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WHAT WE ARE OWED: THE POSSIBILITIES OF A CIVIL LAW RESPONSE TO SEXUAL
INJURIES

A thesis presented
by
NATHALIE E. MARX

SUBMITTED TO SCRIPPS COLLEGE IN PARTIAL FULFILLMENT OF
THE DEGREE OF BACHELOR OF ARTS

PROFESSOR JENNIFER GROSCUP
PROFESSOR PAUL HURLEY

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This project was developed because of, and for, my friends. It is with the vulnerability and trust they granted me that I know their stories. And it is with the support and love they gave when I shared my own that allow me to write this all down. What a beautiful thing to create restoration for each other.

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Abstract: Drawing from philosophical, feminist, and legal frameworks, this thesis aims to reconceptualize our understanding of sexual violations. I suggest that rape and other sexual violations produce injuries unique from other forms of physical violence that must be addressed as an extension of a culture which objectifies, restricts the agency of, and shames women. It is argued that through the ability for survivors to bring a civil claim of negligence against their perpetrators following a sexual injury, pathways for restorative healing and cultural transformation are opened, and a more responsive legal standard for fault is created. This paper responds to theories of how gendered power imbalances are produced and sustained, and reasons that public standards of responsibility must be created as a response to these inequalities being reproduced in private, unprotected spaces as sexual violations.

Keywords: civil law, legal negligence, sexual assault, objectification, feminist legal theory

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Prologue

A young girl plays in a lush and blooming meadow picking roses, violets, and irises with her friends. She is called Kore, the name of a maiden, a virgin. Kore is with her friends, other maidens, when she finds a flower—a narcissus—that smells sweet and shines bright white. It lures her to near it. As Kore reaches her hands out to hold the blossom, the Earth cracks open and Hades appears in his golden chariot to snatch Kore from her playmates, the meadow, and the flower that was hers to pick. She cries out to her father, Zeus, who is the brother of Hades. He does not hear her as she is taken to the underground. But the sounds of her screams would not bother him, they would only inform him that his plan to help Hades abduct Kore has succeeded. Demeter, Kore's mother, learns that her daughter has been taken and she tries to find her, but it is too late. Sorrow fills Demeter's heart and she walks the Earth searching for her daughter, grieving her disappearance as though she were dead. The Earth becomes barren, for the goddess of agriculture no longer tends to the gardens as she laments her young Kore.

In the underworld, Kore weeps, missing her mother and her friends and the Earth above. She does not speak to Hades, and she refuses to eat. She also loses something else. Her virginity “is snatched away by the light” (Homeric Hymn to Demeter). The name Kore no longer describes the girl; she is now Persephone. On Earth, famine threatens human life and Zeus attempts to persuade Demeter to stop her anger. Unable, he sends Hermes to the underworld to tell Hades to return Persephone. Before she leaves, Hades offers her twelve pomegranate seeds, urging her to eat. The seeds smell sweet—maybe a reminder of her narcissus flower—and Persephone eats six of them, unaware that Hermes has come to retrieve her, believing she will never be reunited with the Earth and with her mother. Persephone does not know that eating what was offered to her by Hades has tied her to him forever. However, Zeus knows that if

Persephone is to stay underground, life on Earth is threatened; Demeter will never stop mourning her daughter. And so, Zeus commands that Persephone be released, compromising with Hades that she will return to the underworld for six months of every year; one month for each pomegranate seed she ate.

When she returns to Earth, she is embraced by Demeter and the other goddesses, and the Earth blooms again. But for six months every year when Persephone returns to the underworld and she becomes the property of Hades, the Earth becomes infertile, for Demeter too is at a loss. What was taken from Persephone will not be restored. No matter how many flowers she picks during the spring and summer, winter arrives each year.

Introduction

This project is an analysis of what is lost when our bodies are no longer treated as our own. It offers a reconceptualization of what actions are sexually violating and what we ought to be free from and free to do, by examining the injuries that are sustained when the rights to our bodies, agency, and sexuality are ignored. I suggest that it is these injuries which should guide our legal principles and provide the public with standards to be met when in private. Through an analysis of our culture that objectifies, restricts, and shames women, these suggestions are grounded in a belief that sexual violations remain a gendered issue and should be legally addressed as such. The civil legal solution I offer is not comprehensive, but rather an imagination of one path that could be available to survivors who deserve restoration. Before beginning, I want to provide a few disclaimers.

In this paper I focus primarily on the relationships and interactions between cisgender men and women, as I argue that rapes are the final—and most violent—form of an oppression against women which pervades public spaces and institutions, as well as private spaces. Part of

the project is to address the non-physical injuries a victim of a sexual violation sustains, as those are often unaddressed. To understand how the victim is harmed, I examine what lies between rape and consensual penetration. However, I acknowledge that penetration can be found in all forms of sex and is not limited to heterosexual couples. To rape somebody is to exert power over their bodies, their agency, and their personhood. Power differences exist everywhere—between races, genders, economic classes, abilities. While much of my analysis is conceived from the dynamics between cisgender men and women, I hope the broader arguments about the injuries of sexual violations, cultures of social domination, and legal solutions evade a strict reliance on gender, sexual orientation, or sexual experiences. Anyone can be victimized. I hope this paper speaks authentically to any survivor who happens to read it.

I draw from empirical data but also from my own experiences as well as the stories that have been shared with me. Truthfully, much of the theory is grounded in anecdotal “data.” I would urge the reader to not consider this as less reliable or not trustworthy, but instead perhaps, even more truthful, as empirical data about the prevalence of rape and sexual injuries cannot capture what is discussed in the intimate spaces that survivors create to be heard, resourced, and supported. By weaving more personal evidence into my analysis, I believe the theory becomes more grounded in our material reality, as opposed to less. Linda Martín Alcoff dedicates her recent work *Rape and Resistance* “to those who know.” Those who know are not always those who are known; it would be a noncomprehensive analysis to exclude the unknown from this project.

Lastly, I want to make a disclaimer about my use of the label “victim.” I use the word victim, intentionally, to describe people who have had experiences which meet the legal definitions of rape as well as people who have been violated—and sustained sexual injuries—but

presently would not be identified as a “victim” in a court of law. I intend for my analysis to show that those who are wrongfully sexually injured ought to be legal victims, and my choice in language reflects this belief. There are times when it feels more correct or useful to use the word “survivor,” and as you will see, I do so. I do not intend to label anyone who has experienced sexual violation in ways they do not identify. Each use of the word “victim” could be replaced with the word “survivor,” and the paper would have a nearly identical meaning, non-legally.

Problematizing the Rape and Sex Binary

We do not have the words to accurately describe the nuanced spectrum of sexual violence that exists. This is one of the reasons that many of us are sexually injured, yet do not share our experiences with friends, family, or legal authorities; and why we are unable to quantify or comprehend the prevalence of sexual violence. I have lost count of the number of times a friend has told me they had a sexual interaction with someone, and it felt “gross” or “bad”—and that they took a shower after—and then conclude, “but it wasn’t like I was raped or anything.” Despite an intuitive knowledge that our bodies, our selves, have been violated or used or injured, our repertoire of available language fails to accurately describe what has happened, thus limiting our ability to effectively communicate the wrongs to social networks, as well as hindering the use of legal resources.

The linguistic problem is an epistemic problem. A body of knowledge—knowledge of a wrongdoing—exists among those who are victims of a violence which falls between the continuum of sex and rape, yet this knowledge has been repressed. The knowledge is legally repressed, as there is often no avenue of obtaining justice for victims of the most violent forms of “forcible rape,” let alone people who have been sexually injured but are either hesitant or feel it is inauthentic to describe themselves as rape victims. And the knowledge is culturally repressed,

as we are often told that had something been wrong—truly—we would have left, we would have resisted, we would have reported. There is a collective knowledge of a wrongness of sexual encounters beyond “forcible rape,” yet it has no language, and consequentially, no way to be heard.

Feminist epistemologist Linda Martín Alcoff suggests that the philosophical and theoretical project of better understanding these nuances must be grounded in the stories and testimonies of survivors. By learning from human experiences, our understandings of sexual violence “move away from simplistic binary categories” of rape and sex and become “*complexified*” (Alcoff 2018, 12). Alcoff broadens the framework of sexual experiences that require our attention from *sexual violence* to *sexual violation* to capture a sex that is not necessarily forceful, or violent, but is “a violation of sexual agency, of subjectivity, of our will” (12). I borrow Alcoff’s concept of *sexual violations* to claim that sexually violating experiences ought to be legally recognized as wrong. I further her argument by formulating a framework that guide our understanding of what sexual behaviors are violating.

The Uniqueness of Rape as a Violent Offense

Complexifying the categories of rape and sex is important if we aim to comprehensively analyze the behaviors that are sexual violations. Simultaneously, we must also distinguish the crime of rape from the act of sex to understand what *wrongs* a victim has experienced when they are raped. By muddying the acts of rape and sex *too* much, as Andrea Dworkin does when she states, “penetrative intercourse is, by its nature, violent,” we risk stunting our imagination of a reality in which sex is only experienced as enjoyable, consensual, and empowering—as it should be (Dworkin, 2000). Thus, it is imperative that the offense of rape is dissected. In its most biological, least symbolic, unemotional form, rape is a crime which physically mirrors an act that

is not a crime—sex. Dworkin calls heterosexual penetration an “occupation” and a violation “to the boundaries of [a woman’s] body” (Dworkin 1987, 154). Perhaps even in its most consensual form, heterosexual intercourse could be understood as invasive, yet its inherent physical attributes are not to be conflated with a moral wrong. As we will discover, the wrongs found between the binaries of consensual heterosexual intercourse and rape allow us to also understand what wrongs are committed during sexual violations of all complexities.

Some might think of rape as a physical assault, akin to being punched in the face. There are a couple of reasons why the wrong of rape is not fully captured by this comparison. For one, “few women would agree that being raped is essentially equivalent to being hit in the face” (Cahill 2001, 3). Sexual violations produce harms far beyond their physical injuries. This classification also fails to capture what is unique about the crime of rape. There are few times when someone desires to be punched in the face. Even boxers and MMA fighters try to *not* get punched in the face. There are times, of course, when people want to have sex. If we think of rape as only a physical assault, how is a survivor to prove that what was fully consented to one night, was a “physical assault” the following night? How can she explain what was so *wrong* about the second night without identifying the wrongs of the crime that escape the bounds of a physical violation? Suggesting the wrong of rape is analogous to a physical assault is insufficient when attempting to distinguish between sex which is violating, and sex which is not. It also fails to capture the full impact of such violation on a survivor.

Rape might be thought of as wrong because it is a violation of property and privacy. Imagine that your friend, who you have invited over to your house several times in the past, enters your home when you are out running errands. The crime—one which violates your property, personal space, perhaps your sense of safety—is slightly analogous to the crime of

rape, as sometimes it is okay for your friend to enter your home, but without your consent, it becomes a wrong. Your home, although maybe thought of as an extension of your being and identity, is not *you*. And while the experience of a home invasion might be traumatic, its gravity pales in comparison to an invasion of the body. Describing rape as a violation of privacy or “property,” even one of a physical nature, once again, does not fully capture its wrongness.

We might think about what Garner and Shute describe as “pure rape,” or harmless rape, when attempting to classify the *wrong* of the crime of rape (Garner and Shute, 2000). The authors challenge Mills’ Harm Principle that the only offenses ought to be regulated are ones which cause harm and propose a hypothetical situation where a rapist does no harm to his victim. During a “harmless” rape, a woman is asleep, her rapist wears a condom, she sustains no physical injuries, and she never finds out about the rape. In addition, the rapist tells no one and is hit by a bus on the way home, killing him, such that it is impossible for the woman or anyone else to find out what happened—any possibility of social stigma or public humiliation attached to the victim has disappeared. Despite the lack of *harm*, as she sustained no physical injuries and her sense of safety, security, and self were not threatened, the rape is still a deep and fundamental *wrong*.

The wrong of a “pure rape” comes from the Kantian philosophy that “there is no value in objects unless there is some more ultimate value in its subjects” (Garner and Shute 2000, 19). “Harmless” rape is wrong not just because the victim’s property (her body) was used by someone who was not her, or that she had no way of consenting to its use, but instead that the rapist treated his victim as if the woman’s personal worth was only as much as she was useful to fulfill his own desired outcome. The victim is treated as a “mere repository of use-value” (20).

Although she was not harmed, she becomes wrongly objectified and dehumanized, regardless of her knowledge of this becoming.

This conclusion appears to make clear how rape and sex, as beyond the physical injuries, breaches of privacy, and effects of trauma, are fundamentally and morally distinct. Kant, however, does not provide an ethical distinction between “objectification of subjects either by those subjects or by other subjects” (22). In fact, he wrote specifically on sexual objectification and sex outside of marriage, stating that “sexual love makes of the loved person an Object of appetite; as soon as that appetite has been stilled, the person is cast aside as one casts away a lemon which has been sucked dry... because as an Object of appetite for another a person becomes a thing and can be treated and used as such by every one” (Kant Lectures on Ethics, 163). For Kant, self-abuse and self-use are deontologically unethical as is the use and abuse of one subject by another. Subsequently, we might arrive back to a “Dworkinian” argument that “whatever intercourse is, it is not freedom; and if it cannot exist without objectification, it never will be” (Dworkin 1987, 169). Consensual or not, during intercourse a person is being *used*, despite the reciprocity and consent to their persons transforming into a use-value “object.” The “use” of one’s body during sex is not categorically immoral, however. When Kant writes of someone as “an Object of appetite,” he is speaking of sex outside marriage. His views here are antiquated and, ultimately, not so feminist. I suggest that instead we appropriate Kant’s assertion that to use someone as a *means* is ethically distinct than using someone as a *mere means*, to understand of the moral differences between sex and rape. When I ask my friend to drive me to the airport, I use them as a means to my own end. However, should I only view my friend’s worth to the extent that they can successfully help me make my flight on time, I use them as *merely* a means. I disregard their inherent value as a person (Kant, 1785). It is partly through

Kant that we understand why the consensual “use” of a person during sex is distinct from a person only being used for their “value” during a “pure rape.”

However, while the hypothetical of a “harmless rape” is useful in understanding why the act of rape must be thought of as a wrong of inhumanity—in itself—as opposed to a cumulation of crimes of physical assault and violation of property and privacy, it fails to encapsulate the effects that most rapes and sexual offenses have. While rape is wrong beyond its harms, as Garner and Shute show, is it not rape’s injuries which inform the victim they were wronged? I am not in agreement here with Mill’s Harm Principle, as harmless wrongs most certainly require legal and cultural denouncement, but assert that we build a framework of wrongs that is *primarily* embedded in the material experiences of survivors instead of the morality of the violator.

Thus, I offer two ways we reconceptualize the distinctions between wrongful intercourse and consensual sex. First, building from Alcoff’s framework of complexifying sexual violations, I suggest that our perception of the *injuries* a victim sustains from a sexual violation become more nuanced. This moves us away from a model of crime classification that identifies wrongs from the standards of care and duty created by the legal and political actors who hold hegemonic influence, and instead grounds the immorality of crime from the tangible and experienced injuries a victim sustains. This does not erase the inherent wrongness of a rape that results in no conscious injury, but better addresses the present complexity of harms stemming from rape. This also helps to give us language that explains our knowledge—knowledge which has been oppressed—that there are many acts which fall of a wide spectrum of sexual violations which are wrong.

Second, sexual wrongs must be analyzed from within the social contexts where they were incurred. Many feminist scholars have argued that rape is about power, not sex (Browmiller 1975). The distinction, however, seems unproductive. Sex can be used as a tool in private settings to compound and embody the power differences visible in public spheres. Rape then, and the acts which exist between rape and consensual intercourse, are as much about sex as they are about power—the two cannot become unattached. When we think about what constitutes meaningful and true consent to sex, we are not just left with the simplistic phrase “yes means yes,” but instead are required to evaluate the conditions under which consent was given—or not given—and the ways that verbal consent alone might not be a meaningful legal or cultural standard to evaluate sexual violations. I suggest that the distinction between wrongful intercourse and consensual sex is not only dictated by consent, but also comes from an analysis of the social and external forces which produce unequal power dynamics between persons.

Sexual Injuries

To comprehend how sexual violations differ from consensual sex, I first examine the unique injuries of sexual violations. While the three injuries I describe—objectification, entrapment, and “dirtying”—come from the testimonies and stories of survivors, they in no way represent a comprehensive list of the broad scope of the harms of sexual violation. As the physical acts of sex and rape—and everything in between—can be physically “the same,” and the intention of the perpetrator does not preclude sex from being a violation, it is the testimonies of survivors which must guide our parameters of what is just and unjust sex. These three sexual injuries result from a person being treated as though they do not possess inherent worth, a person who has lost the right to their bodily agency, and a person who has been invaded physically and emotionally. These injuries are produced when a person is used as merely a means.

i. Person to Object

Garner and Shute identify that a “harmless rape” is still a fundamental wrong. A person’s body becomes a vessel for another’s purposes and the victim becomes, literally, an object for their rapist. During an interview, a woman, Helen, shares:

I feel like if my husband tells me that I am attractive or that I'm looking good he's talking about all of me. If he tells me I have nice hips I feel like from here to here and from here to here [DEMONSTRATING] is ugly, but there's one little strip that's nice, and, you know, why is it nice? It's nice because of sex, and that's not all I am, and that's not primarily, what I am, and that's not even among the most important things that I am. [STARTS SOBBING] That may very well be connected [to the rape]...I mean one time my father was making a joke [about how rape victims were desirable], and I was trying to tell him that I didn't think that was a particularly nice thing to do, and I think the phrase that I used was something like, 'You know, you seem to think that it's a compliment, but what it is, is somebody using you like a piece of furniture'. And I think that somebody looking at you as a walking crotch is the same thing (Lebowitz and Roth 1994, 370).

Helen distinguishes between the feeling of her husband telling her she looks nice, and the feeling of receiving a “compliment” about her hips, which creates a divide between her personhood and her body; her body becomes viewed as an object for sexual use when parts of it become unattached from her self by the viewer. The distinction between the way these two comments made her *feel* provides evidence for why we should hesitate to collapse sexual desire and sexual objectification into the same category of wrongful use. Helen goes on to connect times she has felt objectified to the experience of her own rape and explains the feeling of being used “like a piece of furniture” or viewed as a “walking crotch.”

The trauma of becoming an object apart from one’s own personhood can provide one explanation as to why some rape victims dissociate during the crime as “through internalizing the gaze of the objectifying other, women come to see their bodies as object-like and inert and so

distance themselves—as subjects—from their bodies” (Kelland 2011, 181). One woman explained:

I left my body at that point. I was over next to the bed, watching this happen... I dissociated from the helplessness. I was standing next to me and there was just this shell on the bed... When I re-picture the room, I don't picture it from the bed. I picture it from the side of the bed. That's where I was watching from. (Herman, 1992).

In a study with 253 rape survivors, psychologist Patricia D. Rozee finds that “one of the most poignant forms of cognitive resistance involved various forms of *detachment*” as a method to cognitively escape the rape. This also explains why a victim’s “resistance” during a rape is not an accurate measure of its unwantedness or wrongness. The inability to “resist” should not be used as proof that the rape was consensual, but instead evidence that a sexual injury of—literal—objectification and dehumanization might have been sustained.

Gavey (2005) dedicates a chapter in *Just Sex?* to analyzing the interviews from women who do not identify as rape victims but include details of coercion, pressure, and obligation in the retelling of their encounters. The sex was not just unwanted “within some mutually recognized ethic of reciprocity and giving, and entered into willingly in a way that doesn't compromise strong desires in the other direction,” but agreed upon when the “women didn't feel like they had a choice” (128). One woman talks of how she “detested” having sex with someone who had been drinking. When she went on weekend trips with her romantic partner, he drank, and became his most insistent. “Because [they] didn't have many weekends together [she] used to go along with it” despite her strong feelings of “revolt.” She explains:

I just used to sort of let him get on with it. But I [laughing] can't say that I was (pause), you know, a, a full participant (132).

Gavey explains that for the women she interviewed who described these experiences of unwanted sex, “their bodies / their selves became objectified as they acted – under a sense of obligation – to be the body / the woman that they understood their partner wanted and expected” (132).

These examples illustrate objectification as one of the *injuries* of sexual violation, regardless of whether the experiences were labeled as rape or were viewed instead as only unwanted. While the sexual violations might occupy varied places on a spectrum which spans from rape to sex, the description of the *injury* of feeling like an “object” remained static for the women who tell their stories of sexual violation in these interviews.

ii. Autonomy to Entrapment

Most rapes do not involve physical force or the use of a weapon (Black et. al. 2011) however I still want to acknowledge that many survivors are exposed to physical violence, violent threats, and the use of weapons during their rapes. Rapes involving physical violence and threats embodies most clearly and horrifically the agency stolen from rape victims and the loss of their most innate human rights: freedom to independence and freedom from interference (Ripstein 2006). Each of us have the right to use our own means to pursue our own ends without the interference of others. As such we have the right to *choose* when we want to have sex and the right to choose when we don’t want to have sex. Rape accompanied by physical force and threat is a distinctly evil and egregious injury to our freedoms of personal agency.

While the women Gavey interviewed were not threatened or physically forced, they described transforming themselves into the sexual objects they felt they had no choice but to be. Despite a lack of physical threat, the coercion and insistence that their bodies be used for their partners’ desires resulted in the eventual concession to intercourse:

ANN: Sometimes there is giving of, of your own accord and sometimes there is giving because you feel you have to.

NICOLA: Yeah, so that's a distinction you'd make, too, between the giving thing.

ANN: Mm, giving spontaneously and giving begrudgingly.

Ann's articulation here of the difference between giving "of your own accord" as opposed to giving "because you feel you have to" is yet another example of a cognizant capacity to distinguish and *know*—from an internal epistemic source—when sex is freely given to a partner and when it is "given" without agency or the availability of another option. This phenomenon is captured by Gavey's analysis that some of the women she interviewed described a process of "consenting to (avoid) rape." Her respondent Ann explained giving consent "because there is always that fear that you could say no and it would carry on anyway, and, and being physically less, and then you'd be raped sort of thing, and then it would be terrible" (Gavey 2005, 147). The choice, as articulated here, is not whether to have sex, but instead whether to consent to it happening, as the outcome of the situation is appears to be—or is—predetermined.

The necessity for all participants of a sexual experience to possess agency has been recently declared through strong messaging about the importance of consent during sex, and the shift from a lack of consent being only defined as the existence of a "no" to the presence of consent being defined as the clear existence of a "yes." For example, Planned Parenthood created the acronym "FRIES" to define consent as: freely given, retractable, informed, enthusiastic, and specific. Here, what is required for someone to have "good" sex—without injury—is reflected in a detailed description of what consent, or agency, actually entails. The problem, however, is that this type of consent is practiced too infrequently.

I think of my friend who agreed to vaginal penetration and was heavily pressured, mid-act, to have anal sex and gave in despite clearly indicating she did not want it. I think of my friend who was pressured into sex so much by an older, more experienced boyfriend; it was a “big deal” when she was able to have sex again for the first time two years after they broke up. I think of the guy from my high school who offered to give younger girls a ride home, only to then ask for sex/blowjobs bringing them home. I think of my friend who said she was too drunk to have sex with the guy she was hooking up with—but agreed to other things—and he listened to her until he decided he wanted to finish. I think of my friend who was told to perform oral sex in the middle of having penetrative sex so that the guy had an excuse to take the condom off and could then have unprotected sex with her as he originally wanted. Turned out he knew he had an STI.

Entrapment—or loss of agency—is an injury unique to those who experience sex which is violating, as opposed to sex which is truly consensual and free. During a violation, victims lose control of how their bodies are used. This is one of the reasons why regaining control and decision-making power during the subsequent legal and communal processes that follow a violation is necessary for survivors (Munro-Kramer et. al., 2017; Konradi, 1997). During an interview for a study of rape survivors, one woman said “it made me feel helpless. I don’t ever want to feel helpless again” (Bletzer and Koss 2006, 16). Loss of agency is an injury itself; it is also because of this entrapment through which victims become objectified, violated, and even further injured.

iii. Clean to Dirty

I was talking with my mom about rape and the concept of cleanliness, and she said so nonchalantly, almost as if it was an obvious enough universal truth that it needed no discussion:

“Well what do you want to do after being raped? Take a shower.” It was the first thing I did before going to my friend’s house.

Feeling dirty following a sexual violation ought not be conflated with the damaging idea that women who have had sex are less pure than they previously were—a concept which also enforces the idea that it is less wrong to rape someone who is sexually active as they have already been “dirtied” or “ruined.” In Jessica Valenti’s book, *The Purity Myth: How America’s Obsession with Virginity is Hurting Young Women*, she describes a popular exercise used during abstinence-only curriculum (2010). A teacher holds up a piece of scotch tape to show its clarity and then sticks it on a boy’s arm. She then holds the tape up to show how it has collected the particles from his body. And the tape is no longer as sticky; unable to bond again with the boy. Purity culture teaches men that women who have had sex are already ruined.

As one woman shared during an interview, her gynecologist was “very cold...it was like, I was not a virgin and so what if you raped?” (Lebowitz and Roth 1994). The transformation of being dirtied during a sexual violation is a long-lasting injury documented by numerous survivors, sometimes heightened by social stigmas about the purity of an unsexed body. In the following analysis, being “dirtied” is conceptualized as an injury itself rather than a causation of sexual violence.

Testimonies of survivors feeling dirty following their violation exemplifies the harm done to the soul, or to a person’s energy, or to whatever exists intangibly beyond the physical body. A woman, Claire, who was raped twice during her puberty said that “after that [two rapes] I just felt dirty, dirty all the time” (Piran 2016). And in a study comparing the responses between survivors of Cheyenne, Mexican American, and Anglo ethnicities, “*dirty* was a metaphor used consistently by women of all three groups.” Some of the women shared:

“Then when I got pregnant out of it, it just made me feel dirty.”
“I just felt dirty and degraded. I wanted to hide so nobody could see me.”
“I felt low, I felt raunchy.”
“I felt sick, dirty. I wanted to kill myself.”
“It made me feel like I was dirty, nasty...Made me feel real dirty.” (Bletzer and Koss, 2006).

Another survivor shared: “I shower two or three times a day, but I am never clean” (Russell 1997, page 107). Some feminist scholars understand the phenomenon of feeling “dirty” after a sexual assault through the theory of the “transmission of affect” which supposes that “the emotions and energies of one person can enter directly into another” (Brennan, 1993; Caputi, 2003). In Nancy Venable Raine’s book documenting her survival of her rape at knife-point, she talks about how in the emergency room the “scent of the rapist’s rage and hatred was on [her] somehow, and the nurses sensed it” (1998, 25). During a rape, the hostile and impure emotions of the perpetrator can be transmitted to the victim who forcibly receives something which is intangible, yet almost impossible to dissolve. One convicted rapist explained in an interview:

At the time of raping somebody, you feel like that is all it is, is sex. . . Afterwards, it feels like you’re taking your anger out on them, that you’ve directed all the problems and what’s happening to you into sex [...]. (Levine & Koenig, 1980, p. 42).

Another convicted rapist explained that “the rape was for revenge. I didn’t have an orgasm. She was there to get my hostile feelings off on.” This rapist had committed his crime following a violent fight with his wife that led him to drive around “thinking about hurting someone” (Scully and Marolla, 1985). For these two men, their crime was a way to release their own violent feelings onto another person *through* “sex”—it was not a way to obtain sexual pleasure.

During the first season of *Euphoria* there is a particularly upsetting scene between Cassie and her boyfriend, McKay. Cassie and McKay begin to have sex but are then interrupted by McKay's football teammates, who come into his room—masked and in their underwear. They throw him on the ground and yell obscenities at him, while some of the men get on top of him. It is unclear if he is raped, but at the very least he is sexually assaulted. McKay goes to the bathroom where he cries. Suddenly he looks in the mirror, pulls himself together, and walks back to the bedroom where he tells Cassie to “take [her] shirt off.” And then:

CASSIE: I don't know McKay, like eight guys came in here, and that was really fucked up and weird.

MCKAY: So, do you not want to have sex anymore?

CASSIE: I mean I guess...[and after sensing his dissatisfaction] of course...

MCKAY: Well then get undressed.

Cassie gingerly takes her shirt off as McKay stands over her. He suddenly flips her around, gets hard (rejecting her offer to “help him,” leaving the interaction entirely impersonal), shoves her onto her stomach, and proceeds to forcefully penetrate her. She is visibly uncomfortable, perhaps even in pain, and is seen crying in the bathroom after the “sex” ends, wiping cum off her back. It should be noted that this episode opens with a scene between a younger McKay and his father—also his football coach—talking at the dinner table after McKay tackled a white boy for calling him the n-word. When he asks his dad how he should have reacted, his dad responds: “by taking everything you feel, all your frustrations, your anger, your rage, bottle it up, take your position, and when that snap comes, you better explode.” It's hard to believe that the juxtaposition of these two scenes was an accident.

I googled “cassie and mckay rape,” and almost all the results were think-pieces about whether McKay was raped and how the actor, Algee Smith, felt shooting the scene. The scenes provided a display of toxic masculinity and male sexual assault—and the intersections of these

phenomena with the unique pressures of being a Black man—subjects all of which deserve think-pieces and discussions of their own, however, I was surprised that many of the articles left out entirely what happened to Cassie following McKay’s own assault.

I did find one Reddit thread (posted in 2020) where the original poster explained that their roommate said McKay raped Cassie, although they “disagreed with her, as she verbally consented.” Below are four out of the eight responses:

“It was one of those moments where it seemed like she had sex with him for his benefit despite it not being romantic like it was prior. **Cassie seems to understand her sexuality so for her to have sex without needing to be in the mood doesn't seem to faze her.**” (21 upvotes)

“I mean he said do you still want to have sex and she said yes. [...] When he was trying to get hard she asked if he wanted to put it in her mouth. **So I would say that was as consensual as it can get although she was uncomfortable with it** during the act but mostly because he was kind of an asshole about it.” (24 upvotes)

“[...] it wasn't exactly rape, more floating along the lines of abuse if anything.” (34 upvotes)

“I'd say the sex was consensual between the both of them. But how McKay went about pushing her into the bed wasn't cool..... I get that non verbal cues are a thing, but not everyone picks up on them, **that's why u gotta voice Ur objections sometimes.**” (10 upvotes)

Despite the respondents clearly understanding that she “consented” *only* for his benefit, was uncomfortable, and gave non-verbal cues that she did not want to have sex anymore (although she was also verbally hesitant), her final agreement was enough for the violent act to be viewed as consensual. The anger that McKay transmitted through his penetration of her was not seen by these Redditors as an injury to her personhood. Upsetting also in these responses is the idea that because Cassie is a girl who “understand[s] her sexuality” the sex didn’t “seem to faze her.” Perhaps the previous sexual objectification of Cassie made this commenter less likely

to view this act as violent, or violating, because she was already considered as a sexual object, impure, or “dirty.”

The prevalence of the injury of being “dirtied” might help to explain why victims of sexual violation often feel shame; for example, a 2007 study found that seventy-five percent of women reported they felt ashamed that they were sexually assaulted (Vidal and Petrak, 2007). One of my friends recently told me how she was having difficulty validating to herself that what happened to her was as bad as it felt. Her boyfriend (now ex-boyfriend) of two years raped her. In the moment, she froze, not knowing what to do—I imagine just hoping it would stop. When he got off her, he asked, “Do you still love me even though I have sex with you when you say no?” When she first disclosed this to me, I remember we discussed the difficulty in not blaming ourselves for the ways we have been hurt by the people who are supposed to care for us. You see, she was told by her perpetrator that the “sex” he had with her was not love. Her body, an object, for his own ends. And yet, she still has difficulty affirming to herself how badly she was wronged.

For victims of rape and other sexual violations, to feel ashamed might imply that we believe it could have been prevented. That maybe we had agency when, in reality, we did not. These three injuries do not exist distinct from each other, but compound and complexify—they are difficult to describe. One of the ways I suggest our injuries are affirmed is by looking at the world around, which also objectifies us, takes our agency, and makes us feel ashamed.

Cultural Injuries

“It is a fine spring day, and with an utter lack of self-consciousness, I am bouncing down the street. Suddenly I hear men’s voices. Catcalls and whistles fill the air. These noises are clearly sexual in intent and they are meant for me... The body which only moments before I had inhabited with such ease now floods my consciousness. I have been made into an object... But I

must be *made* to know that I am a ‘nice piece of ass.’ I must be made to see myself as they see me. There is an element of compulsion in this encounter, in this being-made-to-be-aware of one’s own flesh...What I describe seems less the spontaneous expression of a healthy eroticism than a ritual subjugation.” – Sandra Bartkey

In a roundtable discussion for his book *Discipline and Punish* (1979), Foucault stated that rape should be decriminalized as a sexual crime:

...when one punishes rape one should be punishing physical violence and nothing but that. And to say that it is nothing more than an act of aggression: that there is no difference, in principle, between sticking one’s fist into someone’s face or one’s penis into their sex. . . . [T]here are problems [if we are to say that rape is more serious than a punch in the face], because what we’re saying amounts to this: sexuality as such, in the body, has a preponderant place, the sexual organ isn’t like a hand, hair, or a nose. It therefore has to be protected, surrounded, invested in any case with legislation that isn’t that pertaining to the rest of the body. . . . It isn’t a matter of sexuality, it’s the physical violence that would be punished, without bringing in the fact that sexuality was involved. (Foucault 1988, 200–202)

I have already discussed how the *injuries* of a sexual violation make it distinct from “sticking one’s fist into someone’s face.” But in making this claim, Foucault also implies that the wrongs of rape become separated from the culture in which they were occurred. For Foucault, the rape of a biologically female body produces the feminine body “as violable and weak” (Henderson 2006). The body becomes a site where gendered hierarchies are reproduced through disciplinary biopower, and thus, the resistance to gendered violence is found by removing the cultural significance from crimes which use bodies as a tool of constructing socialized patterns of domination. However, is it realistic to believe that the gender-neutralization of the crime of rape would diminish the female body from being seen as weak and “rape-able”? To answer this question, we might ask also, why does rape exist if there are other ways of asserting power over someone and assaulting them?

During a rape, the act of sex is used to produce injuries which extend beyond a physical assault. Thus, the cultural meaning of rape is not produced by only terminology or a cultural definition which labels it as a sexual crime. Rape is a crime beyond its physical wrongs, in part, because it is used to perpetuate and heighten existing hierarchies between people who are socialized and disciplined to occupy unequal places in society. It must be contextualized as a crime intertwined with the cultural injuries of the socially subordinated. Data from a 2010 Center for Disease and Control report found that 1 in 5 women are raped in their lifetime and 1 in 71 men are raped in their lifetime. Ninety percent of perpetrators of sexual violence against women are men. As Ann Cahill writes:

The threat of rape, then, is a constitutive and sustained moment in the production of the feminine body. It is the pervasive danger which render so much public space off-limits, a danger so omnipresent, in fact, that the “safety zone” which women attempt to create rarely exceeds the limits of their own limbs, and quite often falls far short of that radius (2000, 56).

A woman does not need to be sexually violated to be victimized by a culture that produces the conditions under which women are raped and sexually violated far more often than men. The distinct injuries of sexual violations that I describe above mirror the injuries of living in a culture that objectifies, reduces the agency of, and shames women.

i. Objectification

Rape culture is defined as “a society or environment whose prevailing social attitudes have the effect of normalizing or trivializing sexual assault and abuse” (Oxford English Dictionary). We might think of rape culture through Catherine MacKinnon’s critique of pornography: men are masturbating to women who are “exposed, humiliated, violated, degraded, mutilated, dismembered, bound, gagged, tortured, and killed. [...] The women are in two dimensions, but the men have sex with them in their own three-dimensional bodies, not in their

mind alone” (1996, 17). Violent pornography sexualizes acts of women having harm done to them and contributes to a culture where sex and the pain of a woman become intertwined. But rape culture does not need to be violent to be effective, as sexual violations do not need to be violent or forceful to be harmful.

A 2018 report found that seventy-seven percent of women have experienced verbal sexual harassment in their lifetime, fifty-one percent of women were sexually touched in an unwelcome way, and forty-one percent of women experienced cyber sexual harassment (*Stop Street Harassment—National Survey*). Men reported these three same types of harassment and assault at thirty-four percent, seventeen percent, and twenty-two percent, respectively. What these statistics fail to report however, is the frequency by which women experience catcalling, unwanted touching, and online harassment. I cannot count the number of times I have been honked at, whistled at, or shouted at when walking on a street. I couldn’t have a single conversation with one of my high school teachers without him staring, intensely, at my chest. Being objectified is a part of daily life.

While we are not physically injured by the men who yell out of their car windows at us, we are made to feel like a body which has no value beyond its ability to exist as a sex object. When a man violates us in bed, the threat of becoming a sexual object is most invasively fulfilled. The threat that we might one day become the object of many men’s desires, becomes an injury itself.

ii. Constrained Choices

Through the feminine body’s objectification, we become aware of what people want to do to us—aware of the ways that we will not be treated as people, should they have the chance. Maintaining our sense of security and sense of safety becomes a main priority. In the summer, I

like to run at night, because it's cooler and calmer, but it is not safe. I much prefer using public transportation instead of Uber but taking a bus or train at a time when there are not a lot of other people around might not safe. Although Uber received 6,000 complaints of sexual assault during the years of 2017 and 2018; the report does not include sexual misconduct such as masturbation, asking for sex, or verbal threats of assault (NPR article, 2019).

We share our locations with friends when we go on a first date (in case we are kidnapped, or raped, or assaulted). Traveling alone is deemed dangerous, as we are left more vulnerable to a potential threat. We buy rape alarms, test strips for our drinks, expensive transportation to get home at night. A study conducted on a college campus in 2020 found that the most two most predominant ways women protected themselves from harm were to not walk alone at night and carry pepper spray (Linder and Lacy). Paying for safety and restricting our free agency is not a choice—it is a necessity to protect our most intimate, bodily space.

One summer, I drove to a park, laid down my blanket in the grass, and started to read. A man came up to me and asked me what school I went to. I answered, but quickly stopped the conversation as I got what we have come to call “a weird vibe.” He sat down near me and begun to watch me. I told him to knock it off and he responded by calling me a “bitch” and then started to circle the park. He did this for about an hour as I figured out what to do. I knew—I just knew—that it was unsafe for me to go to my car. I imagined him following me. I had a daymare of him jotting down my license plate and finding me somehow. I called my friend who lived nearby, and she and her mom came to escort me back to their house. Three or four hours later, my friend's dad went to go pick up my car. The man had parked behind my car and was sitting there, waiting. He must have seen me get out of my car when I arrived at the park and knew it was mine. When he saw it was not me getting into the car, he started his truck up and he sped

away. Lots of my women-identifying friends have stories that are as creepy, or more creepy, than this.

The agency of women—as a social group—is restricted because we are often first seen as our gender, before being seen for our personhood. A theme in many of the respondent’s interview data from the Scully and Marolla study of convicted male rapists was that it did not matter *who* the victim was, because her femininity represented another woman the rapist wanted to harm. Or she was symbolic of the “collective liability” of all women:

Rape was a feeling of total dominance. Before the rapes, I would always get the feeling of power and anger. I would degrade women so I could feel there was a person of less worth than me.

I wanted to take my anger and frustration out on a stranger, to be in control, to do what I wanted to do. I wanted to use and abuse someone as I felt used and abused. I was killing my girl friend. During the rapes and murders, I would think about my girl friend. I hated the victims because they probably messed over men. I hate women because they were deceitful and I was getting revenge for what happened to me.

I decided to rape her to prove I had the guts. She was just there. It could have been anybody” (Scully and Marolla, 21).

Rape serves as a tool for men to put women “in their place,” assert a dominance that is thought of as an entitlement, and remind women of the social hierarchies between genders which are slowly (too slowly) dissolving. A woman does not need to be raped to know that the threat of being “dominated” or losing control over her body exists. As such, she moves through the world with limited freedom to protect the bodily agency she has acquired.

iii. Feminine Purity: sex as property damage

The earliest form of what is modernly known as a marriage “appears to have been institutionalized by the male’s forcible abduction and rape of the female” (Brownmiller 1975, 17). In ancient Babylonian and Mosaic law, criminal rape was a violation against a patriarchal

father who could sell his daughter for fifty pieces of silver. The rape of a woman not yet sold was understood as the theft of virginity which diminished her value in the marketplace (18). An English common law issued in around 892 read that:

If a man ‘seizes by the breast a young woman belonging to the commons, . . . throws her down ... [and] lies with her, he shall pay [her] 60 shillings compensation.’ ‘If another man has previously lain with her, then the compensation shall be half this [amount]’ (Smith 1974, 190).

And during the colonial era of the United States, women were still considered to be valuable only so far as they could marry and produce “legitimate heirs.” The rape of a virgin was considered a crime against her father as she might not be able to “marry into a respectable family and be an economic liability of the father” (Donat and D’Emilio 1997, 260). Purity culture has been institutionalized through a society which has historically treated women in relation to their “market-value.”

Today some evangelic churches still have purity balls “in which the girls sign abstinence pledges, receive a purity ring from their father, and even eat wedding cake as a symbol of their fathers’ ownership over them until their wedding day” (Matas, 2013). In 2019, rapper T.I. said on a podcast that when his 18-year-old daughter has her annual checkup, he has the doctor “check that her hymen is still intact.” He went on to say that he knew his 15-year-old son was sexually active and was okay with it. Virginity testing is still a practice with a 2017 study finding that at least sixteen percent of 288 US obstetricians and gynecologists were asked to perform at least one virginity test or a virginity “restoration” procedure during the twelve months prior to the time of the study (Moaddab et. al., 2017).

Purity culture creates the belief that a woman’s sexuality is not owned by her, but should be saved for, or given to her sexual partner. It can make women feel ashamed to have sex—or to

have sex “done” against their will—as it is not something which has been normalized for the sole purpose of her enjoyment or pleasure. Rather, it is an act that is thought to devalue a woman—her sexuality does not belong to her, but is for her partner’s use. While second wave feminism aimed to fight for women’s sexual liberation and to combat purity and rape culture, remnants of institutions which construct women as property and construct their sexuality as not belonging to their selves still permeate modern society. These cultural forces create the conditions which allow men to believe that women are valuable for their sex, and women are taught to guard their sexuality as it might become property of their future partners. The paradox of rape culture—of course—is that women’s sexuality is only to be protected until it is desired by another.

iv. The Personal is Cultural

Some of the injuries that make sexual violations unique from other violent crimes can be understood as a physical manifestation of the cultural injuries sustained by living in a patriarchal society. To analyze sexual violence and violations apart from sexuality—as Foucault asks us to do—means we fail to account for the ways that visible, cultural harms are reproduced when sex is used as a tool of domination against women in private spaces.

We see this type of cultural “blindness” used to protect other groups which hold social power. During Kyle Rittenhouse’s criminal trial, Judge Schroeder accepted the defense team’s motion that the evidence of Rittenhouse’s previous association with the Proud Boys be barred from the trial as it might sway the jury unfairly by “injecting race” into the case as Rittenhouse had killed white protestors. Without the context of Rittenhouse’s past racism and the system of white supremacy which created the conditions under which the crime occurred, the full extent of the wrongness and harms of his crime remain unacknowledged and unaddressed. Erasing the injuries Rittenhouse caused, in addition to his horrific killing of three people, also stunts our

ability to fight for the abolition of white supremacy and Black subordination, as the root of his crime becomes entirely disguised.

While I have argued that the patterns of sexual violence are largely dictated by social norms of female subordination, the reflection between patriarchy and sex extends also to systems of racism, classism, transphobia, xenophobia, ablism, and other culturally constructed injustices. One report found that forty-seven percent of all transgender people have been sexually assaulted at some point in their lives—the rates were higher for trans people of color and those who are homeless or have a disability (James et. al., 2016). It is unrealistic to believe that the power dynamics which dictate many of our public interactions would disappear in intimate, private spaces. Intercourse, then, is not a neutral activity between two equal persons, but is influenced by the power each party holds through cultural norms and hierarchies.

There is the question of whether cultural and social patterns of male domination reflect the mechanics of heterosexual sex—the man inserting himself into the woman to reproduce or to obtain pleasure—or, if sex would hold no socially-constructed meaning were the patriarchy, or other forms of social oppression, to be nonexistent. Brownmiller states that:

What it all boils down to is that the human male can rape...Man's structural capacity to rape and women's corresponding structural vulnerability are as basic to the physiology of both our sexes as the primal act of sex itself... This single factor may have been sufficient to have caused the creation of a male ideology of rape. When men discovered that they could rape, they proceeded to do it (1975, 13-14).

If male sexual violence against women is derived from the physical act of male “domination” during sexual intercourse, we would then be forced to believe that heterosexual sex can never escape the confines of socialized gender oppression, as it is the physical act itself which produces at least some of the cultural injuries that then compound upon the inherent inequality of heterosexual sex. This is what I imagine Andrea Dworkin to mean when she states

that penetrative intercourse is inherently violent. We are also left with little explanation as to why the rates of sexual violence against people with other marginalized identities exist if sources of violence are primarily biological, instead of socially positioned.

As stated before, I am hesitant to accept that women are raped, primarily, because they are rape-able; to fight for women's sexual liberation we must first conceptualize that it can exist within the parameters of our material realities. If this reality cannot exist in a world where men and women have heterosexual sex for reasons beyond reproduction, working to eliminate the external and social forces which contribute to high rates of rape is ultimately futile. I want to believe that women can have heterosexual sex without ever experiencing force, coercion, and exploitation. The more important question then becomes how to effectively influence the private spheres where intercourse occurs such that women can have heterosexual sex uninjured. This demands that the private sphere be reconceptualized, not as existing apart from the "public," but as a space included in a social society where a women's rights must be afforded protection.

Law as a Site of Repair

If rape and other sexual violations are declared as a wrong unattached from the social conditions which produce the imbalance of power between participants of sexual interactions (Foucault, 1988), it would follow that we prosecute deviations from "just" sex as isolated events of immorality, motivated by the *mens rea* of the perpetrator. We might search for psychological "abnormalities" to help explain why some people are more likely to be sexually violent or violating. This is largely how we address the crime of murder. There are no public campaigns urging people to not murder each other or to educate themselves on how or why to not murder others, as it is universally understood as immoral. Deviations from the norm of not committing

murder are thought of as a problem with the individual offender rather than a reflection of the individual's society at large.

But importantly, when we observe a noticeable pattern of the characteristics of victims and perpetrators in murder cases, we ought to understand murder rates pertaining to a “social fact”: an external social force which exerts power and influence over an individual's behavior (Durkheim, *The Rules of Sociological Method*, 1895). Consider the pushback against describing a police officer who was physically violent towards a Black American as a “bad apple.” Assessing the police officer's wrong apart from the systems and institutions that helped to create his propensity for violence towards members of the Black community fails for two reasons: first, the injury of racism—as separate from the harms of physical violence inflicted—remains unaddressed, and therefore unrestored; and second, any legal consequences to his physical violence provide no public denouncement of a culture which normalizes and encourages the victimization of Black Americans. The legal repercussions only denounce physical violence, and this “colorblind” response contributes to the misconception that police violence is unattached from the “cultural scaffolding” (Gavey, 2005) of racist institutions and systems.

Some sexual violations are certainly perpetrated by abnormally violent individuals—the “bad apples.” However, I propose that many sexual violations derive from the offender's socialization in a culture which normalizes the objectification of women, restricts the agency of women, and shames women for their sexual activity—a culture which produces violence against women. Addressing the harms of sexual violations apart from the systems and institutions which influenced their existence creates the same failures as calling a racist police officer a “bad apple.” Importantly, I am not suggesting that the perpetrators of such violations should not be held individually responsible for their transgressions. Heterosexual sex *does* exist without the

violations I describe. But because many of the injuries of sexual violations beyond the physical harm—and beyond the physiological and psychological trauma—so clearly resemble the injuries that women sustain from living in a society which subordinates them, it would be inattentive to not address how private interactions are influenced by public patterns of inequality and violence in our proposed steps towards a solution.

As the problem is both relational and cultural, I believe the law is a place of appropriate intervention. Linda Martín Alcoff states her skepticism of “designating the legal arena as the principal site for redressing the problem of sexual violations” (2018, 14). She cites low incidents of reporting, carceral injustice, as well as the courtroom being an ineffective space to transform our language. I agree with Alcoff that these are reasonable concerns as to why we might shy away from using the legal system to reduce the high prevalence of sexual violations and to change social norms about sex and violence. Additionally, the current legal process often retraumatizes survivors (Lorenz et. al., 2019) and few reported cases lead to a felony conviction (Department of Justice, 2020). I think of my friend who was recently raped. She called the police immediately, her rapist was arrested at the site of the crime, she had evidence collected that night which showed she sustained physical injuries, and she tried to press charges—only to be told that the district attorney decided not to prosecute the case. She did everything a rape victim is “supposed” to do following their crime, and even she was unable to obtain justice.

In addition to the legal system being inaccessible, the law often fails to regulate behaviors which violate individual’s rights—as I have argued extensively thus far. It was not until 1993 that marital rape was outlawed in all states. Although the definition of rape varies by state, the most recently released federal definition is: “the penetration no matter how slight, of the vagina or anus with any body part of object, or oral penetration by a sex organ of another person,

without the consent of the victim.” In the following sections I provide explanation as to why a consent-based standard for fault is undesirable. However, even with a federal definition that emphasizes consent, many states have created loopholes which allow for women to be legally raped. In 2021, a Minnesota Supreme Court unanimously ruled that an accused rapist could not be found guilty because his victim voluntarily got drunk beforehand. She woke up to him sexually assaulting her after blacking out. In South Carolina, spousal sexual battery is only defined when it is “accomplished through use of aggravated force, defined as the use or the threat of use of a weapon or the use or threat of use of physical force or physical violence of a high and aggravated nature” (SC Code § 16-3-615, 2012).

Even with the disappearance of *most* formal laws which have legalized the rape of women, there is a historical foundation upon which modern laws have been conceived that normalizes the feminine body to be treated as an object for men to use for their own pleasure. Not only is the criminal legal system often unable to affirm to victims who “gave consent”—after coercion, manipulation, and pressure—that they were wrongfully violated, but it is ineffective in providing justice for victims of legal rape.

Despite these failures, the legal system still offers an important site of transformation. First, ideally, courts attend to the specific injuries that a survivor has sustained and can enforce victim-offender restitution and repair. While educational programs are needed for preventative measures and awareness, they are unable to address survivors who need substantive repairs. Second, the law makes clear to the offender that their actions do not align with public standards of decency or reasonableness. This is traditionally expressed through punishment for criminal cases. In civil trials, if a defendant is found to be legally liable for an intentional or unintentional tort, their intentional harms, negligence, or unreasonableness are resolved through restitution.

These two purposes of the legal system represent the relational function of law when mitigating between a victim and offender, or a plaintiff and defendant. The law also provides an “expressive function” as it has “an effect in shaping social norms and social meanings” through the general pattern that people obey the law, and thus, it determines their behavior (Sunstein 1996, 958). In criminal cases, this reflective property between law and culture maybe seems more obvious. Before marital rape was criminalized, there was no legal punishment for partners who raped their spouses, and as such, the concept of marital rape was not a common part of legal lexicon (Bennice and Resick, 2003). A wife could be raped by her husband, but she might not even conceptualize it as rape, as rape was an act which is illegal, and no court would find what had happened to her to be unlawful. This also gave men the legal *right* to rape their wives. While marital rape still exists, through its criminalization a cultural norm now exists that marriage does not grant people the *right* to their partner’s bodies.

Beyond criminal law, civil litigation also has the power to change social norms and behaviors. Sexual harassment was found to be an unlawful behavior in the workplace on the grounds that it violated Title VII of the Civil Rights Act of 1964 which prohibits employment discrimination on the basis of race, color, religion, sex, and national origin. When Title VII was passed however, sexual harassment in the workplace was largely not believed to exist (MacKinnon, 2005). But then, women begun to bring cases to court stating that their harassment was a violation of the Civil Rights Act (MacKinnon, 2005). With each sexual harassment claim, the sitting judge had the power to reinterpret the statute and grant legal protection to plaintiffs who rightly sought legal recovery. This process allows for “precedents [...] to coalesce into principles and statutes” (MacKinnon, 2005). Civil law offers an important site for gendered violations to be addressed. As MacKinnon states, “something about confronting the empirical

realities of women's lives, one at a time but in the conceptual context of women as a group (that is, under a sex equality rubric), has made it possible to extend equality rights to women, bringing about a shift in 'public custom'" (MacKinnon, 2005). Catherine MacKinnon wrote the respondent's brief for the *Meritor Savings Bank v. Vinson* case, which was the first Supreme Court case to recognize sexual harassment as a violation of Title VII.

In the case of sexual harassment, as well as other civil rights claims, a statute had to first exist that outlawed discrimination on the basis of sex. This required a legislature of representatives who, by majority, believed women should be legally protected in the workplace; a feat that was produced from a cultural revolution that exceeded the bounds of legal authority. However, my focus on legal transformations—as opposed to a focus on more *direct* influences on the culture—as a solution to the prevalence of sexual violations, is founded upon my initial argument that through complexifying the categories of intercourse found between rape and sex, a common theme emerges that the non-physical injuries of both rape and other sexual violations are often the same. Because rape is a unique violent offense—the physical act “done” during a rape is, at other times, often consensual—the broader distinction between legal and illegal intercourse ought to come from the material realities of those injured. Women should have the ability to address their sexual injuries legally, which could also create new cultural norms about what is needed for sex to not produce gendered injuries.

Thus, I offer three suggestions of legal reconstruction:

- 1) As Alcoff suggests the problem of sexual violence must be complexified to include sexual violations. I suggest that the standards for what ought to be classified as a legal violation comes from an assessment of the complex injuries produced by unwanted sex, rather than a focus on the perpetrator's moral intent or the parameters of verbal consent. With this standard in place, victims who sustained sexual injuries should have the option to sue for negligence in civil courts.
- 2) Our behaviors in private must be held to public standards of care and duty.

- 3) Stricter regulations are required for pornographic content which explicitly normalizes violence against women as an inherent part of sex.

These suggestions are aimed to expand who can access legal services to include survivors who experienced wrongful sexual violation but whose violation does not meet the current legal standards for rape, and attend to the injuries of survivors more accurately to promote pathways towards healing. Additionally, they might influence a culture which not only causes the conditions for high rates of sexual violence, but causes far higher sexual violence victimization rates of women than men.

1. Sexual Injuries as a Standard for Fault

i. Liability for Injuries

As I hope is clear, the injuries of being sexually violated expand far beyond physical injuries and injuries of a privacy or property violation. And these injuries can be sustained during intercourse which is not legally defined as rape. Because the power imbalances found in our social sphere also invade private spaces, women might feel pressured or coerced to say “yes,” even if they do not *want* to have sex, and thus become a victim of harmful intercourse. Or sometimes there are external circumstances influencing a woman to decide to agree to sex to ensure a different form of safety. One of my friends, Christina, was stuck at a John’s apartment late at night while waiting to be walked home after a party (pseudonyms to protect her anonymity). Earlier in the day she was followed on campus and felt unsafe being alone at night. John, after hearing her worry, offered to walk her home. On the walk back, he demanded that they stop at his apartment first. He found excuses to have her stay at his apartment longer, and then, after not getting what he wanted, stated that he didn’t feel like walking her home anymore. When she told me this story, she explained that she did a cost-benefit analysis and figured she would rather “give in” to some things, as to not potentially be raped by John, or potentially be

assaulted (or worse) walking home alone. Christina “consented to not get raped” (Gavey 2005). It is hard to imagine this qualifies as meaningful consent. By using the presence of sexual injuries as a standard for fault, John would be liable, as he caused her to be sexually injured. He used her insecurity as a means to obtain sex, further constricting her already miniscule amount of agency.

I imagine that some readers might be hesitant to accept a standard of injuries as proof of wrongness, as there are behaviors which we deem universally immoral or “wrong,” yet do not make illegal. Take, for example, your girlfriend cheating on you. To discover that your partner has cheated might cause extreme emotional distress, trauma, and trust issues in subsequent relationships. Your partner caused direct harm and maybe even psychological injuries. However, the relationship between two unmarried people is an agreed upon *restriction* of rights—a contract. Should your partner break that contract, it does not infringe upon your inherent rights. Neither you or your girlfriend has the legal authority to control the other’s bodily autonomy or agency, and thus, you are each free to make self-determined choices about your respective sexual and romantic endeavors, even when in a committed relationship. This does not exclude cheating from being wrong, but their infidelity does not infringe on anyone’s inherent rights, and therefore, they are not legally liable to you.

Unlike breaking a romantic “contract,” having unjust sex violates a person’s inherent rights to their body, agency, and personhood. This behavior ought to be unlawful as victims of sexual violation and violence have a *right* to not sustain injuries. But why should the legal fault for sexual injuries be placed on the perpetrator if they did not intend to cause harm? Arthur Ripstein’s account of torts emphasizes the necessity of the law to establish the right balance of security and liberty interests such that individuals are both free to perform actions that are

necessary to secure their own means, as well as be free from others' actions which cause harm (1999). Without an equal balance of security and liberty, maybe I am convicted of murder for eating peanuts and then touching a doorknob which someone with a severe peanut allergy touched after me (and then they put their hand in their mouth); I caused harm that was my fault. For Ripstein, liability for injury is found through three "tests": duties of care (who care should be granted to), standards of care (the level of care required to provide), and remoteness (if there is a proximate cause to harm). It is unreasonable to expect that I have a "duty of care" to each person who happens to touch a doorknob after I eat peanuts. But if I was eating peanuts around my friend who I knew had a severe peanut allergy, it would require that my "standard of care" was higher given my knowledge of her potential death. Similarly, the death of the stranger who touched a doorknob I had previously touched is far too remote for my actions to leave me liable.

Now consider sex. Each party during a consensual sexual encounter has the right to freely enjoy the sex and "use" their partner for such means. This is, after all, the point. Each party also ought to respect their partner's right to feel secure and safe in that interaction. Your sexual partner has an obligation to you. They have an obligation to provide a level of care that ensures you are without harm. And they are certainly within enough proximity to you for this to be their obligation, and no one else's. If you consent, but only after being pressured, coerced, or manipulated, or are under any other form of duress, your sexual partner has not provided an adequate standard of care to you and your bodily rights. As you have the right to enjoy sex when it is truly consensual, you have the right to not be violated as well.

Perhaps however, your partner has *no* idea that their actions resulted in your sexual violation. We might not deem their actions to be immoral, but they are still at fault for the injuries they caused. This is not a deviation from other types of injuries that result in liability. In

California, an owner is legally liable for a victim's injuries if their dog bites someone—even if the dog has never shown aggression or bitten someone before. This standard for fault is routine in the law; the difficulty for survivors who sustained sexual injuries to obtain justice is abnormal.

ii. Civil Claims of Negligence

It might appear that through the expansion of sexual violations for which one can be held liable, I am making a claim about the moral intent of every person who perpetrates such violation. I aim instead to create a reasonable framework that orients us to what behaviors produce wrongful injury; injury is not just produced by those with an immoral intent. (Also, I hope it goes without saying, that there are perpetrators who have an immoral intent to cause harm, obtain sex forcefully, and hold power over their victims—as is evidenced by the interview data of convicted rapists. This is not negligence but rather intentional violence. Should someone be subjected to this, they ought to have substantive access to make a criminal charge or pursue an intentional tort claim, should they want.) By removing the *mens rea* requirement for a victim to be entitled to legal justice, there is a possibility both for the victim to be affirmed that she was unlawfully injured, and for the defendant to not be found morally culpable of the crime of rape if he had no intent to cause harm.

I suggest that victims ought to be able to bring a negligence claim (“lacking awareness of a problem or risk that you should have been aware of”) against their perpetrators (*Model Penal Code*, 2.02). A negligence claim must prove four things for a defendant to be legally liable for a plaintiff's injuries: duty, breach, causation, and the existence of injuries. These standards for legal negligence mirror Ripstein's standards of duty, care, and remoteness. Upon first consideration, one might be concerned with the possibility of bad “moral luck” unjustly affecting the defendant of a negligence claim. Consider these two hypothetical scenarios:

1. Alice meets up her Tinder date, Chris, for the first time at a bar. The only reason Chris shows up to the date is because he is intent on having sex with someone and plans on raping Alice if she does not consent. At the end of the night, Chris asks Alice if she would like to go back to his apartment and she agrees. Chris did not do anything during the date to manipulate or coerce her into wanting to go to his apartment—she genuinely consented. They have consensual sex and Alice does not feel violated. They mutually decide to not see each other again and Alice never discovers Chris' true intentions.
2. Jerry and Suzie live a few hours away from each other but have been on a couple of dates. Jerry drives to Suzie's house one night to have a date night. After watching a movie, Jerry initiates sex, joking that he "drove all this way" to see her and thinks he is playfully teasing her when he encourages it after she is verbally and physically hesitant. She ends up agreeing, because she feels bad, but during the sex feels extremely violated and used, and wants it to stop. Suzie is clearly not enjoying herself, but Jerry fails to pay attention and keeps going and Suzie completely freezes. The experience was extremely violating for Suzie. Jerry, deep down, did not have bad intentions and misguidedly thought that because she agreed, it was okay.

Most would find Chris to be a far more morally corrupt person than Jerry. However, Jerry unreasonably failed to pick up on obvious verbal and physical cues from Suzie that she didn't want to have sex, resulting in her becoming sexually injured. Chris—however gross this may sound—had good "moral luck" because Alice agreed to have sex and found the experience enjoyable. Were a jury to be presented each case and told to use the current, consent-based model for rape, neither Chris nor Jerry would be found legally in the wrong. This is an undesirable legal outcome. While what Chris did was morally wrong, Jerry caused wrongful injury. This hypothetical helps us to understand why—in the case of sexual violations—the law ought to regulate behavior which causes *injury* rather than only behavior which we deem morally unacceptable. While in this case, Chris did not face consequences for his immoral intent, using a negligence standard allows victims to be protected—and if harmed, restored—for the injuries they sustain regardless of if their perpetrator intended to violate their rights.

The issue with a strict reliance on the absence of consent for determining if someone is at fault for their sexual partner's injuries, is that to prove consent was not given is to provide evidence that something which did not exist, existed. It is not hard to prove that a physical assault was unlawful, as very few people would consent to physical assault. Even in the case of sexual harassment, most reasonable persons would be convinced that touching or sexual remarks in the workplace are unwanted and inappropriate. The evidence of unlawful harm is derived from the defendant's actions. In the case of rape however, the evidence of unlawful harm relies on the victim to prove that she did not consent to her own violation. As such, sex becomes a powerful tool of violence used in private spaces, as a perpetrator can just as easily claim the sex was wanted, as a survivor can claim it was not. A consent standard creates a distinct disadvantage for victims of sexual crimes. Additionally, it denies victims who felt obligated, manipulated, or forced to consent an option to pursue legal remedies. Evidence showing a person sustained injuries from a sexual encounter, including psychological injury, ought to be sincerely valued as proof that meaningful consent was not given.

Legal scholars Martha Chamallas and W. Jonathan Cardi propose the option of a negligence claim for rape also citing a decreased reliance on the "often confusing and highly contested doctrine of consent," as well as suggesting the possibility of survivors to receive tort compensation through existing liability insurance policies and the ability for juries to come to a verdict that accurately represents the defendant's conduct (2022). Finding a defendant liable for an intentional tort "in essence label[s] the defendant an intentional 'rapist,'" even if their actions were only wrongfully unreasonable instead of intentionally violating (2022). I also suggest that claims of negligence reduce the reliance on our carceral state, lessen the necessity of types of

evidence which might conflict with survivors' self-healing and self-protection, and provide more pathways for restorative justice opportunities.

a. Decreased Reliance on Criminal Law

An option for victims of sexual violations to seek civil relief could reduce a reliance on the United States carceral system. Mass incarceration is costly, with the United States spending an estimated \$182 billion on mass incarceration (Prison Policy Initiative, 2017). For comparison, in 2017, the Department of Education was given a budget of \$209.1 billion for both mandatory and discretionary funding (U.S. Department of Education, 2017). The funding that currently supports our extremely large population of prisoners could be used to improve public education, mental health services, victim compensation funds, etc. Additionally, mass incarceration is proven to expose incarcerated individuals to potentially traumatic events, such as victimization and abuse, which can lead to post-traumatic stress disorders (Piper and Berle, 2019). The solution to victimization is not to create additional cycles of trauma and abuse. It also must be acknowledged that there is a long history of rape accusations being used as a tool of racialized oppression. "A black man merely accused of raping a white woman could be lynched" in the years following the Civil War (Hodes, 1993). And it is argued that incarceration has provided a modern replacement to the Jim Crow-era, racialized "caste" system which further socially and politically oppresses millions of Black Americans, particularly Black men (Alexander, 2010). Systems which maintain white supremacy and promote violence against Black Americans ought to be as condemned and critiqued as the maintenance and violence of the patriarchy. A desire to provide justice to victims of sexual violence and violations should not exacerbate the injustices of the current legal system.

b. Harmful Evidence

Types of evidence that are required for a victim to *prove* she was violated are nonconductive to the forms of self-protection, care, and healing survivors use to take care of themselves following sexual trauma. I provide two examples out of many. First, to complete the evidence collection kit (also known as a “rape kit”), it is highly suggested that survivors do not shower, bathe, brush their teeth, or go to the bathroom. As discussed earlier, many victims of sexual violations feel “dirty” following their rapes, and shower to try and rid their physical bodies of the violation. To collect evidence, healthcare providers will use a speculum to take internal swabs of the vagina, which is an invasive and uncomfortable exam even for those who have not experienced sexual trauma. It is important that forms of self-healing, such as taking a shower, or the preference to not complete a vaginal exam, does not impede a survivor’s ability to seek justice.

Second, as evidenced by the frequency of disassociation and dissociative amnesia during traumatic events, many survivors might not remember the details before, during, or after an assault or other traumatic sexual experience. One survivor explained:

I don’t remember a lot of things that happened, so I have no idea what I said... it felt frustrating that I had to be explicit about things. I had to give explicit descriptions and I wasn’t prepared to give explicit descriptions, nor could I remember anything explicit. I was in shock, so I couldn’t remember things. I blocked things out (K.L. Gagnon et. al., 2018).

This should not be viewed as evidence of the victim’s unreliability, but instead a clue that a serious harm has been taken place. The body’s response to “block out” memories of what happened is a protective measure and—at the very least—law enforcement, lawyers, and judges should be informed about and sensitive to this trauma response.

Until the criminal justice system is reformed in significant and radical ways, allowing survivors to file a claim of negligence might lead to more desirable and accessible legal

outcomes. Criminal cases require the prosecution to establish the defendant's guilt beyond a reasonable doubt, whereas the burden of proof in civil cases is a preponderance of the evidence—a far less stringent standard. Expanding options for civil litigation might also reduce the necessity for survivors to provide evidence which is physically invasive and non-conductive to forms of post-traumatic care and soothing, or entirely impossible to provide. Expert witnesses such as psychologists, psychiatrists, counselors, or other mental health professions might be able provide testimony of a survivor's psychological trauma or other non-physical injuries, if physical evidence is unable to be collected.

c. Options for Restorative Practices

The criminal justice system focuses primarily on the punishment of the offender and often fails to provide the victim with care and support. Legal remedies ought to address the injuries a victim sustains in a substantive manner and provide options for restoration. However, remember the survivor who showered two or three times a day but never felt clean? There is something, intangible and indescribable, taken from victims during rape and other instances of sexual violation. Sometimes I think of what is needed to feel whole and I do not think it exists. For memory to be erased and time to go backward. Time going forward helps, but it has not provided completeness again.

Despite the irreversible impact of sexual trauma, survivors are owed more than what is currently legally provided. I should point out, too, that there are countless nonprofit sexual assault support services organizations that provide incredible resources to survivors including counseling sessions, legal advocacy, companionship to the hospital, support groups, and hotlines. These organizations should continue to be available and funded for both survivors who want to pursue legal litigation and those who do not.

Very few studies have been conducted to document what forms of compensation survivors seek by pursuing civil claims. One qualitative study in Canada of rape victims found that the most frequently cited desired outcome of civil cases—with eight-two percent of respondents citing this desire—was “to be heard and to have their experiences acknowledged as hurtful and wrong” in a public setting (Feldthusen, 2000). Over a third of respondents “hoped to receive an apology” (2000). And while forty-one percent of respondents discussed “money as one of their reasons for [...] taking civil action,” it was most often for the ability to pay for counselling, to further education, and to assist with family care costs, and rarely was money “the sole motivating factor” (2000). A study of twenty women in Australia who applied for financial assistance following their rapes found apart from the payment to cover expenses such as counselling, clothing, increased security, and loss of earnings, many survivors used their recognition payment for “self-renewal or remaking the self” (Holder and Daly, 2017). For some survivors, the money allowed them to do nice things for themselves or start a new hobby.

The use of financial restitution to help facilitate the renewal or healing of self speaks to the necessity for the injury of dehumanization and objectification to be treated. Money cannot make the pain of such injury to go away, but it can contribute to forms of healing which allow survivors to reimagine and protect their personhood. Financial compensation can also increase the agency of a survivor. Perhaps the money can go towards purchasing a car, so a survivor is no longer reliant on others for transportation or does not need to walk home late at night. There is a cruel myth that women seek financial restitution to take advantage of their trauma. Restitution should instead be viewed as a way for survivors to facilitate their own healing and respond to their unique injuries with increased agency and feasibility.

There is a promising opportunity for tort agreements to promote restorative processes for victims. First, torts are used to *restore* the injuries that the plaintiff claims to have sustained by examining what was lost. What is taken from victims of sexual violations cannot be given back, however civil law might be able to provide more to a victim than only the punishment of their offender. Restorative justice processes traditionally require mediation, conferencing, and circles (Morris and Maxwell, 2001), which is likely not going to be offered in a traditional courtroom. The tenants of restorative justice principles that address who was harmed, what is needed to address the harms, and how these obligations can be met, are embedded into the practice of civil litigation which attempts to restore a righteous “equilibrium” between two parties. Perhaps included in restitution is a requirement of mediated conflict resolution or educational consent classes for the perpetrator. These are only a couple examples of what types of restitution might be mandated by a court to address both the relational and cultural aspects of sexual violence and violation. An effective legal solution would address the injuries a victim sustains and provide mechanisms to prevent any further victimization.

iii. Feasibility

The potential for civil litigation to provide direct responses to a survivor’s injuries and a potential model for restorative practices is contingent upon the substantive access to the tort system. And unfortunately, “tort law [...] has been especially irrelevant for gender-based violence crimes” (Weiner, 2020). Legal scholar, Merle Weiner, suggests that survivors lack access to the civil legal system because lawyers are hesitant to represent clients whose cases are unlikely to provide a “substantial collective judgement,” and no alternative ways exist to access the civil legal system without legal counsel (Weiner, 2020). Weiner proposes a system of “civil recourse insurance,” in which individuals can purchase “insurance” that would later provide

compensation if they became a victim of sexual assault. Her proposal is partly an alternative to Jennifer Wriggins' proposal of liability insurance where compensation comes from the offender's insurance company, of which they have bought previously. Weiner states that Wriggins' proposal is in direct conflict with the purpose of an intentional tort system, as perpetrators of violence might feel emboldened to commit intentional harms under the assumption that the cost of restitution is covered by their insurance plan. I agree with her critique. At the same time, creating an insurance system that places the financial burden on those most likely to experience sexual violations (although Weiner does propose the possibility of government subsidization) to prepare for their potential victimization is a slightly saddening—although maybe a realistic—solution. Were victims able to file for a claim of negligence (an unintentional tort) the financial burden of a proposed insurance policy could be placed on the potential perpetrators of harm—as I believe was Wriggins' intention—instead of potential victims. Further, this could create increased incentive for persons to ensure meaningful, affirmative consent is given before having sex with somebody as “in a situation where sexist ideology has created false and confusing narratives around sex and consent” our goal must be to “protect women from grave injury,” despite the possibility that a perpetrator of a sexual violation might have not *intended* to cause harm (Mason, 2021).

iv. Collective Standards of Reasonableness

A negligence standard should be applied to civil claims of sexual wrongdoing as it allows those who have been sexually injured to seek justice and pathways to healing, even if consent was given under duress which would currently null legally liability or criminality. Additionally, it helps create a legal standard that both addresses victims' actual experiences of harm while providing boundaries to the broader population about what behaviors are unreasonably harmful.

By allowing survivors to seek legal redress for injuries they sustain during experiences of sexual violations, we create clearer definitions of what sexual interactions are “just” and “unjust.” I suggest that the problem of “linguistic chaos” (Alcoff 2018) comes from our attempts to define behaviors without having a framework of the required standards of care and duty that must be met.

Our standards of what constitutes a sexual violation—and consequentially the social norms produced from those standards—must come from the lived experiences of people who have sustained sexual injuries, instead of from judges, lawmakers, and legal scholars who attempt to define what behaviors ought to be regulated using ideological beliefs often detached from reality. The effectiveness of this approach is seen through the introduction of sexual harassment as a Title VII violation. By creating a pathway for civil law litigation, the cultural shift can arise from a collective understanding of what behaviors cause injuries, instead of abstract determinations about what sexual behavior is deemed to be “acceptable” or “reasonable.” It is not difficult to imagine that the current standards of reasonableness—produced from a culture which prepares women to be violated—might be themselves unreasonable.

2. Private Intervention

Some might be critical of this heightened regulation of sexuality. Foucault cautions us against finding freedom through “the principle of sovereignty.” He claims it is oppressive, itself, for the government to *give* us freedoms that we already inherently own (1980, 108). He was wary of the gay rights movements for this reason. Why should the government have the power to regulate who our sexual partners are? To find true freedom, “we must be convinced, deep down, that ‘homosexuality’ does not exist,” as the construction of homosexuality was through

regulation about what sexual behaviors are “normal,” and therefore permissible (Interview with Frank Mort, Roy Peters, and Michel Foucault, 1995). During an interview, Foucault asserted:

“What I would like to assert is the fact that the authorities and the law have absolutely nothing whatsoever to do with the sexual behaviour of individuals. Terms such as ‘sex’, ‘sexuality’, ‘customs’, ‘morality’, ‘good manners’, ‘decency’, etc, figure in French law, I don’t know whether it is the same in English law. And these words ought not to figure there in any way. It is perfectly understandable that people are prevented from exercising physical violence upon others; whether it is for robbery, or just the pleasure of it - violence should be outlawed. But sexuality has nothing to do with either the law or social control” (Interview, 1995).

He is clear to state that violence ought to be outlawed. This agrees with his recommendation that the crime of rape be decriminalized as a sex crime, and instead criminalized as an act of physical assault. But he is critical of any law which regulates sexuality. Foucault says that the “labelling (épinglage) of individuals to a sexual identity – men, women, lesbians, homosexuals, paedophiles, no matter what, it doesn’t matter – is something which can become dangerous” (Interview, 1995). Perhaps you noticed one of these labels is unlike the others. It is here we find a place to critique Foucault’s account. A minor has the inherent right for someone to not have sex with them. In fact, this is one of the only stipulations to Mills’ very liberal Harm Principle:

“We are not speaking of children, or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury” (Mill 1859).

The way Foucault has clumped together women, lesbians, homosexuals, and pedophiles is why we ought to caution against a Foucauldian framework to guide our legal reforms. There is a substantive difference between having the freedom *to* have sex and the freedom *from* sex. A minor has the inherent right to not have sex “done” to them, whether they “consent” or not.

Adults, also, have an inherent right to not have sex if they do not want to provide meaningful consent. The freedom *from* sex ought to be prioritized over the freedom *to* have sex. A man who wants to have sex with another man ought to possess the right to do so, however should no man want to have sex him he does not still have the right to it—as unfortunate as that may be for him.

Women are frequently subjected to sex which they do not want because of gendered patterns of intimate violence and cultural norms of female violation. I suggest that we are as critical of the cultural which produces women’s subordination that “materially penetrate[s] the body in depth” and a legal system which fails to protect its subjects, as we are critical of legal interventions to this marginalization (Foucault 1980). If the right against having sex is not currently being respected in private spaces, the behaviors which cause this unwantedness ought to be regulated. Importantly, it is not just behaviors which are obviously violent that require our attention. The law is clear to state that hitting someone in private is just as wrong as hitting them in public. It is not that the private sphere becomes invaded by these new standards for liability. Rather, it is that the public standards which ought to protect our bodies, agency, and sexuality are not being adequately met in private. Stricter legal attention is required to address how privacy is used against women to reproduce their cultural oppression.

3. Laws Against Violent Pornography

Although I have created distinct sections in this paper to frame the issue of sexual violations through personal injuries, cultural injuries, and the law, I hope to make clear that, in reality, the wrongs which exist in the private sphere, the wrongs which come from the institutions that make up our cultural scaffolding (Gavey 2005), and the wrongs within our legal system, are connected and in constant interaction with each other—cyclically heightening their magnitude. Therefore, changing legal processes is not the only way to influence rape culture and

the prevalence of rape, as changing attitudes about rape won't necessarily lead to drastically more desirable laws and legal outcomes (although we can hope). The two must work in harmony with each other, one influencing the other, which in turn, influences the other.

There are many educational programs that work to shift social norms through raising competency and awareness of issues pertaining to sex, consent, and healthy relationships. When I was in high school, I taught consent education classes to middle schoolers; many of whom were eager to have complex conversations about the nuances of practicing consent. I remember one conversation about whether it was okay for two drunk people to have sex if they both consented. These programs aim to influence the culture, without the mediation of the law, and are highly valuable and needed for sexual assault prevention and education. However, as I limit the scope of possible solutions to the legal sphere for this paper, I suggest that one way the law might directly influence the prevalence of rape culture is through heightened regulation of violent pornography.

A study published in 2010 found that eighty-eight percent of porn included physical aggression and ninety-four percent of that aggression was directed towards women and girls (Bridges et. al., 2010). In a survey of 330 undergraduate men, the average age of first exposure to porn was 13.37 years old, with the youngest exposure at five years old. The study also found that the men who had a younger exposure were "more likely to want power over women" (Bischmann et. al., 2017). There is convincing empirical evidence which shows significant correlations between viewing violent pornography and perpetrating physical and sexual violence. In a study of tenth grade high school students, researchers found boys who had been exposed to violent pornography were significantly more likely to perpetrate sexual teen dating violence after

controlling for age, a history of suspension/expulsion, heavy alcohol use, rape myth acceptance, and gender equitable attitudes (Rostad et. al., 2019).

Catherine Mackinnon and Andrea Dworkin proposed several ordinances to ban pornography on the grounds that it is a violation of women's civil rights. Some of the city ordinances passed, but courts found that the ban violated a right to constitutional free speech. The question of whether *all* pornography should be banned, as there is certainly an argument that most of it objectifies women, is one I will not answer in depth. Although it would seem that banning non-abusive, non-violent content which is made by sexually liberated individuals who give their free and meaningful consent is counterproductive to a project with goals of giving sexual agency back to women. The structure of the argument stands, however, that pornography—and its common viewing—constructs the “social reality of what a woman is and can be in terms of what can be done to her” (MacKinnon 1993, 25). Sooner or later, the viewer of pornography will want to have the type of sex which he has masturbated to. If he has learned to be aroused by women being forced into sex, being in pain during sex, being violated during sex, the women he has intercourse might become subject to his fantasies. They become subject to the pain, violence, and violations that have been normalized has a part of sex. As MacKinnon writes:

What was words and pictures becomes, through masturbation, sex itself [...] In other words, as the human becomes thing and the mutual becomes one-sided and the given becomes stolen and sold, objectification comes to define femininity, and one-sidedness comes to define mutuality, and force comes to define consent as pictures and words become the forms of possession and use through which women are actually possessed and used (25-26).

As I hope is clear by the previous suggestions for reform, pornography is not unilaterally responsible for the intersection between women and sex and violation. The subordination of women through their institutionalized and systematic objectification, their loss of freedom, and

their loss of ownership to their own sexuality has existed far before the creation of pornography. The development of violent pornography speaks most clearly to what many men *want* to do to us, and what we have been forced to endure in the private spaces where there is no video to prove that it happened. Violent pornography teaches new generations, during their early years of development and socialization, that this type of sex is normal; in part because it is normal. Pornography which normalizes the violation of women as a part of sex ought to be legally addressed alongside the development of legal reforms which directly address survivors injuries.

Conclusion

The Earth does not lose its fertility every winter because Persephone chose to eat six pomegranate seeds. The Earth turns cold because Persephone is forced by Hades and Zeus to return to the underworld. She ate the pomegranate seeds, not out of true desire, but succumbing to a fate she thought was determined to be. Demeter restores the Earth's warmth and flowers and life only when Persephone is truly free. What is taken from survivors of sexual violation—their bodies, agency, and sexuality—is what women lose when they live in a world that functions to dominate and to oppress them. Is what the Earth loses when Persephone returns to the underworld not an embodiment of what she has lost—and loses each year—during her rape?

I am tired of seeing my friends—who I love so much—be so hurt and so broken after they have been used, abused, and violated during sexual interactions. I am tired of making jokes with them about hoping to not get raped on a first date. The jokes aren't really funny, but if we didn't laugh about it, make light of a situation that should be so normal but is really so scary, we may never go on a first date again. There is a collective knowledge that exists among women of our potential to be harmed. We look out for each other in public. Keep our ringers on through the night in case we are needed. And when we are violated, we bond over our collective experiences,

offering the support and care not currently afforded to us by the institutions meant to protect our rights. Our knowledge is suppressed and resisted against, as we are told that had we not wanted to be violated, we would have resisted, left the apartment, not gotten so drunk, not dressed so slutty, stopped dating him, told someone sooner. It must be believed that we did not want to lose what is taken from us when we are violated. That truth, first, must guide us.

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