompanying text (discussing carve-outs).

462. See *supra* note 34 (discussing carceral progressivism).

463. MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 62-67 (10th anniversary ed. 2020) (discussing this discourse during Reagan era); see also NAOMI MURAKAWA, *THE FIRST CIVIL RIGHT: HOW LIBERALS BUILT PRISON AMERICA* 23-25 (2014) (describing how political and public preoccupation with “ghetto” crimes began in the late 1960s and drove tough-on-crime polices in the 1980s and 1990s).

464. See Carroll Bogert & Lynnell Hancock, *Superpredator: The Media Myth that Demonized a Generation of Black Youth*, THE MARSHALL PROJ. (Nov. 20, 2020), <https://perma.cc/DMD7-JHYP> (critiquing “superpredator” rhetoric).

465. See *infra* note 481 and accompanying text; Yaron Steinbuch, *Sex Offenders Among Those Released from New York Jail to Stop Coronavirus Spread*, N.Y. POST (Mar. 30, 2020, 7:55 AM), <https://perma.cc/5G32-FFYQ>; Sydney Brownstone & Ashley Hiruko, *Seattle Police Stopped Investigating New Adult Sexual Assaults this Year*, MEMO SHOWS, SEATTLE TIMES (June 1, 2022, 6:00 AM), <https://perma.cc/WBV8-QSQB>.

466. S. 1509-C, ch. 59, 2019 N.Y. Laws 541, 631-47 (codified as amended in scattered sections of N.Y. CRIM. PROC. LAW); see also MICHAEL REMPEL & KRISTAL RODRIGUEZ, *CTR. FOR CT. INNOVATION, BAIL REFORM IN NEW YORK: LEGISLATIVE PROVISIONS AND IMPLICATIONS FOR NEW YORK CITY* 1-8 (2019), <https://perma.cc/A46A-G8FM>; Roxanna  
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exempted *all* sex-offense misdemeanors from the ban on cash bail.<sup>467</sup> Still, civil liberties organizations hailed it as a potential model for nationwide bail reform,<sup>468</sup> and indeed the law's effect was immediate and profound. New York's jail population plummeted: By February 2020, the month after the law went into effect, the number of people held pretrial was more than forty percent lower than in March 2019, the month before bail reform passed.<sup>469</sup>

Police officials, politicians, and conservative commentators came out swinging. Police Commissioner Dermot Shea published a *New York Times* op-ed painting the misdemeanor releasees as violent "repeat offenders" with extensive records of robberies, murders, and rapes.<sup>470</sup> New York City's largest police union declared a "public safety emergency" due to a rising crime rate it attributed in part to bail reform, despite statistical evidence to the contrary.<sup>471</sup> Media outlets relentlessly covered the release of "convicted sex offender[s]."<sup>472</sup> For example, a judge in Cortland County released on bail a registrant who had been arrested for failing to notify authorities of "his most recent address," although "he had previously registered other addresses over the years."<sup>473</sup> That case produced the headline, "Sex Offender Among 3 Men Released Under Bail Reform in Cortland County."<sup>474</sup>

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Asgarian, *The Controversy over New York's Bail Reform Law, Explained*, VOX (Jan. 17, 2020 8:30 AM EST), <https://perma.cc/Z7HS-ZNPN>.

467. S. 1509-C, ch. 59, 2019 N.Y. Laws 541, 644 (codified at N.Y. CRIM. PROC. LAW § 530.40) (exempting any "misdemeanor defined in article one hundred thirty [of the penal law]," which governs sex offenses). This included misdemeanors like nonconsensual sexual contact, N.Y. PENAL LAW § 130.55 (McKinney 2022), and bestiality, N.Y. PENAL LAW § 130.20(3) (McKinney 2022). Section 130 does not cover morals offenses or failure to register. The bill left untouched the existing requirement that judges employ a special risk assessment before releasing people with past sex-offense convictions. H. Rose Schneider, *How NY's Bail Reform Laws Stack Against Other States*, UTICA OBSERVER-DISPATCH (updated Dec. 16, 2019, 7:09 AM ET), <https://perma.cc/ZU53-3ZNU>.

468. See, e.g., INSHA RAHMAN, VERA INST. OF JUST., NEW YORK, NEW YORK: HIGHLIGHTS OF THE 2019 BAIL REFORM LAW 16 (2019), <https://perma.cc/SX8K-U9A4>.

469. LAUREN JONES, QUINN HOOD & ELLIOT CONNORS, VERA INST. OF JUST., EMPIRE STATE OF INCARCERATION 9 (2021), <https://perma.cc/JL8E-XN3G>.

470. See Dermot Shea, Opinion, *New York's New Bail Laws Harm Public Safety*, N.Y. TIMES (Jan. 23, 2020), <https://perma.cc/CMS5-PRCQ>.

471. Lindsay Beyerstein, Opinion, *Did Bail Reform Really Cause a Crime Wave?*, CITY & STATE N.Y. (Feb. 18, 2020), <https://perma.cc/B89D-ZDYM>. The police's chief statistician tracing the rise in property crimes to teenagers stealing each other's gadgets. *Id.*

472. See, e.g., *Sex Offender Among 3 Men Released Under Bail Reform in Cortland County*, CNY CENTRAL (Jan. 8, 2020), <https://perma.cc/XT2N-HBVU>; Robert Gearty, *New York Bail Reform Law Blamed for Springing Registered Sex Offender in Nursery School Trespass Case*, FOX NEWS (Mar. 1, 2020, 1:49 PM EST), <https://perma.cc/42XA-XN4U>.

473. *Sex Offender Among 3 Men Released*, *supra* note 472.

474. *Id.*



In February, the *New York Daily News* featured a headline, “Set Free to Rape: Suspect Busted in Train Station Sex Assault Was Freed Through State’s New Bail Reform Laws.”<sup>475</sup> Commenting on the story, the president of the Sergeants Benevolent Association, a New York City police union, proclaimed, “Inaction by the governor [to overturn the bail law] is no different than him holding down the hands of a victim while they’re being raped . . . .”<sup>476</sup> But, as it turns out, the releasee had not been “busted” for sexual assault but for theft.<sup>477</sup>

One headline even connected bail reform to the most infamous sex offender of the era, declaring “Harvey Weinstein Posts \$2M Bond Under New York State’s New Bail Reform Statute.”<sup>478</sup> Bail reform had been decades in the making, but it took only four months of spectacular news coverage to undo much of it.<sup>479</sup> On April 3, 2020, just as the pandemic was devastating New York City’s jails, the legislature overhauled the bail law.<sup>480</sup> By November, the jail population had increased by about twenty percent from its low.<sup>481</sup>

In the bail-reform fight, tough-on-crime actors used sexual fearmongering to scare the public away from reform. However, this tactic never really moved the progressive contingent to abandon its support. Perhaps it was because the anti-bail-reform program was not expressed in terms of justice for women, as are many other carceral programs. Nevertheless, in the following story of New York subway policing, we see that sex retains its ability to unite the right and the left in favor of carceral policies. The addition of sex to otherwise tolerable

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475. Rocco Parascandola & Thomas Tracy, *Set Free to Rape: Suspect Busted in Train Station Sex Assault Was Freed Through State’s New Bail Reform Laws*, N.Y. DAILY NEWS (Feb. 2, 2020, 12:06 PM), <https://perma.cc/GT59-B7AH> (archived Feb. 2, 2020). The misleading headline was critiqued in the press, see, e.g., Christopher Robbins, *Tabloids Sow More Bail Reform Confusion, Claiming Laws Set Man “Free to Rape,”* GOTHAMIST (Feb. 3, 2020), <https://perma.cc/NP9D-V2KR>. The *Daily News* later changed the headline on its website. Rocco Parascandola & Thomas Tracy, *Suspect Busted in Brooklyn Subway Station Assault Was Freed Through State’s New Bail Reform Laws*, N.Y. DAILY NEWS (Feb. 2, 2020, 12:06 PM), <https://perma.cc/5MB7-994V>.

476. Tina Moore, Israel Salas-Rodriguez & Jorge Fitz-Gibbon, *Brooklyn Rape Suspect Was Free Under NY’s New Bail-Reform Law*, N.Y. POST (updated Feb. 2, 2020, 5:24 PM), <https://perma.cc/L7FT-H482>.

477. Robbins, *supra* note 475.

478. Chris Francescani & Christina Carrega, *Harvey Weinstein Posts \$2M Bond Under New York State’s New Bail Reform Statute*, ABC NEWS (Dec. 11, 2019, 11:03 AM), <https://perma.cc/NRL8-Z9MC>.

479. LAURA BENNETT & JAMIL HAMILTON, FWD.US, FREEDOM, THEN THE PRESS: NEW YORK MEDIA AND BAIL REFORM 5 (2021), <https://perma.cc/47RJ-9J9U>.

480. S. 7506-B, ch. 56, 2020 N.Y. Laws 184, 438-46 (codified as amended in scattered sections of the N.Y. PENAL LAW and N.Y. JUDICIARY LAW § 216).

481. JONES, HOOD, & CONNORS, *supra* note 469, at 24. While COVID added uncertainty to the numbers, bail reform was decreasing the prison population before the pandemic hit, and its repeal increased detention numbers while pandemic policies and conditions were still in full swing.

street “disorder” led liberals to embrace unfettered police power that portended disparate impacts on marginalized individuals.

## 2. Subway sex policing

In June 2019, Governor Andrew Cuomo and the Metropolitan Transit Authority (MTA) announced a plan to hire 500 additional officers to police crime and “quality of life issues” on the New York City subway at a price tag of \$249 million.<sup>482</sup> In recent years, officials had come under fire for the sardine-packing of riders, turn-of-the-century equipment, and predictable delays.<sup>483</sup> The problem suggested an infrastructural solution but, as is the case with so many social problems, criminal law ended up at center stage.<sup>484</sup> New York authorities justified a surge in policing as “needed to address crime, fare evasion and the system’s growing homeless population.”<sup>485</sup> Former Police Commissioner William Bratton, the founding father of the failed 1990s broken-windows-policing program,<sup>486</sup> tweeted that “NYC’s decline in the 70s & 80s began in the subways. The quality-of-life declines & warning signs are all there for it to happen once again.”<sup>487</sup> This rhetoric recalled a different era, one when Mayor Rudy Giuliani vowed to pare the rot in the Big Apple through such quality-of-life policing, which included increased stops, frisks, and arrests in minority communities.<sup>488</sup>

But by 2019, attitudes toward crime and policing were vastly different, and many regarded quality-of-life policing as a racist and failed policy.<sup>489</sup>

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482. Rebecca Liebson, *Why 500 More Officers Will Police the Subway*, N.Y. TIMES (Dec. 19, 2019), <https://perma.cc/W464-5HFA>; Emma G. Fitzsimmons, *The Subway Is in Financial Crisis. Are 500 More Police Officers Needed?*, N.Y. TIMES, (Nov. 5, 2019), <https://perma.cc/A3X2-9W5X>.

483. Adam Gabbatt, *Taken for a Ride: Can New York’s Decrepit Subway System Be Saved?*, GUARDIAN (Dec. 30, 2019, 1:45 AM EST), <https://perma.cc/N77B-LN9G>.

484. See Emma G. Fitzsimmons & Edgar Sandoval, *New York Tackled Subway Crime. But Is It Starting to Come Back?*, N.Y. TIMES (Feb. 4, 2019), <https://perma.cc/Y3BD-HN6D>.

485. Liebson, *supra* note 482; *MTA Getting 500 Additional Officers to Fight Fare Evasion, Worker Assaults*, WABC (June 17, 2019), <https://perma.cc/K5N6-AGWZ>.

486. WILLIAM J. BRATTON, N.Y. CITY POLICE DEP’T, *BROKEN WINDOWS AND QUALITY-OF-LIFE POLICING IN NEW YORK CITY* 1-3 (2015), <https://perma.cc/LW8F-864H>; see also James Q. Wilson & George L. Kelling, *Broken Windows: The Police and Neighborhood Safety*, ATL. MONTHLY, Mar. 1982, at 29, 29-31, <https://perma.cc/UA8K-N5BX> (popularizing the broken windows theory). For an empirical critique of the broken windows theory, see Bernard E. Harcourt & Jens Ludwig, *Broken Windows: New Evidence from New York City and a Five-City Social Experiment*, 73 U. CHI. L. REV. 271, 272-76 (2006).

487. Bill Bratton (@CommissBratton), TWITTER (Dec. 25, 2018, 12:17 PM), <https://perma.cc/ECY2-ZPC3>.

488. See Peter A. Barta, Note, *Giuliani, Broken Windows, and the Right to Beg*, 6 GEO. J. ON POVERTY L. & POL’Y 165, 166-67 (1999).

489. See, e.g., Michelle Chen, *Want to See How Biased Broken Windows Policing Is? Spend a Day in Court*, NATION (May 17, 2018), <https://perma.cc/TM5L-QGZH>; Sarah Childress, *The*  
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After Bratton's fearmongering tweet and similar sentiments, liberal media critics responded that subway crime had not risen.<sup>490</sup> The proposed police surge was met with a high dose of skepticism from a populace wary of the class and racial implications of minor-offense policing. Right around the time of Cuomo's announcement, videos of transit officers forcibly arresting Black youths and an officer harassing and arresting a Latina churro cart owner went viral.<sup>491</sup> Media also published portions of leaked affidavits from Brooklyn police officers stating that their commander enforced subway arrest quotas and directed officers to target Black and Latino people while avoiding whites and Asians.<sup>492</sup> Indeed, the *New York Times* editorial board criticized the surge as a "misuse of funds," arguing that "adding hundreds of officers to the transit system without good cause could . . . lead to the . . . over-policing of black and Hispanic boys and men."<sup>493</sup>

It was thus a shrewd move for Cuomo to focus on a justification for subway policing with bipartisan appeal. In his 2020 State of the State address, he promised to "keep our straphangers safe by banning repeat sex offenders from the MTA."<sup>494</sup> He added, "[s]ubway cars should not be feeding grounds for predators."<sup>495</sup> Cuomo pushed an unprecedented and peculiar measure to ban "repeat sex offenders" on the subway from using the system.<sup>496</sup> Cuomo's announcement followed several tough-on-subway-predator efforts by Democrats in the state legislature. The "Subway Grinder Bill," which would have significantly increased the criminal penalties for public lewdness and sexual contact on public transportation, had stalled in the codes committee in 2019.<sup>497</sup>

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*Problem with "Broken Windows" Policing*, PBS FRONTLINE (June 28, 2016), <https://perma.cc/7DDP-TCR3>.

490. See, e.g., Dana Rubinstein, *Analysis Suggests Misdemeanors, Like Felonies, Declining on Subways Ahead of Police Expansion*, POLITICO (updated Dec. 17, 2019, 6:38 PM EST), <https://perma.cc/ELU2-8CJ7>.

491. *NYPD Tackle, Arrest Unarmed Black Teen for Not Paying Subway Fare*, NOWTHIS NEWS (Oct. 29, 2019, 3:14 PM), <https://perma.cc/MN55N-SKTL>; Dan Rivoli, *Viral Video of Churro Lady in Cuffs Sparks Protest Against MTA's Police Plan*, SPECTRUM NEWS NY1 (Nov. 11, 2019, 10:42 PM ET), <https://perma.cc/4AHH-2S3T>.

492. Joseph Goldstein & Ashley Southall, *I Got Tired of Hunting Black and Hispanic People*, N.Y. TIMES (updated June 17, 2020), <https://perma.cc/FK2Q-YECP>.

493. Editorial, *Hiring 500 More Police Officers for the Subway Is a Misuse of Funds*, N.Y. TIMES (Dec. 20, 2019), <https://perma.cc/28G2-C398>.

494. Andrew Cuomo, Governor, N.Y., State of the State Address (Jan. 8, 2020), <https://perma.cc/U4N7-ZQ2V>.

495. *Id.*

496. *Id.*

497. S.B. 3229A, 2019–2020 Leg., Reg. Sess. (N.Y. 2019); see also Rachel Silberstein, *Savino Asks De Blasio for Help Passing 'Subway Grinder' Bill He Once Supported*, GOTHAM GAZETTE (Feb. 9, 2018), <https://perma.cc/8XK9-98RW>.

Sarah Feinberg, an MTA board member and former Obama administration official, vowed to “work with the law enforcement and criminal justice community to recommend and seek the harshest penalties for serial criminals preying upon workers or the public in the transit system.”<sup>498</sup> This time, the *New York Times* applauded the government’s efforts to “deal[] more forcefully with sexual predators” that are “a big problem on subways.”<sup>499</sup> The *New York Daily News* was even more laudatory of the efforts to “ban perverts” and “keep creeps from preying on straphangers.”<sup>500</sup>

New York subway riders regularly experience physical shoves, nasty comments, and encounters with unhoused individuals, but most self-identified progressives see these as relatively minor incidents. It is, however, altogether different when the same physical touches—or even looks—seem prurient, when the comment has a sexual tone, or when the unhoused person’s body is exposed. By the time of the subway sex-policing proposal, feminist anti-hassling sentiments had come to the forefront of the liberal consciousness. Proposals to criminalize street harassment had appeared in the legal literature for decades, but in the 2010s, the issue increasingly became a feminist cause célèbre.<sup>501</sup> When #MeToo swept the internet, social media voices encouraged women to profess their experiences with sexual assault and be part of the liberatory “national reckoning.” In turn, alongside far too many horrific stories of abuse, women described more minor occurrences like catcalls and leering. Within the Twitter echo chamber, the latter acts came to represent more than gross inconveniences—they were exemplars of oppressive male sexual abuse that united women in the sentiment “me too.”<sup>502</sup>

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498. Clayton Guse, *MTA Board Moves to Ban Repeat Pervs from Subway*, N.Y. DAILY NEWS (June 24, 2019, 5:44 PM), <https://perma.cc/RER6-399C> (to locate, click “View the live page”).

499. Michael Gold, *Serial Sex Offenders Are a Big Problem on Subways. Should They Be Banned for Life?*, N.Y. TIMES (Mar. 20, 2019), <https://perma.cc/6WC3-LDHQ>.

500. Graham Rayman & Clayton Guse, *Cuomo Repeats Call to Ban Perverts from NYC Subway After Serial Sex Offender Arrested*, N.Y. DAILY NEWS (Sept. 5, 2019, 3:58 PM), <https://perma.cc/E3SC-XKQC>.

501. See Holly Kearl, *SSH’s 10 Year Anniversary*, STOP STREET HARASSMENT (May 29, 2018), <https://perma.cc/7NMD-X5K7> (chronicling the ten-year history of an anti-harassment organization founded in 2008); Sarah Bibi, *Street Harassment Finally Gets City Council’s Attention*, GOTHAMIST (updated Oct. 29, 2010), <https://perma.cc/26NA-AGR3>.

502. In 2017, I read the comments to Milano’s tweet, “If you’ve been sexually harassed or assaulted, write ‘me too’ as a reply to this tweet,” and the first three I encountered included two revelations of child molestation and this: “Standing in a line for food when a man took unwanted pictures of my chest. I was shocked.” Alyssa Milano (@Alyssa\_Milano), TWITTER (Oct 15, 2017, 1:21 PM), <https://perma.cc/VG4P-S7WW> (comments below tweet); see also Cathy Young, *Assessing #MeToo, Five Years On*, BULWARK (Nov. 28, 2017, 5:05 AM), <https://perma.cc/79P2-CVBH> (“#MeToo rose on a wave of wrenching personal stories—stories of women (and in some cases men) sexually exploited, even sexually terrorized, by powerful abusers like Weinstein. But almost at once, other stories began to show up: ones of unsupported, ambiguous  
*footnote continued on next page*”).

The result was a compelling sense that women live in a cesspool of public sexual aggression, necessitating a strong state response to “deal[] more forcefully with predators.”<sup>503</sup> And yet, even after the MTA’s extensive campaign in 2016 and 2017 to encourage women to report sexual harassment, and even after the continuum between creepy stares and masturbation had been collapsed, the total number of 2018 subway sexual misconduct reports was 866.<sup>504</sup> To put this into perspective, public ridership in 2018 was 1,680,060,402—over one-and-a-half *billion* riders.<sup>505</sup> The #MeToo discourse, commentators note, courted “exaggerated portrayals that result[ed] in draconian responses,” without enough attention to the fact that the “costs and benefits . . . [would] be disproportionately distributed by race and class.”<sup>506</sup> Unlike with the general policing surge, there was no outcry that the policing of subway “predators” could also disproportionately harm vulnerable people and encourage racist law enforcement.

### C. A New Vag Lewd?

#### 1. The feminist anti-hassling movement

Since the 1970s, the anti-hassling movement has publicized the idea that sex elevates uninvited street behavior into gender injustice and grave, potentially deadly danger.<sup>507</sup> Advocates have regularly labeled street hassling

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accusations, with little if any evidence of abuse of power and with plenty of room for subjective interpretation and fuzzy or distorted memories.”). For additional sources discussing the effects of #MeToo, see Jeannie Suk Gersen, *The Transformation of Sexual-Harassment Law Will Be Double-Faced*, NEW YORKER (Dec. 20, 2017), <https://perma.cc/BF5K-ZQ6Z>; Monica Akhtar, *#MeToo: A Movement or a Moment?*, WASH. POST (Nov. 9, 2017, 10:56 AM EST), <https://perma.cc/N4A8-NZRP>; *Employers Ban Leering and Long Stares After #MeToo Revelations*, TIMES (Oct. 9, 2018, 12:00 AM BST), <https://perma.cc/D4AM-MMQU> (to locate, click “View the live page”); Emily Reynolds, *Opinion, Criminalising Street Harassment Works. Britain Must Follow France’s Lead*, GUARDIAN (May 2, 2019, 5:44 EDT), <https://perma.cc/S85Y-BPC7>.

503. Gold, *supra* note 499.

504. Yasmine Chokrane, Jasper Krause, Janiya Taylor & Jeanmarie Evelly, *Why Are Reports of Subway Sex Crimes on the Rise?*, CITY LIMITS (Aug. 22, 2018), <https://perma.cc/69MR-QU2X>; Guy Hamilton-Smith, *New York Lawmakers Want to Ban Sex Offenders from the Subway. That Won’t Solve Anything*, APPEAL (Apr. 1, 2019), <https://perma.cc/69QF-2U69>.

505. *Introduction to Subway Ridership*, METRO. TRANSP. AUTH., <https://perma.cc/T3GL-2FHR> (archived Jan. 30, 2023).

506. Deborah L. Rhode, *Essay, #MeToo: Why Now? What Next?*, 69 DUKE L.J. 377, 410, 417 (2019).

507. See Brookfield, *supra* note 204, at 10, 17, 19-20 (discussing the anti-hassling movement of the 1970s).

as a form of “rape,” “sexual violence,” and even “terrorism.”<sup>508</sup> Although it certainly would be wrong to say that hassling is complimentary, benign, or even neutral, street commentary ranges in severity, intent, and effect. Anti-hassling discourse insists that unwanted public *sexual* behavior is always serious business requiring meaningful state action. It does so by drawing a direct line between hassling and rape.<sup>509</sup>

In a seminal 1993 article on street harassment, Cynthia Grant Bowman makes the case that “verbal and nonverbal behavior, such as ‘wolf-whistles, leers, winks, grabs, pinches, catcalls and street remarks,’” should be considered significant wrongful conduct.<sup>510</sup> To establish a minor act like a wink as a grave harm, Bowman articulates a claim that appears frequently in anti-hassling discourse: “[A]ny incident of harassment, no matter how ‘harmless,’ both evokes and reinforces women’s legitimate fear of rape.”<sup>511</sup> But stranger rape on the street is incredibly rare, and the chances that a given hassler is “rape-testing” the woman is even smaller.<sup>512</sup> This may be true, Bowman admits, but

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508. See, e.g., Laniya, *supra* note 2, at 109, 119 (claiming that hassling involves “sexual terrorization of women”); Kissling, *supra* note 3, at 454-56 (arguing that, “regardless of content,” street harassment creates “an environment of sexual terrorism”); Maeve Olney, Note, *Toward A Socially Responsible Application of the Criminal Law to the Problem of Street Harassment*, 22 WM. & MARY J. WOMEN & L. 129, 129 (2015) (“[S]treet harassment is not just a precursor to sexual violence, but is itself a violent act on a continuum of gender-based and sexual violence against women.”); see also Tiffanie Heben, Note, *A Radical Reshaping of the Law: Interpreting and Remediating Street Harassment*, 4 S. CAL. REV. L. & WOMEN’S STUD. 183, 202 (1994) (noting the view that “street harassment is on a continuum with other forms of violence against women, such as rape”); Mary Anne Franks, *Men, Women, and Optimal Violence*, 2016 U. ILL. L. REV. 929, 957 (grouping street harassment with “[k]illings, beatings, [and] rapes . . . [that] all send the message that women must be kept in their place”).

509. See Heben, *supra* note 508, at 202.

510. Bowman, *supra* note 5, at 523 (quoting Elizabeth Arveda Kissling & Cheris Kramarae, *Stranger Compliments: The Interpretation of Street Remarks*, 14 WOMEN’S STUD. COMMUN. 75, 75-76 (1991). Bowman ultimately proposes a model street harassment ordinance that would make such behavior a misdemeanor. See *id.* at 575 (“[A] criminal prohibition would define street harassment as an offense against the community . . . and would provide women the simple and immediate remedy of ‘calling the cops.’”).

511. *Id.* at 540.

512. *Id.* at 536 (describing rape-testing as when rapists “harass women on the street and violate their personal space in order to determine which women are likely to be easy targets”). The Bureau of Justice Statistics puts the 2021 rate of all rape/sexual assault victimization at 1.2 per 1000, which can be compared to the assault rate of 13.6 per 1000. ALEXANDRA THOMPSON AND SUSANNAH N. TAPP, BUREAU OF JUST. STATISTICS, U.S. DEP’T OF JUST., NCJ NO. 305101, CRIMINAL VICTIMIZATION, 2021, at 2 (2022), <https://perma.cc/N8NN-K27Y>. That report does not break sexual assaults into stranger and nonstranger, but RAINN reports that 8 out of 10 rapes are committed by acquaintances. *Perpetrators of Sexual Violence: Statistics*, RAINN, <https://perma.cc/VW89-CW57> (archived Jan. 31, 2023). Add a public street as the setting, and the crime becomes rarer. In fact, sexual assault awareness groups regularly list the *stranger in the*  
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nevertheless the predisposition to fear rape is an “‘eggshell’ shared by millions of women.”<sup>513</sup>

Contemporary anti-hassling advocacy has taken up this idea that hassling is always a big deal and encourages society and even the hassled women themselves to take the issue more seriously.<sup>514</sup> According to activists, simply putting up with hassling, rather than posting a picture to an app, contacting the authorities, or some confrontation, is a poor response. This is not only because “pretend[ing] that nothing is happening” causes more “emotional distress and feelings of disempowerment,” as Bowman claims,<sup>515</sup> but also because failing to confront harassers enables men to continue to dominate public spaces.<sup>516</sup> Indeed, a recurrent theme in contemporary feminist criminal law discourse is that male misconduct harms not just the individual victim but all women.<sup>517</sup> Claire Houston observes that some feminists view gender violence as part of a larger “patriarchal force” and consequently hold that a woman “who refuses criminal justice intervention . . . can be blamed for allowing male domination in general to continue.”<sup>518</sup>

a. Calls for criminalization

Nevertheless, most anti-hassling advocates say the responsibility of fighting hassling should fall not on individual women but on the government. The state has the obligation to broaden and strengthen the enforcement of existing harassment, loitering, disturbing the peace, and disorderly conduct laws and create new criminal prohibitions.<sup>519</sup> The “Stop Street Harassment” website, for example, displays a list with synopses of “The Best Laws” from the

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alley paradigm as a leading “myth.” See, e.g., *Sexual Assault: Myths and Facts*, WOMEN’S CTR.-YOUTH & FAM. SERVS., <https://perma.cc/GM2M-7QFR> (archived Jan. 31, 2023).

513. Bowman, *supra* note 5, at 536-37.

514. *Street Harassment*, RAINN, <https://perma.cc/NRR4-JMAK> (archived Jan. 31, 2023) (“Street harassment is never a compliment and is never OK.”); Mindi Westhoff, *When Is Street Harassment a Big Deal?*, HUFFPOST (updated Feb. 28, 2015), <https://perma.cc/QG7J-RXRF>.

515. Bowman, *supra* note 5, at 537.

516. *Id.* at 520-22; see also Olney, *supra* note 523, at 136 (“Street harassment is not only a ‘personal problem’ for the target, but a ‘social problem’ affecting power dynamics between men and women.”).

517. Claire Houston, *How Feminist Theory Became (Criminal) Law: Tracing the Path to Mandatory Criminal Intervention in Domestic Violence Cases*, 21 MICH. J. GENDER & L. 217, 238 (2014) (commenting on feminist anti-domestic-violence theorizing); see, e.g., *Why Stopping Street Harassment Matters*, STOP STREET HARASSMENT, <https://perma.cc/7S92-5KYP> (archived Jan. 31, 2023) (“[S]treet harassment limits women’s peace of mind and mobility, making it a gender equality and human rights issue.”).

518. See Houston, *supra* note 517, at 238.

519. See, e.g., *supra* note 6.

“perspective of advocates and women who have been frequently street harassed.”<sup>520</sup> The criminal laws the site highlights are expansive, border on unconstitutionally vague, and grant the state sweeping discretionary authority to cleanse public spaces of undesirables.

The site lists these “best” state laws alphabetically, and one need look only at the first few to get a sense of the legal regime endorsed.<sup>521</sup> Regarding Arizona’s harassment law that forbids any communication “in a harassing manner,” the Stop Street Harassment site opines, “If someone is speaking to you or doing some other action that seriously alarms or annoys you, you can report him/her [to the police].”<sup>522</sup> The next set of laudable laws is California’s expansive “miscellaneous offenses” that criminalize a wide variety of acts, including “making loud or unreasonable noise” and “unruly behavior.”<sup>523</sup> Also meriting approval is Florida’s disorderly conduct law that prohibits acts that “outrage the sense of public decency.”<sup>524</sup>

In their zeal to end street harassment, anti-hassling activists have endorsed the broadest public disorder statutes on the books, despite the role such laws played for centuries in maintaining race, class, and gender hierarchies.<sup>525</sup> Indeed, broad disorder laws *presently* harm the vulnerable. Jeremy Waldron observes:

Legislators voted for by people who own private places . . . are increasingly deciding to make public places available only for activities other than . . . primal human tasks [like urinating and sleeping]. The streets and subways, they say, are for commuting from home to office. They are not for sleeping; sleeping is something one does at home. . . . Parks are not for cooking or urinating; again, these are things one does at home. . . . This [system] . . . is disastrous for those who must live their whole lives on common land.<sup>526</sup>

Lewdness and disorderly conduct laws also deprive unhoused individuals of the few meager spaces, like public bathrooms, allotted for their exercise of “primal” behaviors.<sup>527</sup> “[T]he association between these groups and disorder,”

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520. *Street Harassment and the Law: The Best Laws, Advocacy, and Anti-Street Harassment Ordinances*, STOP STREET HARASSMENT, <https://perma.cc/ZF8G-JDUP> (archived Jan. 31, 2023). The site is not for lawyers and does not analyze whether such strategic use of these laws is constitutional.

521. *Id.*

522. *Id.*

523. *Id.*

524. *Id.*

525. *See supra* Part I.B.2.

526. Waldron, *supra* note 15, at 301.

527. *Id.*; Jamelia N. Morgan, *Rethinking Disorderly Conduct*, 109 CALIF. L. REV. 1637, 1679-80 (2021); *see also* Rankin, *supra* note 12, at 107-11.



Jamelia Morgan observes, renders the “‘public’ in public restroom more exclusive and less public.”<sup>528</sup>

Analyzing such laws, Libby Adler observed that “[o]ne subspecies of [vagrancy] laws pester the homeless lgbtq subpopulation in a unique and troubling fashion: lewdness laws, laws against indecent exposure, and other laws located at the peculiar nexus of homelessness and the naked body.”<sup>529</sup> Due to persistent bigotry, gay and trans people—especially youths—are disproportionately represented in the unhoused and urban sex-work populations.<sup>530</sup> Examining data on lewdness arrests, Adler found that “[h]omeless lgbtq youth are exceptionally vulnerable to laws that empower the police to arrest them for urinating, changing their clothes, or engaging in sexual acts in public places.”<sup>531</sup> Prosecutions for lewdness and other sexual disorder crimes can saddle trans youths with convictions, imprisonment, and sex offender status, further cementing their stigmatization, inability to obtain shelter and employment, and continued participation in dangerous commercial sex.<sup>532</sup>

Simply being on a sex-offender registry makes a person ineligible for public housing under federal law, and homeless shelters frequently bar registrants because of residency restrictions and for other reasons.<sup>533</sup> This puts the individual back on the street, making it difficult to comply with strict address reporting requirements and rendering them at perpetual risk of arrest.<sup>534</sup> It is sadly unsurprising that the first person to die of COVID-19 in jail in Miami-Dade County—a jurisdiction with strict SORN regulations—was a registrant.<sup>535</sup> Charles R. Hobbs, Jr., had been placed on the registry more than

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528. Morgan, *supra* note 527, at 1680.

529. Libby Adler, *Life at the Corner of Poverty and Sexual Abjection: Lewdness, Indecency, and LGBTQ Youth*, in RESEARCH HANDBOOK ON GENDER, SEXUALITY, AND THE LAW 76, 84 (Chris Ashford & Alexander Maine eds., 2020).

530. *Id.* at 80; see also RACHEL SWANER, MELISSA LABRIOLA, MICHAEL REMPEL, ALLYSON WALKER & JOSEPH SPADAFORÉ, CTR. FOR CT. INNOVATION, YOUTH INVOLVEMENT IN THE SEX TRADE: A NATIONAL STUDY, at vii, 9 (2016), <https://perma.cc/AW2K-A88H> (finding disproportionate representation of trans people among youth sex workers).

531. Adler, *supra* note 529, at 84.

532. See *id.* at 85-86; see also Stillman, *supra* note 18.

533. See HUM. RTS. WATCH, NO SECOND CHANCE: PEOPLE WITH CRIMINAL RECORDS DENIED ACCESS TO PUBLIC HOUSING 66-69 (2004), <https://perma.cc/CH69-YPHT>; Shawn M. Rolfe, Richard Tewksbury & Ryan D. Schroeder, *Homeless Shelters' Policies on Sex Offenders: Is This Another Collateral Consequence?*, 61 INT'L J. OFFENDER THERAPY & COMPAR. CRIMINOLOGY 1833, 1846 (2017) (studying four states and finding that “the majority (71.9%) of homeless shelters did not allow sex offenders”).

534. See Sarah Kohan, Comment, *Registering a Home When Homeless: A Case for Invalidating Washington's Sex Offender Registration Statute*, 95 WASH. L. REV. ONLINE 205, 207 (2020).

535. Radley Balko, Opinion, *The Last Days of a COVID-19 Prisoner*, WASH. POST (May 20, 2020), <https://perma.cc/NGZ2-HFMA>; *First Miami-Dade Inmate to Die of Coronavirus*  
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twenty years before after being charged with lewd and lascivious conduct with a child, for which he received a “withhold of adjudication”—not a conviction—and five years of probation.<sup>536</sup> The offense occurred in 1997, the year Florida’s registration requirements went into effect, and Hobbs had not committed a single sex crime since.<sup>537</sup> In January 2020, the then-fifty-one-year-old Black man was arrested for the felony of not updating his address.<sup>538</sup> The judge set a \$20,000 bond.<sup>539</sup> Unable to pay, Hobbs spent months in jail awaiting trial—a trial that never occurred because he perished on May 4th.<sup>540</sup> Hobbs’s dorm-mate commented, “Charles began shaking violently in his bed. . . . It was terrifying.”<sup>541</sup> Charles is gone, but when I typed his name into Google while writing this article, his picture and criminal profile popped up, preserved in the public domain by the Florida Department of Law Enforcement’s “Sex Offenders and Predators Search.”<sup>542</sup>

b. Race and class construct street hassling

Like the general police surge, the subway sex-policing surge portended to disproportionately impact vulnerable minorities. Yet the gendered injustice of street hassling mostly overshadowed the race and class implications of instructing women to be fearful, on constant alert, and quick to involve the police for perceived sexual threats.<sup>543</sup> Although Bowman and others recognize that street harassment prohibitions, like all criminal prohibitions, have the potential to be applied in discriminatory ways,<sup>544</sup> there is little discussion of the fact that race and class *define* whether something is sexual and whether it is

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*Was in Jail for Failure to Register as Sex Offender*, FLA. ACTION COMM. (May 4, 2020), <https://perma.cc/49E9-2QLZ>.

536. Balko, *supra* note 535.

537. *Id.*; David Ovalle, *Miami Jail Inmate Diagnosed with the Coronavirus Dies at Hospital After “Shaking Violently,”* MIAMI HERALD (updated May 4, 2020, 3:52 PM), <https://perma.cc/WCV5-Y6PR>.

538. Balko, *supra* note 535.

539. *Id.*

540. Ovalle, *supra* note 537.

541. *Id.*

542. *Sexual Offenders and Predators Search*, FLA. DEP’T L. ENF’T, <https://perma.cc/94TR-FE2X> (archived Feb. 12, 2021).

543. See Aya Gruber, *Why Amy Cooper Felt the Police Were Her Personal “Protection Agency,”* SLATE (May 27, 2020, 3:59 PM), <https://perma.cc/CF2F-PLWF>.

544. See Bowman, *supra* note 5, at 551; Tran, *supra* note 6, at 193-94 (considering an argument that statute “would be used mostly against men of color,” but endorsing criminalization because “men of color nonetheless benefit from gender privilege, given the relativity of their social capital in comparison to women”).

a hassle. Anti-hassling discourse is largely “sex essentialist,” seeing sex as something that has a fixed meaning outside of social context.<sup>545</sup>

As the analysis of the turn-of-the-century “immorality of the poor” paradigm demonstrates, however, the meaning of sex is elastic.<sup>546</sup> A person’s gender, race, class, and other statuses influence, and often determine, people’s intuitions about whether the person’s actions constitute improper sexuality or indeed whether the actions *are* sexual. Unconscious and conscious prejudices color many perceptions, but perhaps none more than sexual threat. Ostensibly sexual comments from white and white-collar men in perceived safer spaces like stores and restaurants do not trigger fear in the same way as comments from minority and poor men in spaces where people of heterodox social strata mix.<sup>547</sup>

Sociologists call these differences “context effects.”<sup>548</sup> Research shows that women’s perceptions of sexual commentary as a grave threat, inconvenience, nothing, or even a compliment are significantly affected by the commenter’s race and “attractiveness,” which is itself race- and class-dependent.<sup>549</sup> Consider these remarks on catcalling from a female college student interviewed as part of a 2016 study:

I think I’d maybe be less inclined to tell him to fuck off if he were more attractive. I’d be like, “thanks.” But . . . when people catcall you and they’re kind of creepy looking, it makes me feel even more uncomfortable. . . . It’s like a cultural thing . . . someone that looks dirty or something is coming at you, and, you know, people avoid them.<sup>550</sup>

Another student agreed that “college guys” would not “creep me out so much,” contrasting them with “dirty construction workers.”<sup>551</sup> Imani Perry posits that people consider the comments of poor and minority “holler-ers”

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545. See Rubin, *supra* note 1, at 275.

546. See *supra* Part I.B.2.

547. See Kay Hymowitz, *Street Harassment Isn’t About Sexism—It’s About Privilege*, TIME (Nov. 4, 2014, 1:13 PM EST), <https://perma.cc/42J9-5AFJ>; Conor Friedersdorf, *Don’t Outlaw Catcalling*, ATLANTIC (Nov. 4, 2014), <https://perma.cc/DL9B-75SH>.

548. Kimberly Fairchild, *Context Effects on Women’s Perceptions of Stranger Harassment*, 14 SEXUALITY & CULTURE 191, 192, 197 (2010).

549. *Id.* 194-95; see also Deborah L. Rhode, *The Injustice of Appearance*, 61 STAN. L. REV. 1033, 1052-53 (2009); Darrell Steffensmeier, Jeffery Ulmer & John Kramer, *The Interaction of Race, Gender, and Age in Criminal Sentencing: The Punishment Cost of Being Young, Black, and Male*, 36 CRIMINOLOGY 763, 768-69 (1998) (“[R]ace, age, and gender will interact to influence sentencing because of images or attributions relating these statuses to membership in social groups thought to be dangerous and crime prone.”).

550. Colleen O’Leary, *Catcalling as a “Double Edged Sword”: Midwestern Women, Their Experiences, and the Implications of Men’s Catcalling Behaviors* 89 (Mar. 11, 2016) (M.S. thesis, Illinois State University), <https://perma.cc/V7KJ-YQ9B>.

551. *Id.* at 89-90.

particularly problematic “because they make women of privileged groups especially uncomfortable.”<sup>552</sup>

Yet from the very inception of the modern anti-hassling movement, feminists have been reluctant to confront the racial implications of the discourse and agenda. In fact, the part of the iconic antirape tome *Against Our Will* that drew the strongest criticism from racial justice scholars was Brownmiller’s analysis of the Emmett Till case.<sup>553</sup> Brownmiller curiously devoted significant time to condemning the whistle that led to Till’s brutal murder—a whistle we now know did not occur.<sup>554</sup> She invested the baby-faced fourteen-year-old’s tweet with a lot of patriarchal oppressiveness *because* Till was Black. Brownmiller opined that the whistle was more than a mere “gesture of adolescent bravado.”<sup>555</sup> Instead, it was Till’s nefarious effort to sexually degrade the white Carol Bryant to compensate for his low racial status.<sup>556</sup> This idea of compensatory subordination moved Brownmiller not to sympathize with the murdered boy’s motivations but to condemn the whistle as particularly assaultive. Till’s Blackness alone elevated the whistle to a serious sexual offense:

We are rightly aghast that a whistle could be cause for murder but we must also accept that Emmett Till and J.W. Milam [the murderer] shared something in common. *They both understood* that a whistle was no small tweet of hubba-hubba . . . . [I]t was a deliberate insult just short of physical assault, a last reminder to Carolyn Bryant that this black boy, Till, had in mind to possess her.<sup>557</sup>

Molly Brookfield describes this analysis as “[t]he most famous example of a white feminist privileging gender over race in discussions of stranger intrusions.”<sup>558</sup> However, Brownmiller went further than that. She argued that Till’s Blackness and Bryant’s whiteness *made* the whistle particularly threatening and degrading, providing a measure of justification for the horrific violence. Brownmiller opined, “At age twenty . . . after the murder of Emmett

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552. See Imani Perry, *Let Me Holler at You: African-American Culture, Postmodern Feminism, and Revisiting the Law of Sexual Harassment*, 8 GEO. J. GENDER & L. 111, 127 (2007).

553. BROWNMILLER, *supra* note 50, at 245-47. Brownmiller also spends time critiquing the “vilification” of the white woman who falsely accused Willie McGee: “I would like to believe . . . that Willametta Hawkins had no alternative but to say she had been raped.” *Id.* at 245; see Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 159 n.54 (noting that Brownmiller’s Till analysis “places the sexuality of white women, rather than racial terrorism, at center stage”).

554. *Id.* at 245-47; see Richard Pérez-Peña, *Woman Linked to 1955 Emmett Till Murder Tells Historian Her Claims Were False*, N.Y. TIMES (Jan. 27, 2017), <https://perma.cc/ZWD6-JFBV>.

555. BROWNMILLER, *supra* note 50, at 246.

556. See *id.* at 247.

557. *Id.*

558. Brookfield, *supra* note 204, at 293.

Till, whenever a black teen-ager whistled at me on a New York City street or uttered in passing one of several variations on an invitation to congress, I smiled my nicest smile of comradely equality—no supersensitive flower of white womanhood.”<sup>559</sup> But things changed: “It took fifteen years for me . . . to understand the insult implicit in Emmett Till’s whistle, the depersonalized challenge of ‘I can have you’ with or without the racial aspect.”<sup>560</sup> After this realization, whenever Brownmiller heard a “sexual remark on the street,” she too felt “a fleeting but murderous rage.”

One gets the sense that Brownmiller was fed up with race and class being cited as excuses for men’s offensive behavior. Indeed, she made much of Eldridge Cleaver’s infamous hyperbolic assertion that raping white women was an “insurrectionary act.”<sup>561</sup> Brownmiller ascribed that insurrectionary rape intent to every Black male commenter, essentially justifying white women’s heightened fear of and preoccupation with Black male sexuality.<sup>562</sup> Perhaps even more striking is her opinion on liberals’ condemnation of the Scottsboro Boys case. She states, “The left fought hard for its symbols of racial injustice, making bewildered heroes out of a handful of pathetic, semiliterate fellows,” and in the process they wrongfully “vilified and excoriated the hapless white woman.”<sup>563</sup>

Indeed, many of the anti-hassling feminists of the 1970s, according to Brookfield, “discussed race in a way that suggested a discomfort with men of color and with racial analysis more broadly.”<sup>564</sup> As I have traced elsewhere, there were significant clashes in the 1970s between feminists of color and “antipatriarchy” feminists over how to understand gendered violence committed by marginalized men of color.<sup>565</sup> Feminists of color placed significant blame on white supremacy, noting that it contributed to male violence, limited victims’ options, and underlaid the government’s simultaneous lack of attention to and overcriminalization of such violence.<sup>566</sup> Yet mainstream feminists were adverse

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559. BROWNMILLER, *supra* note 50, at 247.

560. *Id.*

561. *Id.* at 248-51 (quoting ELDRIDGE CLEAVER, *SOUL ON ICE* 29-33 (1968)).

562. Noting that “oppressed [Black] males take on the values of those who have oppressed them,” Brownmiller protests, “We white women did not dangle ourselves [in front of Black men], yet everything the black man has been exposed to would lead him to this conclusion, and then to action [rape], in imitation of the white man who raped ‘his’ woman.” *Id.* at 252-53.

563. *Id.* at 237.

564. Brookfield, *supra* note 204, at 291.

565. See GRUBER, *FEMINIST WAR*, *supra* note 4, at 52-57.

566. See U.S. COMM’N ON C.R., NCJ NO. 53356, *BATTERED WOMEN: ISSUES OF PUBLIC POLICY* 99-100 (1978), <https://perma.cc/JLG8-ZMF2> (statement of Shelley Fernandez) (tracing domestic violence to “the racism of the Great White Society”).

to the structural racism argument, seeing it as a denial that patriarchy was the cause of gender violence and an excuse for the sexism “inherent in [Black and Latino] culture,” as one feminist judge remarked.<sup>567</sup>

In recent years, despite cautions about the racial problems with anti-hassling discourse,<sup>568</sup> advocates have continued to feature minority and “low-class” men as paradigmatic harassers and their domains, like the Puerto Rican Day Parade, as sites of peril.<sup>569</sup> Consider, for example, the October 2014 video created by the marketing firm Rob Bliss Creative for the anti-hassling activist group “Hollaback!”<sup>570</sup> The video shows actor Shoshana Roberts being subjected to relentless catcalling while walking in New York City, and it predictably went viral.<sup>571</sup> But the video’s creators unintentionally included something else that is very telling: In ten hours of footage, the “sexual harassers” were almost entirely nonwhite.<sup>572</sup> *Slate* writer Hanna Rosin, while sympathetic to activists’ good intentions, criticized the video for suggesting that “harassers are mostly black and Latino, and hanging out on the streets in midday in clothes that suggest they are not on their lunch break.”<sup>573</sup> Bliss, the video’s director and editor, defended it, noting that “[w]e got a fair amount of white guys, but for whatever reason, a lot of what they said was in passing, or off camera.”<sup>574</sup> Joyce Carol Oates drew fire on Twitter for saying the silent part out loud: “Would be

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567. See U.S. COMM. ON C.R., *supra* note 566, at 130 (remarks of Lisa Richette) (admonishing “black and Chicano wom[e]n” to resist the sexism “inherent in [their] culture”).

568. See, e.g., Perry, *supra* note 552, at 127 (warning that the anti-hassling agenda could disparately affect men of color).

569. See, e.g., Laniya, *supra* note 2, at 110-12; see also William Saletan, *The Central Park Rampage*, SLATE (June 22, 2000, 3:00 AM), <https://perma.cc/PWC3-2GAD> (observing that the 2000 Puerto Rican Day parade harassment may have left “liberals . . . embracing criminal justice”).

570. Rob Bliss Creative, *10 Hours of Walking in NYC as a Woman*, YOUTUBE (Oct. 28, 2014), <https://perma.cc/42WF-B9TC>. Hollaback! has since changed its name to “Right to Be.” RIGHT TO BE, <https://perma.cc/C7CK-GHLX> (archived Jan. 31, 2023).

571. Rob Bliss Creative, *supra* note 570. Roberts is apparently a white actor, although she could pass for other races and ethnicities. After the video went viral, she sued Bliss and Hollaback! for failing to share profits with her. Kerry Burke, Barbara Ross & Larry McShane, *Actress from Famous ‘Walking in NYC as a Woman’ Viral Catcall Video Files \$500K Lawsuit Against Makers of Video*, N.Y. DAILY NEWS (July 14, 2015, 6:15 PM), <https://perma.cc/CK4G-87TJ> (to locate, click “View the live page”).

572. See Hanna Rosin, *The Problem with That Catcalling Video: They Edited Out the White Guys*, SLATE (Oct. 29, 2014, 4:37 PM), <https://perma.cc/P5XL-D5R9>.

573. *Id.*; see also Glenn Harlan Reynolds, Column, *Catcalling a Two-Way Street*, USA TODAY (updated Nov. 10, 2014, 12:14 PM ET), <https://perma.cc/J4J9-GEP9> (detailing other critiques of the video).

574. Rosin, *supra* note 572 (quoting a now-deleted Reddit post by Bliss).

very surprised if women walking alone were harassed in affluent midtown NYC (Fifth Ave., Park Ave.), Washington Square Park etc.”<sup>575</sup>

It bears repeating here: My point is not that men of color’s—or any man’s—uninvited commentary, sexual or otherwise, is neutral, benign, or complimentary. To be sure, the idea that street hassling is “flattering” has its own disturbing and exceptionalist cultural history.<sup>576</sup> Rather, my point is that the sexual disorderly conduct highlighted by the video and vociferously condemned by the outraged public as the audacious behavior of privileged male criminals, like the “ghetto” crimes that outraged people in the 1980s, cannot be separated from race and class.

Yes, sexual street commentary is bad, but burglary is worse. In this incarceration-skeptical era, liberals rarely point to a burglary conviction as proof of a person’s inherent egregiousness.<sup>577</sup> Yet Rosin, for all her racial sensitivity, says that the men in the video do “egregious things” like “the one who harangues [Roberts], ‘Somebody’s acknowledging you for being beautiful! You should say thank you more.’”<sup>578</sup> Now try to imagine a similar video without the sex—one that depicted panhandlers yelling at people who ignore them. Would Rosin call the people in it “egregious”? Would we consider the video a public service that furthered social justice and raised liberal consciousness?

## 2. Sex in public

To complete the circle, let us return to the prologue and my companions’ belief that, through street hassling, men keep women in fear and limit their movement in the world.<sup>579</sup> To be sure, women’s reactions to street hassling can range from mildly bothered or utterly exhausted to truly terrified. And women’s fear of crime, the night, and walking solo impose serious limits on their freedom and mobility.<sup>580</sup> Nevertheless, fear is not just a rational calculation of the probability of harm, which is why people fear terrorists more than riding in cars. After all, men have historically been far more likely

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575. Joyce Carol Oates (@JoyceCarolOates), TWITTER (Oct. 30, 2014, 6:26 AM), <https://perma.cc/H4PG-VAZZ>.

576. See Brookfield, *supra* note 204, at 16, 21, 128, 202.

577. See *supra* note 34 (describing progressive carceral skepticism).

578. Rosin, *supra* note 572.

579. *Supra* notes 4-6 and accompanying text.

580. Cf. William R. Smith & Marie Torstensson, *Gender Differences in Risk Perception and Neutralizing Fear of Crime*, 37 BRIT. J. CRIMINOLOGY 608, 608 (1997) (discussing the well-established “paradox” that women, who are far less likely than men to be victims, are more fearful of crime).

to be victims of all types of street violence, especially murder.<sup>581</sup> Yet they do not fear the night.<sup>582</sup>

As the criminal law literature discusses at length, crime fears are deeply influenced by social and cultural factors.<sup>583</sup> Women may be moved to fear by the mere presence of a man on a dark street, a dark man on the street, or even the dark street itself. Researchers often call it a “paradox” that women, especially white older women—statistically the safest demographic—fear random crime the most.<sup>584</sup> Studies connect women’s fears of public attack to a deeply ingrained preoccupation with rape.<sup>585</sup> However, history suggests that women’s outsized fears of public spaces and the night is not a random paradox but has been produced, at least in part, by centuries of legal and social norms constructing city spaces as perilous to women.<sup>586</sup>

Late nineteenth- and early twentieth-century discourse established the public sphere as riddled with sexual danger to women—danger they needed to assiduously avoid to protect their virtue or the appearance thereof.<sup>587</sup> Male authorities *told* women that, by venturing out of the sanctity of the marital or family home without a male escort, they placed themselves in a situation

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581. See Erika Harrell, BUREAU OF JUST. STAT., U.S. DEP’T OF JUST., NCJ NO. 239424, VIOLENT VICTIMIZATION COMMITTED BY STRANGERS, 1993-2010, at 2 (2012), <https://perma.cc/ULS4-62YR> (finding that, in 2010, men were victims of stranger violence at nearly twice the rate of women, a smaller gap than in 1993, when men experienced nearly three times the victimization); see also ERICA L. SMITH & ALEXIA D. COOPER, U.S. DEP’T JUST. BUREAU JUST. STAT., NCJ NO. 254862, SELECTED FINDINGS FROM THE FBI’S UNIFORM CRIME REPORTING PROGRAM 5, tbl.5 (2020), <https://perma.cc/5YW3-4GRC> (showing that in 2018, men were 3.5 times more likely than women to be victims of all homicides, stranger and nonstranger, and Black men 19 times more likely to be victims than white women).

582. See Smith & Torstensson, *supra* note 580, at 624-26 (discussing gender differences in crime fears); Lesley Williams Reid & Miriam Konrad, *The Gender Gap in Fear: Assessing the Interactive Effects of Gender and Perceived Risk on Fear of Crime*, 24 SOCIO. SPECTRUM 399, 403 (2004) (noting that “gender has been the most persistent correlate of fear of crime”).

583. See generally JONATHAN SIMON, GOVERNING THROUGH CRIME: HOW THE WAR ON CRIME TRANSFORMED AMERICAN DEMOCRACY AND CREATED A CULTURE OF FEAR (2007) (showing how crime fears and policy became a primary mode of governance in late twentieth-century America); DAVID GARLAND, CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY (2001) (detailing the profound late twentieth-century shift in American policy, public, and intellectual culture).

584. Smith & Torstensson, *supra* note 580, at 608.

585. *Id.* at 608-09.

586. Brookfield, *supra* note 204, at 86-87; *supra* Part I.B.2.b. We might also ask whose fear matters. In the subway story, the answer to women’s fear of harassing men was more police on the scene. Little attention, however, was given to the fact that the mere presence of police can spark terror in and greatly confine the mobility of people with who, by necessity, are on the street. See, e.g., *supra* note 12 and accompanying text (discussing street policing).

587. See *supra* Part I.B.2.b.



where one false move could lead to life-destroying rape or reputation-destroying sexual impropriety.<sup>588</sup> Brookfield remarks that “narratives of urban space encouraged women to fear stranger interactions in public . . . . In newspaper reporting and fictionalized accounts, a lascivious leer could easily turn into an uncouth remark, which in turn could become an unwelcome touch, culminating in *seduction*, destitution, and even murder.”<sup>589</sup> These narratives reinforced the idea that “women always needed male protectors to prevent insult and attack in public.”<sup>590</sup>

These sensibilities about women’s vulnerability to or, alternatively, complicity in unruly public sexuality justified the formal legal exclusion of women from public spaces well into the late twentieth century. Liz Sepper and Deborah Dinner trace the history of laws that prohibited unescorted women from entering places like bars and taverns and from participating in certain clubs and sports teams.<sup>591</sup> The authors write that these prohibitions were grounded in the “long-standing rationales for sex segregation—avoiding illicit sexual relations and protecting women from undisciplined masculinity.”<sup>592</sup> Sepper and Dinner recount:

In 1970, the owner of Danny’s Hideaway in New York explained that a woman could sit at his bar “[o]nly if I know her and she’s waiting for her husband or boy friend”—any other woman might start talking with a man and “then [the liquor commission] can say she’s soliciting.”<sup>593</sup>

Exclusionary rules, the authors observe, “aimed to create ‘sexuality-free zones’ to avoid immoral or unwanted sex.”<sup>594</sup> The potent message was the same as a century earlier: Proper women fear male sexuality, and therefore only naive women who need paternalistic protection or oversexed bad girls boldly go into the sex-infested public space.<sup>595</sup> Fear or impropriety were women’s only public options.

Today, women’s curated fear of male sexuality in public spaces endures, despite massive legal and cultural transformations. The old preoccupation with the transient wink that insults and frightens a proper woman has become a modern preoccupation with the transient wink that reflects patriarchy and triggers trauma. And as the subway sex policing story shows, to this day, there

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588. See *supra* notes 203-04 and accompanying text.

589. Brookfield, *supra* note 204, at 86-87 (emphasis added).

590. *Id.*

591. Sepper & Dinner, *supra* note 203, at 124.

592. *Id.*

593. *Id.* at 120-21 (alterations in original) (quoting Earl Wilson, *Barkeeps Don’t Want Lone Women*, HARTFORD COURANT, May 27, 1970, at 33).

594. *Id.* at 120.

595. See *id.*

is acute governmental and social concern over women's sexual vulnerability on public transportation.

Back in the Progressive Era, amid worries that trapping the genders together in subway cars posed an unacceptable risk of dangerous and disorderly sexuality, municipalities and railway companies experimented with women-only cars.<sup>596</sup> Those experiments failed because, as it turns out, women did not prefer to ride in the gilded cabs.<sup>597</sup> In 1909, the president of the Hudson Tunnel Company ruminated on the failure of his company's effort: "I couldn't begin to explain why the women don't want those exclusive cars. All I know is that they didn't use them after they got them."<sup>598</sup> That was an understatement. According to the *Appeal* newspaper:

Inquiries among the employes [sic] of the railroad revealed the fact that trainmen have had many altercations with irate women who preferred to stand up and be jostled about in a car full of men rather than step into the special car adjoining, where there were plenty of seats. . . . "It is just like the Jim Crow legislation in the south, and I won't ride in your old car!" one woman snapped at the guard of a tunnel train the other day.<sup>599</sup>

Florence Kelly, general secretary of the National Consumers League, echoed those sentiments, stating, "Why, I think it is perfect nonsense. The last thing in the world women want is to be segregated."<sup>600</sup>

Fast-forward to 2017. Detective Sean Conway was on a Boston subway platform when he apparently saw Lawrence Maguire preparing to urinate and trying to get the attention of women sitting on a nearby bench.<sup>601</sup> Conway arrested Maguire, who was later convicted of open and gross lewdness and lascivious behavior.<sup>602</sup> That offense, which carries a sentence of up to three years, requires that the victim was "shocked" or "alarmed" by the lewd conduct.<sup>603</sup> Yet the sole evidence of shock and alarm in the case was Detective Conway's testimony that *he* was alarmed by Maguire.<sup>604</sup> Tellingly, "[t]he detective's testimony was that he was 'disgusted' after viewing the defendant's exposed penis, *not for himself*, but rather out of 'concern' for the women seated on

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596. See *Club Women Oppose Separate Car Plan*, N.Y. TIMES, Mar. 19, 1909, at 9; "*Jane Crow*" *Cars Fail to Attract*, APPEAL (St. Paul, Minn.), July 31, 1909, at 3; see also Brookfield, *supra* note 204, at 75.

597. See *Jane Crow*, *supra* note 596; *No Cars for Women Only: Service Board Votes Two to One Not to Order Them for the Subway*, N.Y. TIMES, Aug. 4, 1909, at 2.

598. *Jane Crow*, *supra* note 596, at 3.

599. *Id.*

600. *Club Women*, *supra* note 596, at 9.

601. *Commonwealth v. Maguire*, 65 N.E.3d 1160, 1162 (2017).

602. *Id.* at 1161-62.

603. *Id.* at 1163.

604. *Id.* at 1164.

the bench.”<sup>605</sup> The unidentified women had apparently just stayed on the bench, where they may or may not have seen or cared about Maguire’s behavior.<sup>606</sup>

On appeal, the Supreme Judicial Court of Massachusetts, while noting the “sincerity of the detective’s concern,” held that there was “nothing to suggest that the women themselves experienced any strong negative emotion” and reversed the conviction.<sup>607</sup> Yet Conway’s testimony was enough to convict Maguire of the lesser charge of “indecent exposure” under Massachusetts’s “Crimes Against Chastity, Morality, Decency, and Good Order” law.<sup>608</sup> That law, a legacy of the old *Papachristou*-style vagrancy code, criminalizes “[c]ommon night walkers, common street walkers, both male and female, persons who with offensive and disorderly acts or language accost or annoy another person, lewd, wanton and lascivious persons in speech or behavior, keepers of noisy and disorderly houses, and persons guilty of indecent exposure.”<sup>609</sup>

In the New York City of 2019, concerns about women’s vulnerability to sexual misconduct did not lead to a program of gender-exclusive cars as it did a century before. Nevertheless, state and city officials did something equally old-school—they provided male escorts. By way of the police surge, New York officials assured women that they could easily call upon one of the many armed, mostly male, police protectors who, like Detective Conway, would be patrolling the subway system on their behalf.<sup>610</sup> A half-century after equal-rights feminists successfully battled accommodation laws that “construct[ed] men as sexual predators and women as, alternatively, sexual threats or sexual prey,” anti-hassling activists and concerned lawmakers apparently abandoned the principle that “[s]ex equality in public accommodations required independence from attachment to men.”<sup>611</sup>

## Conclusion

Sex exceptionalism has persisted through centuries of changing cultural mores, social arrangements, and legal regimes. It still feels like blasphemy to question the proposition that sexual injury is uniquely devastating, especially to women. But as I have shown, despite its status as canonical truth, the sex-is-different presumption has a past: It is a product of traceable political and socio-cultural forces. The early criminal law treated sex as particularly pernicious

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605. *Id.* (emphasis added).

606. *Id.*

607. *Id.* at 1164-65.

608. *Id.* at 1163, 1165; MASS. GEN. LAWS ch. 272 (2022).

609. MASS. GEN. LAWS ch. 272, § 53(a) (2022).

610. *Supra* notes 494-500, 602-09 and accompanying text.

611. Sepper & Dinner, *supra* note 203, at 115.

because of ancient sexist, moralist, and racist norms about appropriate sexuality, not because of modern concerns over equality and bodily integrity. The state taking sex crime “seriously” had its historical benefits, but it also devastated many vulnerable groups, including women. Indeed, by the 1960s, liberal reformers, feminists among them, saw sex-crime law as outmoded, moralistic, homophobic, and reflective of an antiquated view of women’s sexuality. They sought to make sex crimes more like their nonsexual analogues. Nevertheless, sex exceptionalism survived and thrived on the right and left, and today it continues to profoundly influence law, theory, and, practice.

This is a critical moment in the development of sex-crime law. Popular social movements and high-profile cases have pushed to the fore of public discussion questions of how to understand sexual wrongdoing and whether the criminal law should remain the mechanism primarily responsible for dictating sexual conduct rules. Sex exceptionalism frames the discussion in ways that cabin the potential for addressing sexual violence without augmenting the violence of the penal state. When post-#MeToo calls for zero tolerance run up against post-Floyd calls for radically reducing policing and imprisonment, commentators describe these clashes as zero-sum—gender equality at the expense of racial and social justice, and vice versa. Progressives, especially feminists, experience them as painful dilemmas. This no-win framing derives from an exceptionalist presumption that sexual harms are uniquely grave and for them, unlike many other harms, justice *requires* harsh carceral punishments. At a time when anti-carceral and abolitionist sentiments are becoming more common, raising scholars’ and advocates’ awareness about the vagaries of sex exceptionalism creates new possibilities for collaborative reform that secures sexual *and* social justice.