WMST GU4506
Gender Justice
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Columbia University
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Course Reader – Volume 4

II. Gender, Sex, and Sexual Orientation

April 22: Marriage

- Obergefell v. Hodges. 135 S.Ct. 2584 (2015).
- Opinion of Justice Anthony Kennedy in Obergefell v. Hodges. 135 S.Ct. 2584 (2015).
- Opinion of Justice Katherine Franke in Obergefell v. Hodges.
- Opinion of Justice Sherif Girgis and Robert George

III. Gendering Violence and Trauma

April 29: Rape and Sexual Assault

- MacKinnon, Catharine. "Rape: On Coercion and Consent." In *Toward a Feminist Theory of the State*. (1989).
- Bazelon, Emily. "The St. Paul's Rape Case Shows Why Sexual-Assault Laws Must Change." *The New York Times*. August 26, 2015.
- American Law Institute, "Modern Penal Code, Sexual Assault and Related Offenses." *American Law Institute*. (2014).
- Seidman, Ilene and Vickers, Susan. "The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform," 38 *SUFFOLK U. L. REV*. 467 (2005).
- Suk, Jeannie. "The Trouble with Teaching Rape Law." *The New Yorker*. December 15, 2014.

May 6: Black Lives Matter – A Movement for Racial and Gender Justice

- Chatelain, Marcia, and Asoka, Kaavya. "Women and Black Lives Matter: An Interview with Marcia Chatelain." *Dissent Magazine.* Summer 2015.
- Leveille, Vania, and Park, Sandra. "Black Women and Black Lives Matter: Fighting Police Misconduct in Domestic Violence and Sexual Assault Cases." *ACLU.org*. August 7, 2015.
- Roberts, Dorothy. "Reproductive Justice, Not Just Rights." *Dissent Magazine*. Fall 2015.
- Watson Malachi, Leslie. "Police Violence Is a Reproductive Justice Issue." *Cosmopolitan*. July 18, 2016.

James OBERGEFELL, et al., Petitioners

v.

Richard HODGES, Director, Ohio Department of Health, et al.;

Valeria Tanco, et al., Petitioners

v.

Bill Haslam, Governor of Tennessee, et al.;

April DeBoer, et al., Petitioners

v.

Rick Snyder, Governor of Michigan, et al.; and

Gregory Bourke, et al., Petitioners

v.

Steve Beshear, Governor of Kentucky.

Nos. 14–556, 14–562, 14–571, 14–574.

Argued April 28, 2015.

Decided June 26, 2015.

Background: Same-sex couple brought action alleging that voter-approved Michi-

gan Marriage Amendment (MMA), which prohibited same-sex marriage, violated Equal Protection and Due Process Clauses. The United States District Court for the Eastern District of Michigan, Bernard A. Friedman, J., 973 F.Supp.2d 757, entered judgment in couple's favor, and state appealed. Same-sex couples married in jurisdictions that provided for such marriages brought actions alleging that Ohio's ban on same-sex marriages violated Fourteenth Amendment. The United States District Court for the Southern District of Ohio, Timothy S. Black, J., 14 F.Supp.3d 1036, entered judgment in couples' favor, and state appealed. Same-sex spouses, who entered legal same-sex marriages in Maryland and Delaware, and Ohio funeral director sued Ohio officials responsible for death certificates that denied recognition of spouses' same-sex legal marriages after death of their partners, seeking declaratory judgment and permanent injunction. The United States District Court for the Southern District of Ohio, Timothy S. Black, J., 962 F.Supp.2d 968, entered judgment in plaintiffs' favor, and state appealed. Same-sex couples validly married outside Kentucky brought § 1983 actions challenging constitutionality of Kentucky's marriage-licensing law and denial of recognition for valid same-sex marriages. The United States District Court for the Western District of Kentucky, John G. Heyburn II, J., 996 F.Supp.2d 542, entered judgment in couples' favor, and state appealed. Same-sex couples who were legally married in other states before moving to Tennessee brought action challenging constitutionality of Tennessee's laws that voided and rendered unenforceable in Tennessee any marriage prohibited in state. The United States District Court for the Middle District of Tennessee, Aleta Arthur Trauger, J., 7 F.Supp.3d 759, granted couples' motion for preliminary injunction, and state appealed. The United States Court of Appeals for the Sixth Circuit, Sutton, Circuit Judge, 772 F.3d 388, reversed. Cases were consolidated and certiorari was granted.

Holdings: The Supreme Court, Justice Kennedy, held that:

(1) The right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty, overruling *Baker v. Nelson*, 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65, and abrogating *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, *Adams v. Howerton*, 673 F.2d 1036, and other cases, and

(2) States must recognize lawful same-sex marriages performed in other States.

Reversed.

Chief Justice Roberts filed a dissenting opinion, in which Justices Scalia and Thomas joined.

Justice Scalia filed a dissenting opinion, in which Justice Thomas joined.

Justice Thomas filed a dissenting opinion, in which Justice Scalia joined.

Justice Alito filed a dissenting opinion, in which Justices Scalia and Thomas joined.

Justice KENNEDY delivered the opinion of the Court.

The Constitution promises liberty to all within its reach, a liberty that includes certain specific rights that allow persons, within a lawful realm, to define and express their identity. The petitioners in these cases seek to find that liberty by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex.

I

These cases come from Michigan, Kentucky, Ohio, and Tennessee, States that define marriage as a union between one man and one woman. See, *e.g.,* Mich. Const., Art. I, § 25; Ky. Const. § 233A; Ohio Rev.Code Ann. § 3101.01 (Lexis 2008); Tenn. Const., Art. XI, § 18. The petitioners are 14 same-sex couples and two men whose same-sex partners are deceased. The respondents are state officials responsible for enforcing the laws in question. The petitioners claim the respondents violate the Fourteenth Amendment by denying them the right to marry or to have their marriages, lawfully performed in another State, given full recognition.

Petitioners filed these suits in United States District Courts in their home States. Each District Court ruled in their favor. Citations to those cases are in Appendix A, *infra.* The respondents appealed the decisions against them to the United States Court of Appeals for the Sixth Circuit. It consolidated the cases and reversed the judgments of the District Courts. *DeBoer v. Snyder,* 772 F.3d 388 (2014). The Court of Appeals held that a State has no constitutional obligation to license same-sex marriages or to recognize same-sex marriages performed out of State.

The petitioners sought certiorari. This Court granted review, limited to two questions. 574 U.S. ——, —— S.Ct. ——, —— L.Ed.2d —— (2015). The first, presented by the cases from Michigan and Kentucky, is whether the Fourteenth Amendment requires a State to license a marriage between two people of the same sex. The second, presented by the cases from Ohio, Tennessee, and, again, Kentucky, is whether the Fourteenth Amendment requires a State to recognize a same-sex marriage licensed and performed in a State which does grant that right.

II

Before addressing the principles and precedents that govern these cases, it is appropriate to note the history of the subject now before the Court.

A

From their beginning to their most recent page, the annals of human history

reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.

The centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations. Since the dawn of history, marriage has transformed strangers into relatives, binding families and societies together. Confucius taught that marriage lies at the foundation of government. 2 Li Chi: Book of Rites 266 (C. Chai & W. Chai eds., J. Legge transl. 1967). This wisdom was echoed centuries later and half a world away by Cicero, who wrote, "The first bond of society is marriage; next, children; and then the family." See De Officiis 57 (W. Miller transl. 1913). There are untold references to the beauty of marriage in religious and philosophical texts spanning time, cultures, and faiths, as well as in art and literature in all their forms. It is fair and necessary to say these references were based on the understanding that marriage is a union between two persons of the opposite sex.

That history is the beginning of these cases. The respondents say it should be the end as well. To them, it would demean a timeless institution if the concept and lawful status of marriage were extended to two persons of the same sex. Marriage, in their view, is by its nature a gender-differentiated union of man and woman. This view long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.

The petitioners acknowledge this history but contend that these cases cannot end there. Were their intent to demean the revered idea and reality of marriage, the petitioners' claims would be of a different order. But that is neither their purpose nor their submission. To the contrary, it is the enduring importance of marriage that underlies the petitioners' contentions. This, they say, is their whole point. Far from seeking to devalue marriage, the petitioners seek it for themselves because of their respect—and need—for its privileges and responsibilities. And their immutable nature dictates that same-sex marriage is their only real path to this profound commitment.

Recounting the circumstances of three of these cases illustrates the urgency of the petitioners' cause from their perspective. Petitioner James Obergefell, a plaintiff in the Ohio case, met John Arthur over two decades ago. They fell in love and started a life together, establishing a lasting, committed relation. In 2011, however, Arthur was diagnosed with amyotrophic lateral sclerosis, or ALS. This debilitating disease is progressive, with no known cure. Two years ago, Obergefell and Arthur decided to commit to one another, resolving to marry before Arthur died. To fulfill their mutual promise, they traveled from Ohio to Maryland, where same-sex marriage was legal. It was difficult for Arthur to move, and so the couple were wed inside a medical transport plane as it remained on the tarmac in Baltimore. Three months later, Arthur died. Ohio law does not permit Obergefell to be listed as the surviving spouse on Arthur's death certificate. By statute, they must remain strangers even in death, a state-imposed separation Obergefell deems "hurtful for

the rest of time." App. in No. 14–556 etc., p. 38. He brought suit to be shown as the surviving spouse on Arthur's death certificate.

April DeBoer and Jayne Rowse are co-plaintiffs in the case from Michigan. They celebrated a commitment ceremony to honor their permanent relation in 2007. They both work as nurses, DeBoer in a neonatal unit and Rowse in an emergency unit. In 2009, DeBoer and Rowse fostered and then adopted a baby boy. Later that same year, they welcomed another son into their family. The new baby, born prematurely and abandoned by his biological mother, required around-the-clock care. The next year, a baby girl with special needs joined their family. Michigan, however, permits only opposite-sex married couples or single individuals to adopt, so each child can have only one woman as his or her legal parent. If an emergency were to arise, schools and hospitals may treat the three children as if they had only one parent. And, were tragedy to befall either DeBoer or Rowse, the other would have no legal rights over the children she had not been permitted to adopt. This couple seeks relief from the continuing uncertainty their unmarried status creates in their lives.

Army Reserve Sergeant First Class Ijpe DeKoe and his partner Thomas Kostura, co-plaintiffs in the Tennessee case, fell in love. In 2011, DeKoe received orders to deploy to Afghanistan. Before leaving, he and Kostura married in New York. A week later, DeKoe began his deployment, which lasted for almost a year. When he returned, the two settled in Tennessee, where DeKoe works full-time for the Army Reserve. Their lawful marriage is stripped from them whenever they reside in Tennessee, returning and disappearing as they travel across state lines. DeKoe, who served this Nation to preserve the freedom the Constitution protects, must endure a substantial burden.

The cases now before the Court involve other petitioners as well, each with their own experiences. Their stories reveal that they seek not to denigrate marriage but rather to live their lives, or honor their spouses' memory, joined by its bond.

B

The ancient origins of marriage confirm its centrality, but it has not stood in isolation from developments in law and society. The history of marriage is one of both continuity and change. That institution—even as confined to opposite-sex relations—has evolved over time.

For example, marriage was once viewed as an arrangement by the couple's parents based on political, religious, and financial concerns; but by the time of the Nation's founding it was understood to be a voluntary contract between a man and a woman. See N. Cott, Public Vows: A History of Marriage and the Nation 9–17 (2000); S. Coontz, Marriage, A History 15–16 (2005). As the role and status of women changed, the institution further evolved. Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity. See 1 W. Blackstone, Commentaries on the Laws of England 430 (1765). As women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned. See Brief for Historians of Marriage et al. as *Amici Curiae* 16–19. These and other developments in the institution of marriage over the past centuries were not mere superficial changes. Rather, they worked deep transformations in its structure, affecting aspects of marriage long viewed by many as essential. See generally N. Cott, Public Vows; S. Coontz, Marriage; H.

Hartog, Man & Wife in America: A History (2000).

These new insights have strengthened, not weakened, the institution of marriage. Indeed, changed understandings of marriage are characteristic of a Nation where new dimensions of freedom become apparent to new generations, often through perspectives that begin in pleas or protests and then are considered in the political sphere and the judicial process.

This dynamic can be seen in the Nation's experiences with the rights of gays and lesbians. Until the mid–20th century, same-sex intimacy long had been condemned as immoral by the state itself in most Western nations, a belief often embodied in the criminal law. For this reason, among others, many persons did not deem homosexuals to have dignity in their own distinct identity. A truthful declaration by same-sex couples of what was in their hearts had to remain unspoken. Even when a greater awareness of the humanity and integrity of homosexual persons came in the period after World War II, the argument that gays and lesbians had a just claim to dignity was in conflict with both law and widespread social conventions. Same-sex intimacy remained a crime in many States. Gays and lesbians were prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate. See Brief for Organization of American Historians as *Amicus Curiae* 5–28.

For much of the 20th century, moreover, homosexuality was treated as an illness. When the American Psychiatric Association published the first Diagnostic and Statistical Manual of Mental Disorders in 1952, homosexuality was classified as a mental disorder, a position adhered to until 1973. See Position Statement on Homosexuality and Civil Rights, 1973, in 131 Am. J. Psychiatry 497 (1974). Only in more recent years have psychiatrists and others recognized that sexual orientation is both a normal expression of human sexuality and immutable. See Brief for American Psychological Association et al. as *Amici Curiae* 7–17.

In the late 20th century, following substantial cultural and political developments, same-sex couples began to lead more open and public lives and to establish families. This development was followed by a quite extensive discussion of the issue in both governmental and private sectors and by a shift in public attitudes toward greater tolerance. As a result, questions about the rights of gays and lesbians soon reached the courts, where the issue could be discussed in the formal discourse of the law.

This Court first gave detailed consideration to the legal status of homosexuals in *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986). There it upheld the constitutionality of a Georgia law deemed to criminalize certain homosexual acts. Ten years later, in *Romer v. Evans*, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996), the Court invalidated an amendment to Colorado's Constitution that sought to foreclose any branch or political subdivision of the State from protecting persons against discrimination based on sexual orientation. Then, in 2003, the Court overruled *Bowers*, holding that laws making same-sex intimacy a crime "demea[n] the lives of homosexual persons." *Lawrence v. Texas*, 539 U.S. 558, 575, 123 S.Ct. 2472, 156 L.Ed.2d 508.

Against this background, the legal question of same-sex marriage arose. In 1993, the Hawaii Supreme Court held Hawaii's law restricting marriage to opposite-sex couples constituted a classification on the basis of sex and was therefore subject to

strict scrutiny under the Hawaii Constitution. *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44. Although this decision did not mandate that same-sex marriage be allowed, some States were concerned by its implications and reaffirmed in their laws that marriage is defined as a union between opposite-sex partners. So too in 1996, Congress passed the Defense of Marriage Act (DOMA), 110 Stat. 2419, defining marriage for all federal-law purposes as "only a legal union between one man and one woman as husband and wife." 1 U.S.C. § 7.

The new and widespread discussion of the subject led other States to a different conclusion. In 2003, the Supreme Judicial Court of Massachusetts held the State's Constitution guaranteed same-sex couples the right to marry. See *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (2003). After that ruling, some additional States granted marriage rights to same-sex couples, either through judicial or legislative processes. These decisions and statutes are cited in Appendix B, *infra*. Two Terms ago, in *United States v. Windsor*, 570 U.S. ——, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013), this Court invalidated DOMA to the extent it barred the Federal Government from treating same-sex marriages as valid even when they were lawful in the State where they were licensed. DOMA, the Court held, impermissibly disparaged those same-sex couples "who wanted to affirm their commitment to one another before their children, their family, their friends, and their community." *Id.*, at ——, 133 S.Ct., at 2689.

Numerous cases about same-sex marriage have reached the United States Courts of Appeals in recent years. In accordance with the judicial duty to base their decisions on principled reasons and neutral discussions, without scornful or disparaging commentary, courts have written a substantial body of law considering all sides of these issues. That case law helps to explain and formulate the underlying principles this Court now must consider. With the exception of the opinion here under review and one other, see *Citizens for Equal Protection v. Bruning*, 455 F.3d 859, 864–868 (C.A.8 2006), the Courts of Appeals have held that excluding same-sex couples from marriage violates the Constitution. There also have been many thoughtful District Court decisions addressing same-sex marriage—and most of them, too, have concluded same-sex couples must be allowed to marry. In addition the highest courts of many States have contributed to this ongoing dialogue in decisions interpreting their own State Constitutions. These state and federal judicial opinions are cited in Appendix A, *infra*.

After years of litigation, legislation, referenda, and the discussions that attended these public acts, the States are now divided on the issue of same-sex marriage. See Office of the Atty. Gen. of Maryland, The State of Marriage Equality in America, State–by–State Supp. (2015).

III

[1] Under the Due Process Clause of the Fourteenth Amendment, no State shall "deprive any person of life, liberty, or property, without due process of law." The fundamental liberties protected by this Clause include most of the rights enumerated in the Bill of Rights. See *Duncan v. Louisiana*, 391 U.S. 145, 147–149, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). In addition these liberties extend to certain personal choices central to individual dignity and autonomy, including intimate choices that define personal identity and beliefs. See, *e.g.*, *Eisenstadt v. Baird*, 405 U.S. 438, 453, 92 S.Ct. 1029, 31 L.Ed.2d

349 (1972); *Griswold v. Connecticut*, 381 U.S. 479, 484–486, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965).

[2, 3] The identification and protection of fundamental rights is an enduring part of the judicial duty to interpret the Constitution. That responsibility, however, "has not been reduced to any formula." *Poe v. Ullman*, 367 U.S. 497, 542, 81 S.Ct. 1752, 6 L.Ed.2d 989 (1961) (Harlan, J., dissenting). Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect. See *ibid.* That process is guided by many of the same considerations relevant to analysis of other constitutional provisions that set forth broad principles rather than specific requirements. History and tradition guide and discipline this inquiry but do not set its outer boundaries. See *Lawrence*, *supra*, at 572, 123 S.Ct. 2472. That method respects our history and learns from it without allowing the past alone to rule the present.

[4] The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal stricture, a claim to liberty must be addressed.

[5, 6] Applying these established tenets, the Court has long held the right to marry is protected by the Constitution. In *Loving v. Virginia*, 388 U.S. 1, 12, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), which invalidated bans on interracial unions, a unanimous Court held marriage is "one of the vital personal rights essential to the orderly pursuit of happiness by free men." The Court reaffirmed that holding in *Zablocki v. Redhail*, 434 U.S. 374, 384, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978), which held the right to marry was burdened by a law prohibiting fathers who were behind on child support from marrying. The Court again applied this principle in *Turner v. Safley*, 482 U.S. 78, 95, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987), which held the right to marry was abridged by regulations limiting the privilege of prison inmates to marry. Over time and in other contexts, the Court has reiterated that the right to marry is fundamental under the Due Process Clause. See, *e.g.*, *M.L.B. v. S.L.J.*, 519 U.S. 102, 116, 117 S.Ct. 555, 136 L.Ed.2d 473 (1996); *Cleveland Bd. of Ed. v. LaFleur*, 414 U.S. 632, 639–640, 94 S.Ct. 791, 39 L.Ed.2d 52 (1974); *Griswold*, *supra*, at 486, 85 S.Ct. 1678; *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942); *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S.Ct. 625, 67 L.Ed. 1042 (1923).

It cannot be denied that this Court's cases describing the right to marry presumed a relationship involving opposite-sex partners. The Court, like many institutions, has made assumptions defined by the world and time of which it is a part. This was evident in *Baker v. Nelson*, 409 U.S. 810, 93 S.Ct. 37, 34 L.Ed.2d 65, a one-line summary decision issued in 1972, holding the exclusion of same-sex couples from marriage did not present a substantial federal question.

Still, there are other, more instructive precedents. This Court's cases have expressed constitutional principles of broader reach. In defining the right to marry these cases have identified essential attributes of that right based in history, tradition, and other constitutional liberties inherent in this intimate bond. See, *e.g.*,

Lawrence, 539 U.S., at 574, 123 S.Ct. 2472; *Turner, supra,* at 95, 107 S.Ct. 2254; *Zablocki, supra,* at 384, 98 S.Ct. 673; *Loving, supra,* at 12, 87 S.Ct. 1817; *Griswold, supra,* at 486, 85 S.Ct. 1678. And in assessing whether the force and rationale of its cases apply to same-sex couples, the Court must respect the basic reasons why the right to marry has been long protected. See, *e.g., Eisenstadt, supra,* at 453–454, 92 S.Ct. 1029; *Poe, supra,* at 542–553, 81 S.Ct. 1752 (Harlan, J., dissenting).

This analysis compels the conclusion that same-sex couples may exercise the right to marry. The four principles and traditions to be discussed demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.

[7] A first premise of the Court's relevant precedents is that the right to personal choice regarding marriage is inherent in the concept of individual autonomy. This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause. See 388 U.S., at 12, 87 S.Ct. 1817; see also *Zablocki, supra,* at 384, 98 S.Ct. 673 (observing *Loving* held "the right to marry is of fundamental importance for all individuals"). Like choices concerning contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make. See *Lawrence, supra,* at 574, 123 S.Ct. 2472. Indeed, the Court has noted it would be contradictory "to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society." *Zablocki, supra,* at 386, 98 S.Ct. 673.

Choices about marriage shape an individual's destiny. As the Supreme Judicial Court of Massachusetts has explained, because "it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life's momentous acts of self-definition." *Goodridge,* 440 Mass., at 322, 798 N.E.2d, at 955.

[8] The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation. See *Windsor,* 570 U.S., at ——, 133 S.Ct., at 2693–2695. There is dignity in the bond between two men or two women who seek to marry and in their autonomy to make such profound choices. Cf. *Loving, supra,* at 12, 87 S.Ct. 1817 ("[T]he freedom to marry, or not marry, a person of another race resides with the individual and cannot be infringed by the State").

[9] A second principle in this Court's jurisprudence is that the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals. This point was central to *Griswold v. Connecticut,* which held the Constitution protects the right of married couples to use contraception. 381 U.S., at 485, 85 S.Ct. 1678. Suggesting that marriage is a right "older than the Bill of Rights," *Griswold* described marriage this way:

> "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose

as any involved in our prior decisions." *Id.*, at 486, 85 S.Ct. 1678.

And in *Turner*, the Court again acknowledged the intimate association protected by this right, holding prisoners could not be denied the right to marry because their committed relationships satisfied the basic reasons why marriage is a fundamental right. See 482 U.S., at 95–96, 107 S.Ct. 2254. The right to marry thus dignifies couples who "wish to define themselves by their commitment to each other." *Windsor*, *supra*, at ——, 133 S.Ct., at 2689. Marriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other.

[10] As this Court held in *Lawrence*, same-sex couples have the same right as opposite-sex couples to enjoy intimate association. *Lawrence* invalidated laws that made same-sex intimacy a criminal act. And it acknowledged that "[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring." 539 U.S., at 567, 123 S.Ct. 2472. But while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the full promise of liberty.

[11] A third basis for protecting the right to marry is that it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education. See *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 69 L.Ed. 1070 (1925); *Meyer*, 262 U.S., at 399, 43 S.Ct. 625. The Court has recognized these connections by describing the varied rights as a unified whole: "[T]he right to 'marry, establish a home and bring up children' is a central part of the liberty protected by the Due Process Clause." *Zablocki*, 434 U.S., at 384, 98 S.Ct. 673 (quoting *Meyer*, *supra*, at 399, 43 S.Ct. 625). Under the laws of the several States, some of marriage's protections for children and families are material. But marriage also confers more profound benefits. By giving recognition and legal structure to their parents' relationship, marriage allows children "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives." *Windsor*, *supra*, at ——, 133 S.Ct., at 2694–2695. Marriage also affords the permanency and stability important to children's best interests. See Brief for Scholars of the Constitutional Rights of Children as *Amici Curiae* 22–27.

As all parties agree, many same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. See Brief for Gary J. Gates as *Amicus Curiae* 4. Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents, see *id.*, at 5. This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.

Excluding same-sex couples from marriage thus conflicts with a central premise of the right to marry. Without the recognition, stability, and predictability marriage offers, their children suffer the stigma of knowing their families are somehow lesser. They also suffer the significant material costs of being raised by unmarried parents, relegated through no fault of their own to a more difficult and uncertain family life. The marriage laws at issue

here thus harm and humiliate the children of same-sex couples. See *Windsor, supra,* at ——, 133 S.Ct., at 2694–2695.

That is not to say the right to marry is less meaningful for those who do not or cannot have children. An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State. In light of precedent protecting the right of a married couple not to procreate, it cannot be said the Court or the States have conditioned the right to marry on the capacity or commitment to procreate. The constitutional marriage right has many aspects, of which childbearing is only one.

Fourth and finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order. Alexis de Tocqueville recognized this truth on his travels through the United States almost two centuries ago:

> "There is certainly no country in the world where the tie of marriage is so much respected as in America . . . [W]hen the American retires from the turmoil of public life to the bosom of his family, he finds in it the image of order and of peace. . . . [H]e afterwards carries [that image] with him into public affairs." 1 Democracy in America 309 (H. Reeve transl., rev. ed. 1990).

In *Maynard v. Hill,* 125 U.S. 190, 211, 8 S.Ct. 723, 31 L.Ed. 654 (1888), the Court echoed de Tocqueville, explaining that marriage is "the foundation of the family and of society, without which there would be neither civilization nor progress." Marriage, the *Maynard* Court said, has long been " 'a great public institution, giving character to our whole civil polity.' " *Id.,* at 213, 8 S.Ct. 723. This idea has been reiterated even as the institution has evolved in substantial ways over time, superseding rules related to parental consent, gender, and race once thought by many to be essential. See generally N. Cott, Public Vows. Marriage remains a building block of our national community.

For that reason, just as a couple vows to support each other, so does society pledge to support the couple, offering symbolic recognition and material benefits to protect and nourish the union. Indeed, while the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules. See Brief for United States as *Amicus Curiae* 6–9; Brief for American Bar Association as *Amicus Curiae* 8–29. Valid marriage under state law is also a significant status for over a thousand provisions of federal law. See *Windsor,* 570 U.S., at ——–——, 133 S.Ct., at 2690–2691. The States have contributed to the fundamental character of the marriage right by placing that institution at the center of so many facets of the legal and social order.

There is no difference between same- and opposite-sex couples with respect to this principle. Yet by virtue of their exclusion from that institution, same-sex couples are denied the constellation of benefits that the States have linked to marriage. This harm results in more than just material burdens. Same-sex couples are consigned to an instability many opposite-sex couples would deem intolerable in their own lives. As the State itself makes

marriage all the more precious by the significance it attaches to it, exclusion from that status has the effect of teaching that gays and lesbians are unequal in important respects. It demeans gays and lesbians for the State to lock them out of a central institution of the Nation's society. Same-sex couples, too, may aspire to the transcendent purposes of marriage and seek fulfillment in its highest meaning.

The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest. With that knowledge must come the recognition that laws excluding same-sex couples from the marriage right impose stigma and injury of the kind prohibited by our basic charter.

Objecting that this does not reflect an appropriate framing of the issue, the respondents refer to *Washington v. Glucksberg,* 521 U.S. 702, 721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997), which called for a "'careful description'" of fundamental rights. They assert the petitioners do not seek to exercise the right to marry but rather a new and nonexistent "right to same-sex marriage." Brief for Respondent in No. 14–556, p. 8. *Glucksberg* did insist that liberty under the Due Process Clause must be defined in a most circumscribed manner, with central reference to specific historical practices. Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy. *Loving* did not ask about a "right to interracial marriage"; *Turner* did not ask about a "right of inmates to marry"; and *Zablocki* did not ask about a "right of fathers with unpaid child support duties to marry." Rather, each case inquired about the right to marry in its comprehensive sense, asking if there was a sufficient justification for excluding the relevant class from the right. See also *Glucksberg,* 521 U.S., at 752–773, 117 S.Ct. 2258 (Souter, J., concurring in judgment); *id.,* at 789–792, 117 S.Ct. 2258 (BREYER, J., concurring in judgments).

[12] That principle applies here. If rights were defined by who exercised them in the past, then received practices could serve as their own continued justification and new groups could not invoke rights once denied. This Court has rejected that approach, both with respect to the right to marry and the rights of gays and lesbians. See *Loving,* 388 U.S., at 12, 87 S.Ct. 1817; *Lawrence,* 539 U.S., at 566–567, 123 S.Ct. 2472.

The right to marry is fundamental as a matter of history and tradition, but rights come not from ancient sources alone. They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era. Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here. But when that sincere, personal opposition becomes enacted law and public policy, the necessary consequence is to put the imprimatur of the State itself on an exclusion that soon demeans or stigmatizes those whose own liberty is then denied. Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.

[13] The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection

Clause are connected in a profound way, though they set forth independent principles. Rights implicit in liberty and rights secured by equal protection may rest on different precepts and are not always coextensive, yet in some instances each may be instructive as to the meaning and reach of the other. In any particular case one Clause may be thought to capture the essence of the right in a more accurate and comprehensive way, even as the two Clauses may converge in the identification and definition of the right. See *M.L.B.*, 519 U.S., at 120–121, 117 S.Ct. 555; *id.*, at 128–129, 117 S.Ct. 555 (KENNEDY, J., concurring in judgment); *Bearden v. Georgia*, 461 U.S. 660, 665, 103 S.Ct. 2064, 76 L.Ed.2d 221 (1983). This interrelation of the two principles furthers our understanding of what freedom is and must become.

The Court's cases touching upon the right to marry reflect this dynamic. In *Loving* the Court invalidated a prohibition on interracial marriage under both the Equal Protection Clause and the Due Process Clause. The Court first declared the prohibition invalid because of its unequal treatment of interracial couples. It stated: "There can be no doubt that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause." 388 U.S., at 12, 87 S.Ct. 1817. With this link to equal protection the Court proceeded to hold the prohibition offended central precepts of liberty: "To deny this fundamental freedom on so unsupportable a basis as the racial classifications embodied in these statutes, classifications so directly subversive of the principle of equality at the heart of the Fourteenth Amendment, is surely to deprive all the State's citizens of liberty without due process of law." *Ibid.* The reasons why marriage is a fundamental right became more clear and compelling from a full awareness and understanding of the hurt that resulted from laws barring interracial unions.

The synergy between the two protections is illustrated further in *Zablocki*. There the Court invoked the Equal Protection Clause as its basis for invalidating the challenged law, which, as already noted, barred fathers who were behind on child-support payments from marrying without judicial approval. The equal protection analysis depended in central part on the Court's holding that the law burdened a right "of fundamental importance." 434 U.S., at 383, 98 S.Ct. 673. It was the essential nature of the marriage right, discussed at length in *Zablocki*, see *id.*, at 383–387, 98 S.Ct. 673, that made apparent the law's incompatibility with requirements of equality. Each concept—liberty and equal protection—leads to a stronger understanding of the other.

[14] Indeed, in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged. To take but one period, this occurred with respect to marriage in the 1970's and 1980's. Notwithstanding the gradual erosion of the doctrine of coverture, see *supra*, at 2595, invidious sex-based classifications in marriage remained common through the mid–20th century. See App. to Brief for Appellant in *Reed v. Reed*, O.T. 1971, No. 70–4, pp. 69–88 (an extensive reference to laws extant as of 1971 treating women as unequal to men in marriage). These classifications denied the equal dignity of men and women. One State's law, for example, provided in 1971 that "the husband is the head of the family and the wife is subject to him; her legal civil existence is merged in the husband, except so far as the law recognizes her

separately, either for her own protection, or for her benefit." Ga.Code Ann. § 53–501 (1935). Responding to a new awareness, the Court invoked equal protection principles to invalidate laws imposing sex-based inequality on marriage. See, *e.g., Kirchberg v. Feenstra,* 450 U.S. 455, 101 S.Ct. 1195, 67 L.Ed.2d 428 (1981); *Wengler v. Druggists Mut. Ins. Co.,* 446 U.S. 142, 100 S.Ct. 1540, 64 L.Ed.2d 107 (1980); *Califano v. Westcott,* 443 U.S. 76, 99 S.Ct. 2655, 61 L.Ed.2d 382 (1979); *Orr v. Orr,* 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979); *Califano v. Goldfarb,* 430 U.S. 199, 97 S.Ct. 1021, 51 L.Ed.2d 270 (1977) (plurality opinion); *Weinberger v. Wiesenfeld,* 420 U.S. 636, 95 S.Ct. 1225, 43 L.Ed.2d 514 (1975); *Frontiero v. Richardson,* 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973). Like *Loving* and *Zablocki,* these precedents show the Equal Protection Clause can help to identify and correct inequalities in the institution of marriage, vindicating precepts of liberty and equality under the Constitution.

Other cases confirm this relation between liberty and equality. In *M.L.B. v. S.L.J.,* the Court invalidated under due process and equal protection principles a statute requiring indigent mothers to pay a fee in order to appeal the termination of their parental rights. See 519 U.S., at 119–124, 117 S.Ct. 555. In *Eisenstadt v. Baird,* the Court invoked both principles to invalidate a prohibition on the distribution of contraceptives to unmarried persons but not married persons. See 405 U.S., at 446–454, 92 S.Ct. 1029. And in *Skinner v. Oklahoma ex rel. Williamson,* the Court invalidated under both principles a law that allowed sterilization of habitual criminals. See 316 U.S., at 538–543, 62 S.Ct. 1110.

In *Lawrence* the Court acknowledged the interlocking nature of these constitutional safeguards in the context of the legal treatment of gays and lesbians. See 539 U.S., at 575, 123 S.Ct. 2472. Although *Lawrence* elaborated its holding under the Due Process Clause, it acknowledged, and sought to remedy, the continuing inequality that resulted from laws making intimacy in the lives of gays and lesbians a crime against the State. See *ibid.* *Lawrence* therefore drew upon principles of liberty and equality to define and protect the rights of gays and lesbians, holding the State "cannot demean their existence or control their destiny by making their private sexual conduct a crime." *Id.,* at 578, 123 S.Ct. 2472.

This dynamic also applies to same-sex marriage. It is now clear that the challenged laws burden the liberty of same-sex couples, and it must be further acknowledged that they abridge central precepts of equality. Here the marriage laws enforced by the respondents are in essence unequal: same-sex couples are denied all the benefits afforded to opposite-sex couples and are barred from exercising a fundamental right. Especially against a long history of disapproval of their relationships, this denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry. See, *e.g., Zablocki, supra,* at 383–388, 98 S.Ct. 673; *Skinner,* 316 U.S., at 541, 62 S.Ct. 1110.

[15] These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that

same-sex couples may exercise the fundamental right to marry. No longer may this liberty be denied to them. *Baker v. Nelson* must be and now is overruled, and the State laws challenged by Petitioners in these cases are now held invalid to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples.

. . .

The respondents also argue allowing same-sex couples to wed will harm mar-riage as an institution by leading to fewer opposite-sex marriages. This may occur, the respondents contend, because licens-ing same-sex marriage severs the connection between natural procreation and marriage. That argument, however, rests on a counterintuitive view of opposite-sex couple's decisionmaking processes regard-ing marriage and parenthood. Decisions about whether to marry and raise children are based on many personal, romantic, and practical considerations; and it is un-realistic to conclude that an opposite-sex couple would choose not to marry simply because same-sex couples may do so. See Kitchen v. Herbert, 755 F.3d 1193, 1223 (C.A.10 2014) ("[I]t is wholly illogical to believe that state recognition of the love and commitment between same-sex couples will alter the most intimate and personal decisions of opposite-sex couples"). The respondents have not shown a foun-dation for the conclusion that allowing same-sex marriage will cause the harmful outcomes they describe. Indeed, with respect to this asserted basis for excluding same-sex couples from the right to marry, it is appropriate to observe these cases involve only the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties.

[21] Finally, it must be emphasized that religions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. The same is true of those who oppose same-sex marriage for other reasons. In turn, those who believe allowing same-sex marriage is proper or indeed essential, whether as a matter of religious conviction or secular belief, may engage those who disagree with their view in an open and searching debate. The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.

* * *

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were. As some of the petitioners in these cases demonstrate, marriage embodies a love that may endure even past death. It would misunderstand these men and women to say they disrespect the idea of marriage. Their plea is that they do respect it, respect it so deeply that they seek to find its fulfillment for themselves. Their hope is not to be condemned to live in loneliness, excluded from one of civilization's oldest institutions. They ask for equal dignity in the eyes of the law. The Constitution grants them that right.

The judgment of the Court of Appeals for the Sixth Circuit is reversed.

It is so ordered.

FRANKE, J., CONCURRING IN THE JUDGMENT

I join parts I through VI of Court's opinion, concurring in the judgment. I agree that the decision of the court below should be reversed, and therefore I concur in the Court's judgment, but write separately to clarify that this matter should not be decided on fundamental rights grounds. Further, I believe that the Court should provide more specific instructions to the court below with respect to the appropriate remedy that should be awarded in light of the equal protection remedy we find herein: the only remedy that would be equality-enhancing overall would be one that disestablished the institution of civil marriage altogether. It would then be left to the states to devise a more equitable means by which to secure the economic and legal interests of its citizens; one that does not rest on status hierarchies that run afoul of fundamental values of equality and democracy.

We are urged by the petitioners in this case to usher in the next step in the modernization of the institution of civil marriage. The petitioners, sixteen people making up eight couples, contend that any distinction between their partnerships and those now deemed eligible to marry in the states in which they reside, turns on the consideration of factors rendered constitutionally illegitimate for the purpose of public law-making. This argument takes two principal forms: one based in the Equal Protection Clause, and another that suggests a substantive due process right to civil marriage as a fundamental right.

I

As a preliminary matter, I note that the relief sought by the petitioners herein is neither radical nor sweeping, notwithstanding the alarm bells rung by some *amici*. The claimants merely plea that their unions should be legitimized through the grant of a civil marriage license on the same terms as that afforded to different-sex couples. They insist that the same level of commitment, decency, and stability reasonably characterizes their partnerships as do the partnerships of different-sex couples that are granted state licensure. Indeed, the facts alleged by the couples in the petitioner class suggest a greater degree of commitment and stability than the majority of different-sex couples who are not barred from a civil license for their union. In important respects, the success of the petitioners in this case will subsidize the underlying values of marriage more generally, insofar as the petitioner-couples have embraced values of monogamy, financial interdependence, loving and responsible parenthood, and dignity that make up the very fabric of traditional notions of marriage. To the ways in which dignity underwrites the celebrated status that marriage enjoys I shall return. The petitioners herein have no aspirations to upend the institution of marriage, but rather seek to prove their entitlement to the blessings, rights, and responsibilities conferred by civil marriage on its current terms.

II

The Court's and the nation's evolving sense of justice, protected in many cases through a constitutional commitment to equality, has assigned particular legal and social opprobrium to public policies or laws that manifest or perpetuate ideologies of superiority and attendant inferiority. As the CHIEF JUSTICE rightly notes, "Legislation must promote the public interest, and may not be used merely to promote or disparage the private interests of some group."[1] A mere desire to stigmatize or humiliate a

particular group cannot serve as a legitimate public justification for lawmaking or public policy. See *Windsor v. United States*, 133 S.Ct. 2675 (2013); *United States v. Virginia,* 518 U.S. 515 (1996); *Romer v. Evans*, 517 U.S. 620 (1996); *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (concurring opinions); *Department of Agriculture v. Moreno,* 413 U. S. 528, 534 (1973).

This Court has a rich jurisprudence elaborating more than one way of framing the guarantee of equality. One approach, preferred by the CHIEF JUSTICE, analogizes the instant case to *Plessy v. Ferguson*, 163 U.S. 537, 559 (Harlan, J., dissenting) and *United States v. Carolene Products*, 304 U.S. 144, 152 & n.4 (1938), and sets out to determining whether sexual orientation-based discrimination should be granted suspect class status akin to race. Some scholars have described this as an "anticlassification" approach and have critiqued it for the way in which it distracts the equality analysis from underlying causes or effects of status hierarchies by focusing attention instead on the wrong of legislative classification as a failure of instrumental rationality. Reva Siegel, *Equality Talk: Antisubordination And Anticlassification Values In Constitutional Struggles Over Brown*, 117 Harv. L. Rev. 1470, 1503 (2004).

Yet another account interprets the values underlying the Fourteenth Amendment's equality guarantee as hostile to status hierarchies. This perspective toward constitutional equality seeks to isolate and excise from the domain of legitimate public action those "laws and practices that aggravate [or perpetuate] the subordinate position of a specially disadvantaged group." Owen Fiss, Groups and the Equal Protection Clause, 5 Phil. & Pub. Aff. 107, 108, 157 (1976). This approach, often described as a "group disadvantaging" principle, is vulnerable, however, to a critique that it relies too heavily on social facts of disadvantage and their aggravation, rather than the exposure of the logic underlying the regulation, a logic with a basic structure of inferiority and superiority.

A separate line of cases treats the constitutional promise of equality as something more ambitious and more substantive. In these cases the Court has accepted the invitation to identify and then dismantle the ideologies or forms of thinking that maintain status hierarchies. The Court's infelicitous evaluation of laws that single out a kind of status for negative legal treatment has roots outside the context of the Equal Protection Clause. For instance, in *Robinson v. California*, 370 U.S. 660 (1962), we held that rights secured by the Fourteenth Amendment are in jeopardy when a mere status, drug addition in that context, forms the basis of criminal punishment:

> It is unlikely that any State at this moment in history would attempt to make it a criminal offense for a person to be mentally ill, or a leper, or to be afflicted with a venereal disease. A State might determine that the general health and welfare require that the victims of these and other human afflictions be dealt with by compulsory treatment, involving quarantine, confinement, or sequestration. But, in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.
>
> 370 U.S. at 666.

In cases raising sex discrimination claims under the Equal Protection Clause brought to this Court in the last 40 years, we have repudiated the embrace from an earlier era of the sex-based status hierarchy that lay at the core of the separate spheres doctrine endorsed by the Court in *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872). See *Reed v. Reed,* 404 US 71 (1971); *Frontiero v Richardson*, 411 U.S. 677 (1973); *Craig v. Boren*, 429 U.S. 190 (1976).

In the context of race-based equality the Court most unequivocally adopted the antisubordination principle, calling out forms of power that created and reinforced the formation of caste when it was mobilized through invidious classification. For instance, in *Loving v. Virginia*, 388 U.S. 1, 11 (1967), the Court invalidated laws that prohibited white persons from marrying non-white persons because, *inter alia*, such laws were "measures designed to maintain White Supremacy." Similarly, an ideology of racial supremacy underwrote the essential wrong of laws segregating people on the basis of their race in the context of public transportation, employment, housing, or access to lunch counters. See e.g. *Beckett v. School Bd. of City of Norfolk*, 308 F.Supp. 1274, 1304 (E.D. Va. 1969) *rev'd on other grounds*, 434 F.2d 408 (4th Cir. 1970)(attributing some forms of housing segregation "as measures designed to maintain White Supremacy."). This approach embodied the most effective repudiation of Chief Justice TANEY's endorsement of racial caste in *Dred Scott v. Sanford*:

> They had for more than a century before been regarded as beings of an inferior order, and altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect; and that the negro might justly and lawfully be reduced to slavery for his benefit.
>
> *Dred Scott v. Sandford*, 60 U.S. (19 How) 343, 407 (1857).

This approach runs far deeper than a mere condemnation of racial classifications, irrationality in the making of public policy, or violations of a formalistic commitment to color-blindness. Rather, our constitution's commitment to equality should, and does, take aim at a particular form of mischief beyond mere classification. A commitment to the equal protection of the laws entails a suspicion with regard to the *work* that classification does and the ways it *collaborates* with ideologies of supremacy through the notions of inferiority it puts into action. In this regard, the principle of inequality that animates some of the Court's modern equality jurisprudence concerns itself especially with state policies and practices that create or legitimize a badge of inferiority born by racial and other minorities. This badge operates invidiously as a kind of warrant permitting, if not inviting, exclusion of, derision toward, and second-class treatment of those subjects so insigned. Under this account, when applied to the context of racial equality, the Fourteenth Amendment embodies "a broad principle of practical equality for the Negro race, inconsistent with any device that in fact relegates the Negro race to a position of inferiority." Charles L. Black, Jr., *The Lawfulness of the Segregation Decisions*, 69 Yale L.J. 421, 429-30 (1960).

The commitment underlying the equal protection clause in the racial context, one that aims to invalidate public policies that enact or perpetuate ideologies of inferiority, is equally salient in the case before us now. The segregation of same-sex couples from the domain of civil

marriage offends fundamental principles of equality because these laws express and implement an ideology of disgust, disdain, and antipathy towards lesbian and gay people that renders same-sex partnerships categorically undeserving of the recognition conferred on different-sex couples as a class. The N.A.A.C.P. Legal Defense and Education Fund made a similar argument to this Court in their briefing of the *Loving v. Virginia* case: "Actually, the laws against interracial marriage grew out of the system of slavery and were based on race prejudices and notions of Negro inferiority used to justify slavery, and later segregation … [These laws] intrude a racist dogma into the private and personal relationship of marriage." Brief of N.A.A.C.P. Legal Defense and Educational Fund, Inc. as Amicus Curiae, *Loving v. Commonwealth of Virginia*, 1967 WL 113929 at 13, 14-15.

With particular relevance to the instant case, in a series of decisions the Court has drawn sexual orientation-based discrimination within the protective pickets of the Equal Protection Clause by framing the claimants' equality claims as status-based injuries. Starting with *Romer v. Evens*, 517 U.S. 620 (1996), the Court has developed a jurisprudence of equality for lesbian and gay people that identifies a status-based harm as the gravamen of the constitutional wrong. "[Amendment 2] is a status-based classification of persons undertaken for its own sake, something the Equal Protection Clause does not permit." 517 U.S. 620 at 635. "Respect for this principle explains why laws singling out a certain class of citizens for disfavored legal status or general hardships are rare. A law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of equal protection of the laws in the most literal sense." *Id.* at 633. At stake in this reading of the Equal Protection Clause is the notion that status hierarchies undermine, indeed are anathema to, the very essence of democracy. "A State cannot so deem a class of persons a stranger to its laws," clarified Justice KENNEDY. *Id.* at 635. See also Jack Balkin, *The Constitution of Status*, 106 Yale L.J. 2313 (1997).

The Court continued this line of reasoning in *United States v. Windsor*, 570 U.S. __ , 133 S.Ct. 2675 (2013), wherein we invalidated a statute that denied federal legal recognition to valid marriages between persons of the same-sex by anchoring our Equal Protection analysis in the observation that, "The avowed purpose and practical effect of the law here in question are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States." 133 S.Ct. at 2693.

Overall, this line of cases can be understood to embrace something more than an anticlassification principle of equality, preferring instead a stance that can be understood as antisubordination in nature. See Siegal, *supra*, at 1505. Given that the Court's prior lesbian and gay equality cases drew from an antisubordination account of equality I expect us to continue that line of reasoning in the case before us now.

The antisubordination approach affords the Court the opportunity, or better yet, requires that the Court unearth and expose the social meanings expressed by the prohibition, and obliges the Court to describe "the status relations enforced, and the status harms inflicted, by the prohibition" in question." Siegal, *supra*, at 1503. I prefer to approach the wrong raised by the petitioners herein by recognizing how laws that ban civil licensure to otherwise qualified same-sex

couples convey a badge of inferiority toward those couples on account of their homosexuality. In so doing, those laws reinforce the caste supremacy of heterosexuality over homosexuality.

The ban on same-sex marriage is best understood as a measure designed to maintain heterosexual supremacy and to inflict a badge of inferiority on sexual minorities generally, and lesbians and gay men particularly. This argument can be found in judicial findings and briefs as the cause of marriage equality has moved its way toward us in lower courts, likening the invidious wrong underlying the exclusion of same-sex couples from the institution of civil marriage to the kind of ideological wrong named by this Court in *Loving*. See e.g.: *Conaway v. Deane*, 401 Md. 219, 268 (Ct.App.Md. 2007); *In Re Marriage Cases*, 43 Cal.4th 757, 834 (Cal. S.Ct. 2008). The plaintiffs in the 2001 Massachusetts challenge to the state's ban on same-sex civil marriage argued in the trial court: the ban on same-sex marriage "reinforces a caste supremacy of heterosexuality over homosexuality just as laws banning marriages across the color line exhibited and reinforced white supremacy." Memorandum in Support of Plaintiffs' Motion for Summary Judgment, *Goodridge v. Dep't of Public Health*, No. 01–1647-A, Massachusetts Superior Court, Aug. 20, 2001. Similarly, Judge Vaughn Walker, ruling in the case challenging California's ban on same-sex marriage enacted in Proposition 8, found that the marriage ban "conveys a message of inferiority." *Perry v. Schwarzenegger*, Pretrial Proceedings and Trial Evidence Credibility Determinations Findings of Fact Conclusions of Law Order, 704 F.Supp.2d 921, 974, 980 (N.D.Cal. 2010).

To be clear, the ideology of inferiority that underwrites the laws under challenge in this action is not reserved for same-sex couples that seek to marry. Rather, it enunciates a kind of hatred or disgust of lesbian and gay men generally, whether or not they are in intimate partnerships or seek to have those partnerships licensed by law. The ban on marriage for same-sex couples is simply one institutional setting in which that ideology of disdain gains the state's endorsement. As our prior jurisprudence makes clear, the embrace of this kind of subordinating dogma cannot serve as a legitimate public justification for lawmaking or public policy. See *Windsor v. United States*, 133 S.Ct. 2675 (2013); *United States v. Virginia,* 518 U.S. 515 (1996); *Romer v. Evans*, 517 U.S. 620 (1996); *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985) (concurring opinions).

I concur in the CHIEF JUSTICE's conclusion that laws categorically barring otherwise qualified same-sex couples from eligibility for civil marriage licenses are invalid under the Equal Protection Clause of the Fourteenth Amendment, but I do not join his reasoning in so finding. I see no need to examine the question of whether sexual-orientation based classifications should receive the same elevated level of constitutional scrutiny as classifications based on race, sex or other suspect or quasi-suspect classes. Rather, in this case we can conclude that same-sex couples can successfully challenge on equal protection grounds laws that categorically bar them from civil marriage because such laws find their origin in and perpetuate notions of heterosexual supremacy, designs that cannot form the basis of a legitimate public purpose.

II

As the CHIEF JUSTICE notes in Part VII of his opinion, petitioners also argue that a ban on same-sex marriage violates a fundamental right to marry, secured by

the Due Process Clause. I do not join in the Court's fundamental rights analysis, first because I regard it as *dicta* given that the Court had found sufficient grounds to invalidate the challenged laws on equal protection grounds. Second, I part company with what I regard as slippage in the CHIEF JUSTICE's reasoning with respect to the fundamental nature of civil marriage. Noting first that "we need not decide whether the states have a constitutional duty to create a special legal status called marriage" [2] the CHIEF JUSTICE then goes on to treat civil marriage "as if" it were fundamental, building on stilts an argument with no foundation. The CHIEF JUSTICE begins with a premise that transforms a contingent fact, "[a]ll of the states have created such a status," into a necessary one, all states must do so because "[w]e therefore treat it as a fundamental interest." The question before us is not whether marriage is fundamental in a religious, cultural, or historical sense but only whether the state's civil licensure of marriage is fundamental in a sense that is constitutional in nature. Without denying the clear fact that many people consider marriage to be a distinctly meaningful, if not sacred, form of intimate association that may entail the blessings of clergy, family, and community, this Court has never held that the constitution's due process protections require that the state set up a civil marriage regime to license those otherwise private vows.[3]

As this Court has acknowledged, "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life," *Lawrence v. Texas*, 539 U.S. 558, 573-74 (2003), but this important constitutional principle imagines that liberty flourishes in the absence of, not because of, state regulation, and does not require the state's involvement in sanctioning or licensing the forms that a good, meaningful or sacred life might take. [4] Unlike political rights such as voting, many of which require the state's facilitation in order for them to be meaningful, state facilitation is in no way essential to the revered nature of private, intimate vows of love and commitment. As is the case generally with the U.S. Constitution, civil liberties and rights tend to be negative in nature, proscribing certain discriminatory or oppressive terms and conditions imposed by the state on its citizens. It might be a better constitution if it contained an array of positive in addition to negative rights but it would be a markedly different one from the one we have.[5]

To be sure, once the state gets into the marriage business it must do so on terms that conform to the requirements of the constitution, but this strong imperative does not entail a constitutional duty placed on the state to license marriages at all.[6] For this reason, I would resist using this case as an opportunity expand the substantive reach of the Due Process Clause to include a fundamental right to marry.

III

Finally, while I join the Court's finding that the Equal Protection Clause is offended by laws that limit the issuance of civil marriage licenses to different-sex couples, I write separately to clarify our instructions to lower courts on remand with respect to the remedy entailed by the constitutional violation we find today.

Given that I would ground the Court's holding in an equal protection injury that focuses on the way the law reinforces the caste-based supremacy of heterosexuality, the appropriate remedy for such a violation must pay heed to the larger rights and interests of the full class of

persons so harmed. As such, the real parties in interest in this matter include homosexuals more generally, not merely homosexuals who seek to marry, or same-sex couples who seek to marry. Reverse engineering the ban on same-sex civil marriage leads one back to a blueprint for homophobia more generally, and the marriage ban is merely one element of that originary design.

The interests of this larger class of persons should inform our consideration of the appropriate remedy in this case. Justice would not be done, nor would the spirit of the Equal Protection Clause be honored, if in dismantling one status hierarchy we inextricably fortified another. Yet we would do just that were we to simply order a remedy that same-sex couples be permitted to gain civil marriage licenses on the same terms and conditions as different-sex couples. This remedy would simultaneously dissolve one status hierarchy within the gay community while assembling another, privileging married gay people over unmarried gay people, and would reinforce the supremacy of married people as a class.[7]

As society evolves in such a way as to recognize the claims of lesbians and gay men to equality and dignity, marriage has persisted as the social, legal and moral container for legitimacy and respectability. Surely the Court is correct in finding that the statutory exclusion of same-sex couples from civil marriage creates the kind of stigmatic harm that the Equal Protection Clause was designed to prohibit. But in so finding we should be loath to reinforce the legacy of laws and public values that disparage sexual relations outside of marriage. The dignity enjoyed by same-sex couples who are now eligible to marry should not be gained by reinforcing the stigma suffered by adults who cannot or do not marry, or by children born to married parents.[8] The cause of advancing the equal protection rights of same-sex couples should not be bought at the expense of an equality norm that condemns marital status discrimination. As one commentator has rightly noted, "[i]n a world in which marriage is both a privileged status and a status of the privileged, marriage equality that rests upon non-marriage's ignominy risks reinforcing the many other status inequalities that taint the legacy of marital supremacy." Serena Mayeri, *Marital Supremacy And The Constitution Of The Nonmarital Family*, 103 Cal. L. Rev. 1277, 1283 (2015).

For these reasons, the appropriate remedy for the Equal Protection injury in this case would be the disestablishment of civil marriage altogether.

This remedy may strike some as a radical cure for the ill of excluding same-sex couples from civil marriage. To be sure, the disestablishment of civil marriage could impose its own equal protection injury if doing so were motivated by a desire to deny same-sex couples a right to marry, just as closing public schools created an equal protection injury when done to avoid this Court's command to end *de jure* racial segregation in *Brown v. Board of Education*, 347 U.S. 483 (1954): "[w]hatever nonracial grounds might support a State's allowing a county to abandon public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional." *Griffin v. County Sch. Bd. of Educ.*, 377 U.S. 218, 231 (1964). But if the abolition of marriage were undertaken, as I urge here, in sympathy with the equal protection rights of same-sex couples no constitutional infirmity of the sort of the kind confronted by the Court in *Griffin* would occur. Rather than a subterfuge to avoid compliance with the

constitution, the abolition of marriage would assure greater fidelity to the constitution's promises of equal treatment and dignity under law for all gay men and lesbians.[9]

IV

For these reasons, I concur in the Court's conclusion that the laws at issue here violate the Equal Protection Clause, but I do so for reasons other than those marshaled by the CHIEF JUSTICE. Laws barring same-sex couples from eligibility for licensure as civil marriages find their origin in and perpetuate notions of heterosexual supremacy, and have the aim and effect of imposing a badge of inferiority on gay men and lesbians more generally. Furthermore, I seek to clarify the nature of the remedy that ought to be ordered on remand. Given that the real parties in interest in this action include all gay men and lesbians, the underlying values of equal protection can only be served if the Court were to avoid a remedy that ameliorated one form of inequality while simultaneously exacerbating yet another. For this reason, the only remedy that would be equality-enhancing overall would be one that disestablished the institution of civil marriage altogether. It would then be left to the states to devise a more equitable means by which to secure the economic and legal interests of its citizens; one that does not rest on status hierarchies that run afoul of fundamental values of equality and democracy.

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[1] Opinion for the Court at p. 2.

[2] Opinion for the Court at p. 10.

[3] Cases cited by the petitioners and amici advancing the proposition that there is a Due Process right to civil marriage are less conclusive than they claim. *Turner v. Safely*, 482 U.S. 78 (1987); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967). These cases, taken as a whole, do not establish a substantive due process right to civil licensure of marriage in the absence of the illegitimate exclusion of one class of persons therefrom.

[4] This is not to say that there aren't other contexts where state facilitation is essential to the fundamental right at issue. In *Maher v. Roe*, 432 U.S. 464 (1977), the Court rejected the claim of indigent women that the meaningful exercise of fundamental rights secured in *Roe v. Wade*, 410 U.S. 113 (1973), entailed assess to public funding that would render those rights accessible for poor women. I believe that *Maher* was wrongly decided, yet my view in this case does not contract my position in *Maher*. In the case of poor women's access to abortion, facilitation by the state in the form of public funding is the only way to render the right secured in *Roe* meaningful. In the absence of public funding, the right secured in *Roe* would be completely meaningless for many poor or low income women. With marriage, by contrast, state facilitation or licensure is incidental to a vow of love and commitment that is essentially private in nature.

[5] See Pamela S. Karlan, *Let's Call The Whole Thing Off: Can States Abolish The Institution Of Marriage?*, 98 Cal. L. Rev. 697, 700 (2010).

[6] "The 'right to marry,' is different from rights deemed 'fundamental' for equal protection and due process purposes because the State could, in theory, abolish all civil marriage while it cannot, for example, abolish all private property rights." *Goodridge v. Department of Public Health*, 440 Mass. 309, 325 n. 14 (Mass

SJC 2003)(citations omitted). See also: Cass Sunstein, *The Right to Marry*, 26 Cardozo L.Rev. 2081, 2083–2084, (the right to marry "comprises a right of access to the expressive and material benefits that the state affords to the institution of marriage ... [and that] states may abolish marriage without offending the Constitution.") (italics omitted).

[7] We have witnessed the amplification of this status hierarchy in several states that have extended marriage rights to same-sex couples legislatively, through state court litigation, or through popular referendum. In Massachusetts, Connecticut, Delaware, New Hampshire, Rhode Island and Vermont, extending civil marriage rights to same-sex couples was accompanied by the statutory dissolution of other forms of family recognition such as domestic partnerships or civil unions. See National Center for Lesbian Rights, *Summary of Laws Regarding Recognition of Relationships of Same-Sex Couples*, December 10, 2015, available at: http://www.nclrights.org/wp-content/uploads/2013/07/Relationship_Recognition_State_Laws_Summary.pdf. In these states marriage is granted a monopoly on licensing largely out of concerns for distributional efficiency.

[8] See e.g. Solangel Maldonado, *Illegitimate Harm: Law, Stigma, And Discrimination Against Nonmarital Children*, 63 Fla. L. Rev. 345 (2011).

[9] Constitutional scholars have described the cynical elimination of public benefits or rights that is motivated by a larger interest in rights-avoidance as a kind of "leveling-down," whereas the remedy demanded by the petitioners herein requires a kind of "leveling up," the provision of a benefit to a previously excluded group. See Pamela S. Karlan, *Race, Rights, and Remedies in Criminal Adjudication*, 96 Mich. L. Rev. 2001, 2027-29 (1998). The remedy I suggest herein does not amount to a form of "leveling down" insofar as the remedy seeks to advance the equal protection rights of all members of the larger class with interests in this matter: gay men and lesbians who suffer a status injury regardless of their marital status or desire to formalize an intimate relationship.

GIRGIS AND GEORGE, JJ., DISSENTING IN THE JUDGMENT

We can dispose of the case in two sentences: The States' marriage laws closely reflect normative and policy judgments about marriage that are reasonable in themselves and cannot have had their origins in bigotry. A ruling for petitioners requires replacing those judgments with alternatives of which our Constitution and legal tradition and two centuries of cases are all wholly innocent.

These points alone block every path to the majority's destination. The laws it deems unconstitutional reflect no animus. They create no caste. They deny nothing so rooted in our legal traditions as to support even a half-baked claim under our less-than-half-baked substantive Due Process law. They flout no other Constitutional provision or principle, whether real or even merely invented by our most enterprising predecessors on this Court.

All that remain are policy judgments—those of our colleagues, and those of millions of voters across the nation. But in the majority's calculus, five lawless votes from this bench are worth more than 40 million lawful ones at the ballot box. [1] From that judicial self-aggrandizement, so heedless of our Constitutional limits, we dissent.

I. The Equal Protection Challenge

A. Appropriate Level of Scrutiny

Our colleagues would variously hold that the laws at stake today (the "States' laws") deserve heightened scrutiny for classifying by sexual orientation or by sex. Yet they make nothing hinge on sexual orientation, assumed or avowed—a point that one scholarly defender of the majority's ultimate ruling considers a "simple" and "devastat[ing]" objection to its view that the States' laws discriminate based on orientation. [2] They do have widely disparate impact, but that triggers no heightened scrutiny. [3] What does trigger it, as even opponents of the States' laws have observed, [4] is a law requiring officials to rely on suspect traits in distributing legal benefits or burdens. These laws don't require—they don't *allow*—doing that with sexual orientation.

The Court demurs: seen in their "social context," it holds, the States' laws "pretend that sexual orientation minorities do not exist," or require them to "disguise their real selves." The first thing to note about this charge is that it puts the cart before the horse, effectively ruling on the laws' constitutionality in the course of deciding which level of scrutiny to apply.

The second thing to note is that it is outlandish. The States' marriage laws cast no one into outer darkness and require no dissembling about desires. All marriage laws work precisely by privileging some close bonds over all others; they will *always* leave out romantic relationships that some citizens prize the most. If that is enough to erase those citizens' social existence, then all marriage law is *ultra vires*; then all 50 states shove into the closet polyamorists. Then all require asexuals to form sexual relationships, as the Court says that the States' laws "require[] or expect[]" all men to have desire for women. The Court purports to leave these questions for another day; its opinion answers them now—in holding that the States' laws trigger heightened scrutiny because they discriminate by sexual orientation.[5]

Though Justice Koppelman agrees on the first point, he thinks the States' laws classify by sex. But even if this justified heightened scrutiny of the States' laws, it would provide no argument for a

constitutional right *to same-sex marriage*. That requires the further premise that what traditional laws conditioned on sex, was legal recognition of a category of relationships general enough to have included same-sex partnerships in the first place (e.g., that of *intimate consensual bonds, period*). That is precisely what's in dispute.

Besides, a closer look at the *kind* of sex classification at issue here shows that it needn't and shouldn't trigger heightened scrutiny. For unlike every sex-based classification to which we have ever applied heightened scrutiny, the States' laws classify based *ultimately* by a couple's *sexual composition*. And the reasons to apply heightened scrutiny to other classifications—sex-based or otherwise—apply *not at all* to classifications by opposite-sex composition. Indeed, applying it here would undermine principles of our sex-discrimination law articulated most recently in the *VMI* case. So we needn't and shouldn't apply heightened scrutiny to the States' laws.

As the Chief Justice admits, tiers of scrutiny are not constitutional guarantees, but judicially invented tools for implementing them. In Equal Protection cases, we first ask about the law's *form or structure*. If it classifies based on traits that we have prior reason to think may be relied on invidiously, we go on to examine the law's *substance* with special scrutiny. Suspect form calls for scrutiny of a law's rationale.

But here we can see at the first stage—looking at structure —that no suspicion is warranted. With these laws alone, you can't fully *describe* their criterion of classification without mentioning a social good. Their justification seeps into their form. After all, opposite-sex composition is *conceptually* related to a legitimate public end. So its connection to that end doesn't depend on further, questionable social conventions or empirical assumptions; we needn't go on to scour its rationale.

Male and female are not just any two sexes, as black and white are just two races. They are *necessarily inter-defined*: you cannot fully explain either without reference to the other and a social good. What defines them—at a deeper level of explanation than anatomy or genes—is their biological organization (and thus, their basic physical potency) for reproducing together. And reproduction, its social value, and its link to opposite-sex composition are not mere constructs. So a relation to an important public end appears on the face of this classification, without resting on any stereotypes.

Yes, same-sex couples can adopt or use reproductive technology. But our point is that male-female pairing is inherently linked to reproduction, so that a social good appears on the face of the marriage laws' classification, fully spelled out. It makes no difference to this point to say that other couplings might *also* be related (in other ways) to childrearing.

Nor is it relevant that some opposite-sex couples lack some physiological conditions for having children. The *tightness* of the link between the States' criterion and a social good would be an issue only at the second stage, of heightened scrutiny analysis: precisely what we think the Court need not reach here.

Again, our point is about the appropriate level of scrutiny, still a question of presumptions. It is that any particular racial (or ethnic, or religious) grouping is *prima facie* arbitrary—and its political relevance, presumptively in need of justification—as the male-female sexual grouping is not. In none of the

suspect groupings (racial, ethnic, etc.)—whether individual or couple-based (as in *Loving v. Virginia*)—are the classification criteria inherently linked to a legitimate public goal. They seem to be linked to a social goal only where society has created or invented—or inferred by generalization—the goal or link or both. Those generalizations and goals have often been malign (like empirical claims about African Americans; or the socially constructed goal of racial "purity"), so it makes sense not to presume their legitimacy.[6]

The same goes for perceived links between either sex and, say, particular professions. If a policy assumed a special link between women and teaching, empirical data would be needed to establish the link, to say nothing of showing that States may shape policy around it. That's why we heighten scrutiny of run-of-the-mill sex classifications. By contrast, opposite-sex composition is necessarily linked, by the concepts involved, to a social purpose we didn't just invent and can scarcely do without: society's reproduction. Here alone, the law's criterion on its face—fully spelled out—already refers to a public end. So our framework supports keeping heightened scrutiny for classifications by sex or race or racial composition, while applying the rational-basis test to classifications by opposite-sex composition.

This standard leaves intact every sex discrimination case to date. But unlike Justice Koppelman's approach, it would make good on Justice Ginsburg's assurances in the most recent sex-discrimination case, *United States v. Virginia*, that "inherent" and "physical" sex differences—unlike alleged racial ones—are a cause for "celebration," but not for oppression or limitation.[7] What scheme could possibly hug this standard more tightly than one that heightened scrutiny for all sex classifications *except* one focused on a *necessarily* "celebrat[ed]"[8] social end, to which men and women's "physical" differences are "*inherent[ly]*" linked?[9] Rejecting the present approach, by contrast, would belie the contrasts this Court has drawn between sex and race.

Does our proposal rely on "outmoded"[10] notions about gender, like the "pervasive sex-role stereotype," repudiated by this Court, that "caring for family members is women's work"?[11] Would it subjugate women by "defin[ing] masculinity and femininity in terms of complementary traits and attraction to the opposite sex," as the Chief Justice suggests?[12]

Gender stereotypes can of course be excuses to subjugate. To be sure, some also fear the effects of rejecting *all* generalizations about sex or gender. According to some feminists,[13] ignoring even the most physically grounded sex differences would itself demean women, by holding up the "unencumbered, wombless male" body as ideal.[14] In fact, some generalizations about *behavioral* differences must also be acceptable, or else *affirmative action policies based on the value of gender diversity would be unconstitutional*—a point that devastates the majority's blithe and breezy denunciations of even the subtlest appreciation of sex differences.

But we needn't resolve these matters. The premise of our proposed deference is *not* that men are by definition those attracted to women or fatherhood, so that childless men or those attracted to other men are aberrations—nor, *mutatis mutandis*, for women. It is that the sexes are conceptually specified by their biological organization and consequent *basic physical potency* (*not* moral

obligation or proper desire)[15]—to advance together an obvious social interest. This is the sort of "undeniable difference" which Justice Ginsburg affirmed can inform our law without imposing a stereotype.[16]

And it is the difference on which respondent States rely.

B. Rational Basis

In *United States v. Windsor*, Justice Alito summarized the policy judgments and empirical conjectures behind laws enshrining the traditional view of marriage and those enshrining the "'consent-based' vision." *United States v. Windsor*, 133 S. Ct. 2675, 2718 (2013) (Alito, J., dissenting). Here, too, it is worth synthesizing arguments for the States' laws as gleaned from their and some *amici*'s representations, and the common law tradition on which they rely—and juxtaposing these to policy defenses of same-sex marriage reflected in the petitioners' and other amici's arguments and desired relief:

	"States' Defense"	"Petitioners' Defense"
Normative judgment about the nature and value of marriage[17] --of the bond whose recognition is a fundamental right	The exclusively committed union of a man and woman—including the sort of conjugal union uniquely possible through sexual complementarity—has inherent value, different in kind from that of other companionate bonds (same- or opposite-sex, sexual or not, dyadic or not).[18]	The exclusively committed union of any two people—including the sort of intensity and emotional quality uniquely possible through sexual intimacy—has inherent value, different in kind from that of other forms of companionship (sexual or not, dyadic or larger).[19]
Choice of policy purposes for legally recognizing the class of bonds above	To make children likelier to grow up with their committed biological parents—something valuable in itself, as well as instrumentally. And to do so without blurring the distinctive (inherent) value of marriage as understood above.	To promote the relationship's stability and social status—for the partners' sake and that of any children they rear. And to do so without blurring the distinctive (inherent) value of marriage as understood above.
Empirical judgments about the cultural effects of marriage policies	Recognizing only opposite-sex relationships better serves these purposes. For including any	Recognizing any romantic pair bond better serves these purposes. For limiting recognition to opposite-sex relationships might promote the

	companionate pair bond might promote the ideas that marriage is defined only by partners' desires and consent, that its *distinctive* value runs out when its emotional fulfillment does, and that growing up with one's biological parents doesn't matter in itself—that it's bigotry to think so.	ideas that committed same-sex relationships matter less than opposite-sex ones, that society doesn't expect gays and lesbians to form stable relationships, and that doing so wouldn't help them as much as others.
	Yet as people (in *opposite*-sex relationships) absorbed these ideas, they might be less likely to stay together to give their children a home with both biological parents, to marry before having children in the first place, or to live out the stabilizing norms (of permanent exclusivity) eroded by a focus on desire and consent alone.	Yet as people (whether in same-sex relationships or inclined to them) absorbed these ideas, they might be less likely to appreciate the value of their own bonds, to enjoy equal social standing with others, or to maintain the stability that serves their partners and children alike.

As judges, our job is not to say which of these sets of normative ideals, policy choices, and empirical judgments is true. Neither is required by any aspect of constitutional text, structure, history, or precedent, or by any underlying constitutional value or principle, however broadly construed. Since we should apply the rational-basis test, the only question is whether the States' defense is *reasonable*. It is.

To reach today's decision, therefore, the Court has had to take sides on normative and empirical disputes, and policy choices, in the face of (a) reasonable and legitimate alternatives, on which (b) the Constitution is silent. That makes its decision a usurpation of authority vested constitutionally in the people and their representatives—and not just by originalist logic. However loosely read, constitutional law does not make the normative and policy decisions on marriage that are needed to complete the petitioners' Equal Protection argument.[20]

Today's decision therefore does what Justice Holmes accused *Lochner* of having done (rightly or wrongly—recent scholarship rehabilitating *Lochner*'s

reputation matters not here). It is "decided upon" a moral and political theory of marriage "which a large part of the country does not entertain."[21] For "the Fourteenth Amendment does not enact,"[22] we might say, Mr. Evan Wolfson's book on marriage.[23] "A constitution is not intended to embody a particular [marriage] theory, whether" traditional or consent-based.[24] "It is made for people of fundamentally differing views," and "the word liberty"—or equality—is misapplied if used "to prevent the natural outcome of a dominant opinion," unless any reasonable person "would admit" that the statute was invidious.[25] But studying the States' laws, "a reasonable man might think it a proper measure on the score of" public norms and the general welfare.[26]

In short, the Court has imposed an eminently debatable ideology—a "comprehensive doctrine"[27]—under the guise of enforcing the Fourteenth Amendment with all the blindfolded impartiality of Lady Justice. But whatever the merits of our colleagues' *Weltanschauung*, their fellow citizens are free to enact another. It is no Constitutional objection to your worldview that the Progressivism that has dominated the professional and social worlds from which five Justices are drawn happens (only lately, we might add) to reject it.

1. Reasonable and Legitimate

Petitioners cite *Loving v. Virginia*, which struck down Virginia's bans on interracial marriage. But while history provided grounds for ruling Virginia's defenses pretextual or illegitimate,[28] it *disproves* the idea that the sorts of judgments behind the States' defense originated in animus. Indeed, many of them find support among same-sex marriage supporters.

a. The States' normative vision of marriage

The nearly perfect global consensus on sexual complementarity in marriage,[29] together with certain intellectual traditions, supports two conclusions about the traditional vision of marriage (even the normative judgment that sexual complementarity makes possible a distinctly valuable form of union): It wasn't conceived in bigotry, and it isn't inherently theological.

It has prevailed in societies spanning the spectrum of attitudes toward homosexuality, including ones favorable toward same-sex intimacies, and others lacking concepts of sexual orientation and gay identity. (Whatever proves discriminatory purpose against a class, ignorance of the class as such surely disproves it.) And some philosophical and legal traditions have even excluded certain opposite-sex bonds (because of un-chosen impediments to conjugal union), belying the idea that they were targeting same-sex partners.

Thus, great ancient thinkers—including Xenophanes and Socrates, Plato[30] and Aristotle,[31] Musonius Rufus[32] and Plutarch[33]—found special public value in bonds embodied in sexual intercourse and uniquely apt for family life.[34] They were not influenced by Judaism or Christianity, or ignorant of same-sex sexual attractions or relations (common, e.g., in Greece). That is, ignorance, theology, and hostility didn't motivate their conclusions about the meaning of marriage.

b. The States' empirical judgments and choices of policy purposes

The majority and Justice Eskridge's concurrence reject the respondent States' claims that excluding same-sex bonds

might advance the child-focused purposes that the States would use marriage law to serve. How a State treats one relationship, they suggest, cannot affect the decisions or behavior of any other.

This betrays a remarkably flatfooted view of social institutions. It's a truism that the law reflects culture; it would be astonishing if it didn't also *shape* culture, which in turn shapes individual choices. Thus, legally recognizing same-sex bonds will contribute to the belief that what sets marriage apart from other forms of common life is a certain emotional intensity; and that biological parenting is not specially valuable.[35]

To begin with the former: Some scholars have argued that basing civil marriage on romance-and-consent-alone might further entrench what Johns Hopkins sociologist and same-sex marriage supporter Andrew Cherlin, among others, calls the "expressive individualist" model of marriage,[36] on which a relationship that no longer fulfills you personally is "inauthentic and hollow," so that you "will, *and must*, move on."[37] It is no surprise that another study suggests that "conflict and divorce" tend to be higher where spouses internalize this view of marriage as defined by emotional fulfillment.[38]

The spread of this view might thus diminish social pressures and incentives for husbands and wives to remain together for their children, or for men and women having children to commit to marriage first. Indeed, several scholars corroborate the social power of legal change by noting that another policy—no-fault divorce—yielded "new norms and expectations for marriage and family commitments,"[39] thus "open[ing] the door for some couples who would not have" sought divorce "without the new liberalization."[40] Though supported by a review of two dozen empirical studies,[41] this claim might of course be wrong. But it makes it *reasonable* for states to worry about undermining the stabilizing norms that they have chosen marriage laws to serve—or undercutting efforts to restore those cultural norms.

The reasonableness of such concerns is only reinforced by leading same-sex marriage supporters' own arguments. Thus, some 300 LGBT and allied activists and scholars have advocated legally recognizing multiple-partner, sexually open, and term-limited bonds.[42] Some have *expressly embraced* the goal of weakening the institution of marriage by the recognition of same-sex partnerships.[43] A prominent marriage scholar has argued—in the most prestigious academic journal of moral philosophy—that justice requires a "minimal marriage" policy allowing any number and mix of partners to determine their own rights and duties.[44] These steady trends in scholars' efforts to work out the implications of their own support for same-sex marriage make it impossible to brand as irrational the States' concern that changing marriage law would undermine, in principle and practice, other stabilizing norms of marriage. But this is a real public harm, if there is distinctive value in growing up with one's committed biological parents (even if studies showed no difference between *same- and opposite-sex adoptive parenting*—empirical debates from which this point prescinds).

And it is reasonable for the States to think so. The value of biological parenting is encoded in the presumption of our law, and that of nearly every culture, that parents are responsible for their biological children.[45] It is supported by scholarly reflection on how biological ties facilitate "identity formation"[46]; by studies confirming that reflection;[47] and by

studies suggesting other benefits of married biological parenting. [48] It's implausible to dismiss these points, right or wrong, as cover for bigotry.

Justice Eskridge suggests that this "deinstitutionalization" rationale for the States' laws fails "most fundamentally" because no-fault divorce laws show that respondents have already given up on promoting the stabilizing norms of marriage. The problem for his argument is that our Constitution contains no Ratchet Clause. Nothing forbids a State, having turned a few notches in one policy direction, from stopping to move back the other way. Nor does anything forbid it from serving certain policy goals imperfectly in the meantime; "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (per curiam).

Even so, Justice Eskridge asks, "are [we] supposed to draw the line with LGBT couples and their families" in particular? No, and no one does. The States' laws leave out the most prized companionate bonds not only of those identifying as LGBT, but of those most inclined to polyamorous unions, or legally-presumptively nonsexual ones (e.g., the platonically intimate bond of cohabiting sisters).

To think that there is a difference in principle between stopping at opposite-sex couples (as the States would) and stopping at pair bonds generally (as Justice Eskridge would) is tendentious. It takes as a neutral and unquestionable axiom what would be rejected by every thinker and culture before yesterday, by all but a narrow band of Western nations today, and even by many of Justice Eksridge's fellow same-sex marriage supporters: viz., that there is something special about the bond of two adults—any two, but only two—so long as they also happen to be unrelated, and romantically involved, and pledged indefinitely. The cultural Left would be forgiven for thinking this an oppressively bourgeois grab bag of norms. The States think it harmful to their policy purposes for marriage law. Both may be wrong; for that matter, both may be right. Neither side's views are illegitimate bases for policy under our Constitution.

2. Caste?

The majority notes that the Fourteenth Amendment prohibits class legislation, which "singles out a group for special burdens or benefits without adequate" justification. A policy clearly stratifies in this unjust sense if it is based on the idea (behind Jim Crow laws, for example[49]) that some people should not interact with the rest on a plane of social equality.

But we've already seen, on historical grounds, that this cannot possibly explain the genesis of traditional-marriage laws, which preceded the modern concepts of gay and lesbian identity (as Jim Crow could not have preceded awareness of race), and which have prevailed in every civilization. Indeed, while marriage law has always been with us, "[w]idespread discrimination against a class of people on the basis of their homosexual status developed only in the twentieth century . . . and peaked from the 1930s to the 1960s." Brief of Professors of History George Chauncey, Nancy F. Cott, et al., *Lawrence v. Texas*, 539 U.S. 558 (2003). Yet the only remaining way to find a caste here (as Chief Justice Balkin elsewhere concedes[50]) is to take sides between the rival visions of marriage sketched above; to hold that the States' laws thus impose *unjustified* burdens. That we cannot do. Even the view that marriage laws are unjust for perpetuating patriarchy simply assumes—incorrectly, as we have seen—

that they have no possible alternative, legitimate basis.

3. Actual Motives?

To be sure, traditional marriage laws' unobjectionable origins do not prove that benign motives actually inspired the respondents' recent constitutional amendments. On the other hand, a law cannot be struck down simply for its ratifiers' actual motives, if an identical law could have been passed on legitimate grounds. Then lawmakers could reenact the same law the next day, following only a change of heart. Constitutionality should not hinge on acts of contrition, as this Court has held.[51] Nor should the motives of millions of honorable citizens of many different faiths and shades of belief be so cavalierly impugned. But petitioners argue that the *objective* purpose of the States' laws was to demean, and that this can be gleaned from the rhetoric of campaigns to enact them. In this vein, Justice Koppelman has noted that malign purposes can be gleaned from "the text [of a traditional marriage law] itself, consistently with other aspects of its context."[52] Thus, the *Loving* Court relied on context to find illegitimate purposes in Virginia's marriage ban, without having to search the hearts of Virginia's lawmakers.

Yet it would prove too much to say that a policy is unconstitutional if its enactment disadvantaged a group then facing popular hostility. An act repealing scholarships meant to enable students from low-income backgrounds to attend private schools[53] harms poor—and disproportionately minority—students, who remain targets of prejudice and injustice. Is it unconstitutional? Of course not. There is no uniquely tight fit between the repeal and the concurrent cultural prejudice; support for public schools is a perfectly good explanation.

Likewise, to rule against the States' laws based on hostile purposes, we must find not only concurrent (or even historically pervasive) hostility toward same-sex partnerships, but a tight fit between such hostility and objective features of the States' laws—the sort of fit that the Court rightly found in Loving between Virginia's marriage ban and White Supremacy.

But as we have seen, there are legitimate alternative bases. They are not just abstract possibilities but had to be purposes of marriage laws historically. They are consistent with the cultural and legal context of the States' laws' passage and were reflected in some prefatory and campaign materials. Nothing of the sort could be said in defense of the marriage ban in Loving.

Petitioners nonetheless argue that under Windsor, a law has malign objective purposes (the "intent" to "injure") if it imposes "a disadvantage, a separate status, and so a stigma" on same-sex partnerships. See United States v. Windsor, 133 S. Ct. 2675, 2693 (2013). But if creating a separate status suffices to render a marriage regime unconstitutional, then again, none can stand. The function of marriage law is precisely to create a separate status for a narrow range of companionate bonds: marital status.

II. Due Process Clause

A final question is whether we have already rejected the States' normative and policy vision of marriage as a matter of constitutional law, in the course of enforcing the fundamental right to marry. The most frequently cited (and by far the most useful) case for this claim is *Turner v. Safley* 482 U.S. 78 (1987), where we held that "important attributes of marriage" remain available to inmates.

We said that the following features were sufficient, "taken together," to "form a constitutionally protected marital relationship": (i) expressions of commitment; (ii) exercise of religious faith; (iii) the expectation of consummation upon release; and (iv) legal and social benefits (like Social Security benefits and the legitimation of children). Could these show that same-sex bonds come within the fundamental right to marry? No.

First, (i) and (iv) show that we were taking for granted the view of marriage long enshrined at common law: consummation was satisfied only by male-female sexual intercourse, and the legitimation of children born to a relationship is relevant only to opposite-sex couples. Second, if we *did* bracket those hints that the traditional view was being assumed, and tried to infer all the contours of the right to marry from the other attributes listed in *Turner*, there would be no end of it. Any consensual adult bond—including a group sexual bond, or a non-romantic one—can involve commitment, religious significance, and (if the government chooses) legal benefits. *Turner* was not implying that all these bonds came under the fundamental right to marry.

So this case—about whether certain prison regulations were reasonably related to sound penological purposes—didn't commit our legal system to rejecting the traditional view. It took for granted that vision of the content of the right to marry. It simply added that the same right was not forfeited by convicts, and that severely restricting it didn't serve (well enough) the goals of rehabilitation and security. Likewise, *Zablocki v. Redhail*, 434 U.S. 374 (1978), held that Wisconsin's restriction of marriage for those charged with failing to pay child support was not appropriately tailored to its asserted (child-centered) goals. There again, we did not commit our legal tradition to a purely companionate vision of marriage. We simply read off our history the basic contours of the fundamental right, and then asked whether a state had curbed access to marriage *so understood*, or imposed restrictions hard to justify on the same vision of its purposes. So a Due Process ruling for petitioners today—maybe even more clearly than an Equal Protection ruling—would require us to adopt a new vision of what makes a marriage.

Finally, to dispatch the privacy argument: Our privacy cases are exclusively concerned with freedom from criminal bans.[54] From that, you cannot extrapolate to a right to legal *recognition*.

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[1] This estimate reflects the number of votes for ballots approving traditional marriage laws between 1996 and 2012, based on official state reports.

[2] Andrew Koppelman, *Beyond Levels of Scrutiny: Windsor and "Bare Desire to Harm"*, 64 Case. W. Res. L. Rev. 1045, 1048 (2014).

[3] *See* Washington v. Davis, 426 U.S. 229, 242 (1976) (holding that a disparate impact claim alone does not "trigger the rule, that racial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations." (citation omitted)).

[4] *See* Koppelman, *supra* note 2, at 1049 .

[5] The majority might object that desire for particular contours of group sexual bonds, and the absence of sexual desire, don't constitute identities, unlike desire for same-sex relationships. But as a previous case of ours has noted, and Justice Eskridge today repeats, "the

'concept of the homosexual as a distinct category of person' emerged only at the end of the nineteenth century." (Eskridge, J., concurrence) (citing *Lawrence v. Texas,* 539 U.S. 558, 568 (2003)). So there's no "natural" divide between patterns of desire that do and don't constitute an identity.

[6] *See, e.g.*, Massachusetts Board of Retirement v Murgia, 427 U.S. 307, 313 (1976) (suggesting that strict scrutiny applies in cases involving groups with a "'history of purposeful unequal treatment'" (quoting San Antonio Sch. Dist. v. Rodriguez, 411 US 1, 28 (1973)).

[7] United States v. Virginia, 518 U.S. 515, 533 (1996).

[8] *Id.*

[9] Hence, perhaps, the Court's ambivalence about sex classifications. *See, e.g.*, Craig v Boren, 429 U.S. 190, 200 (1976) (opting for intermediate scrutiny, three years after a plurality of the Court had applied heightened scrutiny in Frontiero v. Richardson, 411 U.S. 677 (1973)).

[10] City of Cleburne v. Cleburne Living Ctr. Inc., 473 U.S. 432, 441 (1985).

[11] Nev. Dep't of Human Res. v. Hibbs, 538 U.S. 721, 731 (2003).

[12] J.M. Balkin, *The Constitution of Status*, 106 Yale L.J. 2313, 2361 (1997).

[13] For claims along these lines by women across the political spectrum, see, for example, Helen M. Alvaré, Gonzales v. Carhart*: Bringing Abortion Law Back into the Family Law Fold*, 69 Mont. L. Rev. 409, 444 (2008) ("Denying that women are drawn to their unborn children, as well as to spending considerable time and effort rearing born children, only results in policies reinforcing an outdated and largely male model of social life and employment—a model in which no institution need 'flex' or change to allow women and men to meet children's needs. On the other hand, recognizing that both men and women feel keen obligations to their children at the same time that they have work or school obligations to meet is both more realistic and a more likely premise for a successful argument in favor of family-friendly work and education policies." (footnote omitted)); Elizabeth Fox-Genovese, *Wrong Turn: How the Campaign to Liberate Women Has Betrayed the Culture of Life*, *in* Life and Learning XII: Proceedings of the Twelfth University Faculty for Life Conference 11, 19 (Joseph W. Koterski, ed., 2003) (lamenting the claim that "to enjoy full dignity and rights as an individual, a woman must resemble a man as closely as possible. It is difficult to imagine a more deadly assault upon a woman's dignity as a woman. For this logic denies that a woman can be both a woman and a full individual."); Robin West, *Concurring in the Judgment*, *in* What *Roe v. Wade* Should Have Said: The Nation's Top Legal Experts Rewrite America's Most Controversial Decision 121, 141–42 (Jack M. Balkin ed., 2005) (arguing that the equal citizenship argument for abortion rights "legitim[izes], and with a vengeance, the inconsistency of motherhood and citizenship itself").

[14] Erika Bachiochi, *Embodied Equality: Debunking Equal Protection Arguments for Abortion Rights*, 34 HARV. J.L. & PUB. POL'Y 889, 941 (2011).

[15] It is basic or radical (i.e., root) in that other, contingent conditions (of health, age, timeliness, other circumstances, and certain actions) need

to be met for it to be realized fully in any particular case.

[16] Nguyen v. INS, 553 U.S. 53, 68 (2001).

[17] What motivates the States to recognize marriage at all may be mundane policy purposes and empirical claims that we could compare quite apart from these pure value judgments behind the rival policy schemes. We consider the latter anyway because they are necessary to explain *some* of the features of both the States' and petitioners' preferred policies.

First, ideas about the distinct value of a certain subset of companionate bonds seem to supply each side's view of the *content* of the fundamental right to marry. They set the baseline against which each side would judge whether a particular change would simply limit eligibility for marriage (in a potential violation of that fundamental right), or create a new legal institution altogether—as both sides would say of expanding marriage law to include presumptively nonsexual bonds (e.g., between cohabiting siblings). These normative judgments about the nature and value of marriage also limit how closely each side is willing to tailor marriage law to its more mundane policy goals. A traditionalist law will extend recognition to conjugal unions that do not obviously serve the instrumental policy goals on which the traditional view is focused (e.g., if the couple doesn't have children), and *mutatis mutandis* for the revisionist (e, g., if public recognition wouldn't affect a particular couple's stability or social standing in their community).

[18] We infer this set of principles from the fact that for hundreds of years at common law, while infertility was no ground for declaring a marriage void, only sexual intercourse was recognized as consummating a marriage (after which it could not be annulled). No other sexual act between man and woman could so complete a marriage. What could make sense of these two longstanding practices?

If marriage at common law were regarded as *merely* a legal tool for keeping parents together for their children (not as *inherently* valuable), old age and other clear evidence of infertility would have been grounds for legally voiding a marriage. And if the law were targeting same-sex relationships for exclusion, it would have counted any sexual act between a man and woman as apt to consummate a marriage. (How could animus against gay men have motivated the legal norm that fellatio between a man and a woman could not consummate a marriage, and indeed that a man's impotence was a ground for annulment?) Only one explanation will do: The law saw unions consummated by sexual intercourse as valuable in themselves, and different in kind from other bonds.

Reinforcing this interpretation is the fact that several independent traditions—secular and religious, cultural and legal; the common law as well as ecclesiastical, Greco-Roman as well as Judeo-Christian—have reflected the same idea. *See* Sherif Girgis, Ryan T. Anderson, and Robert P. George, *What Is Marriage? Man and Woman: A Defense* (Encounter, 2012), chs. 2, 5 (tracing this insight across different traditions and offering a defense of it); John Finnis, "The Good of Marriage and the Morality of Sexual Relations: Some Philosophical and Historical Observations," American Journal of Jurisprudence 42 (1998): 97–134 (same).

[19] We infer this set of principles from the fact that petitioners, would generally (i) recognize committed same-sex sexual bonds regardless of whether any given bond served more instrumental

purposes, while (ii) rejecting policies that would distinguish such bonds from opposite-sex ones (e.g., civil unions), or lump them together with presumptively *non*-sexual ones (e.g., civil unions for any committed cohabitants).

[20] The rational-basis test, which we have argued applies here, is judges' way of applying the Equal Protection clause while deferring to lawmakers' normative and policy choices wherever these are reasonable, whether or not ultimately *sound*. It is another question whether the U.S. Congress, pursuant to its enforcement power under Section 5 of the Fourteenth Amendment, has more leeway to impose its own normative and policy judgments, including by requiring States to recognize same-sex civil marriages. *See, e.g.,* Manning HLR Foreword, fn. 18 and surrounding text (suggesting that Congress may have more discretion than the Courts in enforcing the Reconstruction Amendments).

[21] *Id.* at 75.

[22] *Id.*

[23] Evan Wolfson, Why Marriage Matters: America, Equality, and Gay People's Right to Marry (2005).

[24] *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

[25] *Id.* at 76.

[26] *Id.*

[27] Cite to Rawls, Political Liberalism (1993).

[28] *Loving*, 388 U.S. at 7 (quoting Naim v. Naim, 87 S.E.2d 749, 756 (Va. 1955)). Nancy F. Cott provides historical support for this conclusion:

> It is important to retrieve the singularity of the racial basis for these laws. Ever since ancient Rome, class-stratified and estate-based societies had instituted laws against intermarriage between individuals of unequal social or civil status, with the aim of preserving the integrity of the ruling class. . . . But the English colonies stand out as the first secular authorities to nullify and criminalize intermarriage on the basis of race or color designations. [Their laws] did not concern all mixed marriages. They aimed to keep the white race unmixed . . .and thus only addressed marriages in which one party was white.

Nancy F. Cott, Public Vows: A History of Marriage and the Nation 41 (2000) (footnote omitted).

[29] *See, e.g.*, G. Robina Quale, A History of Marriage Systems 2 (1988) ("Marriage, as the socially recognized linking of a specific man to a specific woman and her offspring, can be found in all societies. Through marriage, children can be assured of being born to both a man and a woman who will care for them as they mature."); *see also* Edward Westermarck. A Short History of Marriage 1 (1926) (recognizing that marriage across cultures "involves certain rights and duties both . . . of the parties entering the union and . . . of the children born of it," and "implies the right of sexual intercourse.").

[30] *See, e.g.*, Plato, The Laws of Plato 232, 840c–841a (Thomas L. Pangle trans., Univ. of Chi. Press, 1988) (1980) (writing favorably of legislating to have people

"pair off, male with female . . . and live out the rest of their lives" together).

[31] For Aristotle, the foundation of political community was "the family group," by which he "mean[t] the nuclear family." Alberto Maffi, *Family and Property Law*, *in* The Cambridge Companion to Ancient Greek Law 254, 254 (Michael Gagarin & David Cohen eds., 2005). For Aristotle, indeed, "[b]etween man and wife friendship seems to exist by nature." Aristotle, Nicomachean Ethics bk. VIII, at 1162a15–19 (W.D. Ross trans., 1925)(ca. 350 B.C.E), *reprinted in* 2 The Complete Works of Aristotle 1836 (Jonathan Barnes ed., 1984).

[32] He said that a "husband and wife . . . should come together for the purpose of making a life in common and of procreating children, and furthermore of regarding all things in common between them . . . even their own bodies," viewing this form of affectionate and bodily union—and not only its fulfillment in procreation—as desirable. Musonius Rufus, *Discourses* XIIIA, *reprinted in* Cora E. Lutz, *Musonius Rufus "The Roman Socrates," in* X Yale Classical Studies 3, 89 (Alfred R. Bellinger ed., 1947).

[33] According to Plutarch, Solon saw marriage as a union of life between man and woman "for the delights of love and the getting of children." Plutarch, Life of Solon ch. 20, § 4, *reprinted in* 1 Plutarch Lives 403, 459 (G.P. Goold ed., Bernadotte Perrin trans., Harv. Univ. Press. 6th prtg. 1993) [hereinafter Plutarch, Solon]. Plutarch himself wrote of marriage as a distinct form of "friendship," specially embodied in "physical union" of intercourse (which he called a "renewal" of marriage). Plutarch, The Dialogue on Love § 769, *reprinted in* IX Moralia 307, 427 (Edwin L. Minar, Jr. trans., T. E. Page et al. eds., Harv. Univ. Press. 1961).

[34] And they all denied that any sexual acts but coitus, even between a married man and a woman, could seal a truly marital relationship. *See* John M. Finnis, *Law, Morality, and "Sexual Orientation"*, 69 Notre Dame L. Rev. 1049, 1062–68 (1994).

[35] Petitioners contend that this point is undermined by the States' recognition of infertile opposite-sex partnerships. But it's reasonable for the States to hold that recognizing infertile conjugal unions would have at least fewer of the costs of recognizing same-sex bonds.

First, petitioners argue, it does less to focus the public vision of marriage on romantic attachment alone—as opposed to conjugal unions conspicuously and naturally oriented to family life. So to the extent that that focusing is what undermines traditional marital norms, it's reasonable to expect it to do less harm. Second, many couples believed to be infertile end up having children, who are served by their parents' marriage; and trying to determine fertility would require unjust invasions of privacy. Moreover, a policy limited to fertile opposite-sex unions might lead couples to see marriage as *merely* instrumental to childrearing, which might well destabilize their bond, thus harming the public interest in giving children a stable home with both parents.

[36] Andrew J. Cherlin, Marriage-Go-Round: The State of Marriage and the Family in America Today 29 (2009).

[37] *Id.* at 31 (emphasis added).

[38] W. Bradford Wilcox & Jeffrey Dew, *Is Love a Flimsy Foundation? Soulmate Versus Institutional Models of*

Marriage, 39 Soc. Sci. Res. 687, 697 (2010).

[39] Lenore J. Weitzman, *The Divorce Law Revolution and the Transformation of Legal Marriage*, *in* Contemporary Marriage: Comparative Perspectives on a Changing Institution 301, 305 (Kingsley Davis ed., 1985).

[40] William J. Goode, World Changes in Divorce Patterns 144 (1993).

[41] *See* Douglas W. Allen & Maggie Gallagher, *Does Divorce Law Affect the Divorce Rate? A Review of Empirical Research, 1995–2006*, iMAPP (July 2007), http://www.marriagedebate.com/pdf/imapp.nofault.divrate.pdf.

[42] *Beyond Same-Sex Marriage: A New Strategic Vision for All Our Families & Relationships*, BeyondMarriage.org (July 26, 2006), http://beyondmarriage.org/BeyondMarriage.pdf.

[43] Ellen Willis, *Can Marriage Be Saved?*. The Nation, July 5, 2004, at 16 ("[C]onferring the legitimacy of marriage on homosexual relations will introduce an implicit revolt against the institution into its very heart.").

[44] Elizabeth Brake, *Minimal Marriage: What Political Liberalism Implies for Marriage Law*, 120 Ethics 302, 303 (2010).

[45] *See* Quale, *supra* note XYZ, at 2.

[46] *Id.* at 375.

[47] *See, e.g.*, Elizabeth Marquardt et al., Instit. for Am. Values, My Daddy's Name is Donor: A New Study of Young Adults Conceived through Sperm Donation 5, (2010) (seeking "to learn about the identity, kinship, well-being, and social justice experiences of young adults who were conceived through sperm donation.").

[48]

[49] *Id.* at 2324.

[50] *See* Jack M. Balkin, *Windsor and the Constitutional Prohibition against Class Legislation*, BALKINIZATION (June 26, 2013), http://balkin.blogspot.com/2013/06/windsor-and-constitutional-prohibition.html ("Class legislation is legislation that picks out a group of people for special benefits or special burdens *without adequate public justification*.. . . . All laws classify and have some kind of differential impact; whether a law singles out a group for special and unjustified burdens or stigma is an interpretive question and a question of values.").

[51] *See, e.g.*, United States v. O'Brien, 391 U.S. 367, 383 (1968) ("It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.").

[52] Koppelman, …, at 142–143 (footnotes omitted) (quoting Antonin Scalia & Brian A. Garner, Reading Law: The Interpretation of Legal Texts 33 (2012)). We note that while in this last sentence, Koppelman argues that DOMA's purpose was to injure and disparage gay people, in the very next he says "[t]he impact on gay people was far from Congress's mind when [DOMA] was enacted." *Id.* at 143.

[53] The Case is not far from real life. President Barack Obama and congressional Democrats sought to limit

and eventually end Congressional support for tuition vouchers to low-income families in the District of Columbia. Bill Turque and Shailagh Murray, *Obama Offers Compromise on D.C. Tuition Vouchers*, Washington Post, May 7, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/05/06/AR2009050603852.html.

[54] *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479 (1965) (the use of contraceptives by spouses); Eisenstadt v. Baird, 405 U.S. 438 (1972) (the use of contraceptives by the unmarried); Roe v. Wade, 410 U.S. 113 (1973) (abortions); Webster v. Reprod. Health Serv., 492 U.S. 490 (1989) (same); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (same); Lawrence v. Texas, 539 U.S. 558 (2003) (consensual sex).

TOWARD A FEMINIST THEORY OF THE STATE

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For Kent Harvey

and who is not in the habit of obeying anyone else.[47] Men are the group that has had the authority to make law, embodying H. L. A. Hart's "rule of recognition" that, in his conception, makes law authoritative.[48] Distinctively male values (and men) constitute the authoritative interpretive community that makes law distinctively lawlike to the likes of Ronald Dworkin.[49] If one combines "a realistic conception of the state with a revolutionary theory of society,"[50] the place of gender in state power is not limited to government, nor is the rule of law limited to police and courts. The rule of law and the rule of men are one thing, indivisible, at once official and unofficial—officially circumscribed, unofficially not. State power, embodied in law, exists throughout society as male power at the same time as the power of men over women throughout society is organized as the power of the state.

Perhaps the failure to consider gender as a determinant of state behavior has made the state's behavior appear indeterminate. Perhaps the objectivity of the liberal state has made it appear autonomous of class. Including, but beyond, the bourgeois in liberal legalism, lies what is male about it. However autonomous of class the liberal state may appear, it is not autonomous of sex. Male power is systemic. Coercive, legitimated, and epistemic, it *is* the regime.

9 Rape: On Coercion and Consent

Negotiations for sex are not carried on like those for the rent of a house. There is often no definite state on which it can be said that the two have agreed to sexual intercourse. They proceed by touching, feeling, fumbling, by signs and words which are not generally in the form of a Roman stipulation.

—Honoré, twentieth-century British legal scholar and philosopher

Rape is an extension of sexism in some ways, and that's an extension of dealing with a woman as an object . . . Stinky [her rapist] seemed to me as though he were only a step further away, a step away from the guys who sought me on the streets, who insist, my mother could have died, I could be walking down the street and if I don't answer their rap, they got to go get angry and get all hostile and stuff as though I walk down the street as a . . . that my whole being is there to please men in the streets. But Stinky only seemed like someone who had taken it a step further . . . he felt like an extension, he felt so common, he felt so ordinary, he felt so familiar, and it was maybe that what frightened me the most was that how similar to other men he seemed. They don't come from Mars, folks.

—Carolyn Craven, reporter

If you're living with a man, what are you doing running around the streets getting raped?

—Edward Harrington, defense attorney in New Bedford gang rape case

If sexuality is central to women's definition and forced sex is central to sexuality, rape is indigenous, not exceptional, to women's social condition. In feminist analysis, a rape is not an isolated event or moral transgression or individual interchange gone wrong but an act of terrorism and torture within a systemic context of group subjection, like lynching. The fact that the state calls rape a crime opens an inquiry into the state's treatment of rape as an index to its stance on the status of the sexes.

Under law, rape is a sex crime that is not regarded as a crime when it looks like sex. The law, speaking generally, defines rape as intercourse with force or coercion and without consent.[1] Like sexuality under male supremacy, this definition assumes the sadomasochistic definition of sex: intercourse with force or coercion can be or become consensual. It assumes pornography's positive-outcome-rape scenario: dominance plus submission is force plus consent. This equals sex, not rape. Under male supremacy, this is too often the reality. In a critique of male supremacy, the elements "with force and without consent" appear redundant. Force is present because consent is absent.

Like heterosexuality, male supremacy's paradigm of sex, the crime of rape centers on penetration.[2] The law to protect women's sexuality from forcible violation and expropriation defines that protection in male genital terms. Women do resent forced penetration. But penile invasion of the vagina may be less pivotal to women's sexuality, pleasure or violation, than it is to male sexuality. This definitive element of rape centers upon a male-defined loss. It also centers upon one way men define loss of exclusive access. In this light, rape, as legally defined, appears more a crime against female monogamy (exclusive access by one man) than against women's sexual dignity or intimate integrity. Analysis of rape in terms of concepts of property, often invoked in marxian analysis to criticize this disparity, fail to encompass the realities of rape.[3] Women's sexuality is, socially, a thing to be stolen, sold, bought, bartered, or exchanged by others. But women never own or possess it, and men never treat it, in law or in life, with the solicitude with which they treat property. To be property would be an improvement. The moment women "have" it—"have sex" in the dual gender/sexuality sense—it is lost as theirs.

To have it is to have it taken away. This may explain the male incomprehension that, once a woman has had sex, she loses anything when subsequently raped. To them women have nothing to lose. It is true that dignitary harms, because nonmaterial, are ephemeral to the legal mind. But women's loss through rape is not only less tangible; it is seen as unreal. It is difficult to avoid the conclusion that penetration itself is considered a violation from the male point of view, which is both why it is the centerpiece of sex and why women's sexuality, women's gender definition, is stigmatic. The question for social explanation becomes not why some women tolerate rape but how any women manage to resent it.

Rape cases finding insufficient evidence of force reveal that acceptable sex, in the legal perspective, can entail a lot of force. This is both a result of the way specific facts are perceived and interpreted within the legal system and the way the injury is defined by law. The level of acceptable force is adjudicated starting just above the level set by what is seen as normal male sexual behavior, including the normal level of force, rather than at the victim's, or women's, point of violation.[4] In this context, to seek to define rape as violent not sexual is as understandable as it is futile. Some feminists have reinterpreted rape as an act of violence, not sexuality, the threat of which intimidates all women.[5] Others see rape, including its violence, as an expression of male sexuality, the social imperatives of which define as well as threaten all women.[6] The first, epistemologically in the liberal tradition, comprehends rape as a displacement of power based on physical force onto sexuality, a preexisting natural sphere to which domination is alien. Susan Brownmiller, for example, examines rape in riots, wars, pogroms, and revolutions; rape by police, parents, prison guards; and rape motivated by racism. Rape in normal circumstances, in everyday life, in ordinary relationships, by men as men, is barely mentioned.[7] Women are raped by guns, age, white supremacy, the state—only derivatively by the penis. The view that derives most directly from victims' experiences, rather than from their denial, construes sexuality as a social sphere of male power to which forced sex is paradigmatic. Rape is not less sexual for being violent. To the extent that coercion has become integral to male sexuality, rape may even be sexual to the degree that, and because, it is violent.

The point of defining rape as "violence not sex" has been to claim an ungendered and nonsexual ground for affirming sex (heterosexu-

ality) while rejecting violence (rape). The problem remains what it has always been: telling the difference. The convergence of sexuality with violence, long used at law to deny the reality of women's violation, is recognized by rape survivors with a difference: where the legal system has seen the intercourse in rape, victims see the rape in intercourse. The uncoerced context for sexual expression becomes as elusive as the physical acts come to feel indistinguishable. Instead of asking what is the violation of rape, their experience suggests that the more relevant question is, what is the nonviolation of intercourse? To know what is wrong with rape, know what is right about sex. If this, in turn, proves difficult, the difficulty is as instructive as the difficulty men have in telling the difference when women see one. Perhaps the wrong of rape has proved so difficult to define because the unquestionable starting point has been that rape is defined as distinct from intercourse,[8] while for women it is difficult to distinguish the two under conditions of male dominance.

In the name of the distinction between sex and violence, reform of rape statutes has sought to redefine rape as sexual assault.[9] Usually, assault is not consented to in law; either it cannot be consented to, or consensual assault remains assault.[10] Yet sexual assault consented to is intercourse, no matter how much force was used. The substantive reference point implicit in existing legal standards is the sexually normative level of force. Until this norm is confronted as such, no distinction between violence and sexuality will prohibit more instances of women's experienced violation than does the existing definition. Conviction rates have not increased under the reform statutes.[11] The question remains what is seen as force, hence as violence, in the sexual arena.[12] Most rapes, as women live them, will not be seen to violate women until sex and violence are confronted as mutually definitive rather than as mutually exclusive. It is not only men convicted of rape who believe that the only thing they did that was different from what men do all the time is get caught.

Consent is supposed to be women's form of control over intercourse, different from but equal to the custom of male initiative. Man proposes, woman disposes. Even the ideal it is not mutual. Apart from the disparate consequences of refusal, this model does not envision a situation the woman controls being placed in, or choices she frames. Yet the consequences are attributed to her as if the sexes began at arm's length, on equal terrain, as in the contract fiction. Ambiguous cases of

consent in law are archetypically referred to as "half won arguments in parked cars."[13] Why not half lost? Why isn't half enough? Why is it an argument? Why do men still want "it," feel entitled to "it," when women do not want them? The law of rape presents consent as free exercise of sexual choice under conditions of equality of power without exposing the underlying structure of constraint and disparity. Fundamentally, desirability to men is supposed a woman's form of power because she can both arouse it and deny its fulfillment. To woman is attributed both the cause of man's initiative and the denial of his satisfaction. This rationalizes force. Consent in this model becomes more a metaphysical quality of a woman's being than a choice she makes and communicates. Exercise of women's so-called power presupposes more fundamental social powerlessness.[14]

The law of rape divides women into spheres of consent according to indices of relationship to men. Which category of presumed consent a woman is in depends upon who she is relative to a man who wants her, not what she says or does. These categories tell men whom they can legally fuck, who is open season and who is off limits, not how to listen to women. The paradigm categories are the virginal daughter and other young girls, with whom all sex is proscribed, and the whorelike wives and prostitutes, with whom no sex is proscribed. Daughters may not consent; wives and prostitutes are assumed to, and cannot but.[15] Actual consent or nonconsent, far less actual desire, is comparatively irrelevant. If rape laws existed to enforce women's control over access to their sexuality, as the consent defense implies, no would mean no, marital rape would not be a widespread exception,[16] and it would not be effectively legal to rape a prostitute.

All women are divided into parallel provinces, their actual consent counting to the degree that they diverge from the paradigm case in their category. Virtuous women, like young girls, are unconsenting, virginal, rapable. Unvirtuous women, like wives and prostitutes, are consenting, whores, unrapable. The age line under which girls are presumed disabled from consenting to sex, whatever they say, rationalizes a condition of sexual coercion which women never outgrow. One day they cannot say yes, and the next day they cannot say no. The law takes the most aggravated case for female powerlessness based on gender and age combined and, by formally prohibiting all sex as rape, makes consent irrelevant on the basis of an assumption of powerlessness. This defines those above the age line as powerful,

whether they actually have power to consent or not. The vulnerability girls share with boys—age—dissipates with time. The vulnerability girls share with women—gender—does not. As with protective labor laws for women only, dividing and protecting the most vulnerable becomes a device for not protecting everyone who needs it, and also may function to target those singled out for special protection for special abuse. Such protection has not prevented high rates of sexual abuse of children and may contribute to eroticizing young girls as forbidden.

As to adult women, to the extent an accused knows a woman and they have sex, her consent is inferred. The exemption for rape in marriage is consistent with the assumption underlying most adjudications of forcible rape: to the extent the parties relate, it was not really rape, it was personal.[17] As marital exemptions erode, preclusions for cohabitants and voluntary social companions may expand. As a matter of fact, for this purpose one can be acquainted with an accused by friendship or by meeting him for the first time at a bar or a party or by hitchhiking. In this light, the partial erosion of the marital rape exemption looks less like a change in the equation between women's experience of sexual violation and men's experience of intimacy, and more like a legal adjustment to the social fact that acceptable heterosexual sex is increasingly not limited to the legal family. So although the rape law may not now always assume that the woman consented simply because the parties are legally one, indices of closeness, of relationship ranging from nodding acquaintance to living together, still contraindicate rape. In marital rape cases, courts look for even greater atrocities than usual to undermine their assumption that if sex happened, she wanted it.[18]

This approach reflects men's experience that women they know do meaningfully consent to sex with them. *That* cannot be rape; rape must be by someone else, someone unknown. They do not rape women they know. Men and women are unequally socially situated with regard to the experience of rape. Men are a good deal more likely to rape than to be raped. This forms their experience, the material conditions of their epistemological position. Almost half of all women, by contrast, are raped or victims of attempted rape at least once in their lives. Almost 40 percent are victims of sexual abuse in childhood.[19] Women are more likely to be raped than to rape and are most often raped by men whom they know.[20]

Men often say that it is less awful for a woman to be raped by someone she is close to: "The emotional trauma suffered by a person victimized by an individual with whom sexual intimacy is shared as a normal part of an ongoing marital relationship is not nearly as severe as that suffered by a person who is victimized by one with whom that intimacy is not shared."[21] Women often feel as or more traumatized from being raped by someone known or trusted, someone with whom at least an illusion of mutuality has been shared, than by some stranger. In whose interest is it to believe that it is not so bad to be raped by someone who has fucked you before as by someone who has not? Disallowing charges of rape in marriage may, depending upon one's view of normalcy, "remove a substantial obstacle to the resumption of normal marital relationships."[22] Note that the obstacle is not the rape but the law against it. Apparently someone besides feminists finds sexual victimization and sexual intimacy not all that contradictory under current conditions. Sometimes it seems as though women and men live in different cultures.

Having defined rape in male sexual terms, the law's problem, which becomes the victim's problem, is distinguishing rape from sex in specific cases. The adjudicated line between rape and intercourse commonly centers on some assessment of the woman's "will." But how should the law or the accused know a woman's will? The answer combines aspects of force with aspects of nonconsent with elements of resistance, still effective in some states.[23] Even when nonconsent is not a legal element of the offense, juries tend to infer rape from evidence of force or resistance. In Michigan, under its reform rape law, consent was judicially held to be a defense even though it was not included in the statute.[24]

The deeper problem is that women are socialized to passive receptivity; may have or perceive no alternative to acquiescence; may prefer it to the escalated risk of injury and the humiliation of a lost fight; submit to survive. Also, force and desire are not mutually exclusive under male supremacy. So long as dominance is eroticized, they never will be. Some women eroticize dominance and submission; it beats feeling forced. Sexual intercourse may be deeply unwanted, the woman would never have initiated it, yet no force may be present. So much force may have been used that the woman never risked saying no. Force may be used, yet the woman may prefer the sex—to avoid more force or because she, too, eroticizes dominance. Women and men

know this. Considering rape as violence not sex evades, at the moment it most seems to confront, the issue of who controls women's sexuality and the dominance/submission dynamic that has defined it. When sex is violent, women may have lost control over what is done to them, but absence of force does not ensure the presence of that control. Nor, under conditions of male dominance, does the presence of force make an interaction nonsexual. If sex is normally something men do to women, the issue is less whether there was force than whether consent is a meaningful concept.[25]

To explain women's gender status on a rape theory, Susan Brownmiller argues that the threat of rape benefits all men.[26] How is unspecified. Perhaps it benefits them sexually, hence as a gender: male initiatives toward women carry the fear of rape as support for persuading compliance, the resulting appearance of which has been considered seduction and termed consent. Here the victims' perspective grasps what liberalism applied to women denies: that forced sex as sexuality is not exceptional in relations between the sexes but constitutes the social meaning of gender. "Rape is a man's act, whether it is a male or a female man and whether it is a man relatively permanently or relatively temporarily; and being raped is a woman's experience, whether it is a female or a male woman and whether it is a woman relatively permanently or relatively temporarily."[27] To be rapable, a position that is social not biological, defines what a woman is.

Marital rape and battery of wives have been separated by law. A feminist analysis suggests that assault by a man's fist is not so different from assault by a penis, not because both are violent but because both are sexual. Battery is often precipitated by women's noncompliance with gender requirements.[28] Nearly all incidents occur in the home, most in the kitchen or bedroom. Most murdered women are killed by their husbands or boyfriends, usually in the bedroom. The battery cycle accords with the rhythms of heterosexual sex.[29] The rhythm of lesbian sadomasochism is the same.[30] Perhaps violent interchanges, especially between genders, make sense in sexual terms.

The larger issue raised by sexual aggression for the interpretation of the relation between sexuality and gender is: what is heterosexuality? If it is the erotization of dominance and submission, altering the participants' gender does not eliminate the sexual, or even gendered, content of aggression. If heterosexuality is males over females, gender matters independently. Arguably, heterosexuality is a fusion of the

two, with gender a social outcome, such that the acted upon is feminized, is the "girl" regardless of sex, the actor correspondingly masculinized. Whenever women are victimized, regardless of the biology of the perpetrator, this system is at work. But it is equally true that whenever powerlessness and ascribed inferiority are sexually exploited or enjoyed—based on age, race, physical stature or appearance or ability, or socially reviled or stigmatized status—the system is at work.

Battery thus appears sexual on a deeper level. Stated in boldest terms, sexuality is violent, so perhaps violence is sexual. Violence against women is sexual on both counts, doubly sexy. If this is so, wives are beaten, as well as raped, as women—as the acted upon, as gender, meaning sexual, objects. It further follows that acts by anyone which treat a woman according to her object label, woman, are in a sense sexual acts. The extent to which sexual acts are acts of objectification remains a question of one's account of women's freedom to live their own meanings as other than illusions, of individuals' ability to resist or escape, even momentarily, prescribed social meanings short of political change. Clearly, centering sexuality upon genitality distinguishes battery from rape at exactly the juncture that both existing law, and seeing rape as violence not sex, do.

Most women get the message that the law against rape is virtually unenforceable as applied to them. Women's experience is more often delegitimated by this than the law is. Women, as realists, distinguish between rape and experiences of sexual violation by concluding that they have not "really" been raped if they have ever seen or dated or slept with or been married to the man, if they were fashionably dressed or not provably virgin, if they are prostitutes, if they put up with it or tried to get it over with, if they were force-fucked for years. The implicit social standard becomes: if a woman probably could not prove it in court, it was not rape.

The distance between most intimate violations of women and the legally perfect rape measures the imposition of an alien definition. From women's point of view, rape is not prohibited; it is regulated. Even women who know they have been raped do not believe that the legal system will see it the way they do. Often they are not wrong. Rather than deterring or avenging rape, the state, in many victims' experiences, perpetuates it. Women who charge rape say they were raped twice, the second time in court. Under a male state, the

boundary violation, humiliation, and indignity of being a public sexual spectacle makes this more than a figure of speech.[31]

Rape, like many other crimes, requires that the accused possess a criminal mind (*mens rea*) for his acts to be criminal. The man's mental state refers to what he actually understood at the time or to what a reasonable man should have understood under the circumstances. The problem is that the injury of rape lies in the meaning of the act to its victim, but the standard for its criminality lies in the meaning of the act to the assailant. Rape is only an injury from women's point of view. It is only a crime from the male point of view, explicitly including that of the accused.

The crime of rape is defined and adjudicated from the male standpoint, presuming that forced sex is sex and that consent to a man is freely given by a woman. Under male supremacist standards, of course, they are. Doctrinally, this means that the man's perceptions of the woman's desires determine whether she is deemed violated. This might be like other crimes of subjective intent if rape were like other crimes. With rape, because sexuality defines gender norms, the only difference between assault and what is socially defined as a noninjury is the meaning of the encounter to the woman. Interpreted this way, the legal problem has been to determine whose view of that meaning constitutes what really happened, as if what happened objectively exists to be objectively determined. This task has been assumed to be separable from the gender of the participants and the gendered nature of their exchange, when the objective norms and the assailant's perspective are identical.

As a result, although the rape law oscillates between subjective tests and objective standards invoking social reasonableness, it uniformly presumes a single underlying reality, rather than a reality split by the divergent meanings inequality produces. Many women are raped by men who know the meaning of their acts to their victims perfectly well and proceed anyway.[32] But women are also violated every day by men who have no idea of the meaning of their acts to the women. To them it is sex. Therefore, to the law it is sex. That becomes the single reality of what happened. When a rape prosecution is lost because a woman fails to prove that she did not consent, she is not considered to have been injured at all. It is as if a robbery victim, finding himself unable to prove he was not engaged in philanthropy, is told he still has his money. Hermeneutically unpacked, the law assumes that, because the

rapist did not perceive that the woman did not want him, she was not violated. She had sex. Sex itself cannot be an injury. Women have sex every day. Sex makes a woman a woman. Sex is what women are for.

Men set sexual mores ideologically and behaviorally, define rape as they imagine women to be sexually violated through distinguishing that from their image of what they normally do, and sit in judgment in most accusations of sex crimes. So rape comes to mean a strange (read Black) man who does not know his victim but does know she does not want sex with him, going ahead anyway. But men are systematically conditioned not even to notice what women want. Especially if they consume pornography, they may have not a glimmer of women's indifference or revulsion, including when women say no explicitly. Rapists typically believe the woman loved it. "Probably the single most used cry of rapist to victim is 'You bitch . . . slut . . . you know you want it. You all want it' and afterward, 'there now, you really enjoyed it, didn't you?' "[33] Women, as a survival strategy, must ignore or devalue or mute desires, particularly lack of them, to convey the impression that the man will get what he wants regardless of what they want. In this context, to measure the genuineness of consent from the individual assailant's point of view is to adopt as law the point of view which creates the problem. Measuring consent from the socially reasonable, meaning objective man's, point of view reproduces the same problem under a more elevated label.[34]

Men's pervasive belief that women fabricate rape charges after consenting to sex makes sense in this light. To them, the accusations are false because, to them, the facts describe sex. To interpret such events as rapes distorts their experience. Since they seldom consider that their experience of the real is anything other than reality, they can only explain the woman's version as maliciously invented. Similarly, the male anxiety that rape is easy to charge and difficult to disprove, also widely believed in the face of overwhelming evidence to the contrary, arises because rape accusations express one thing men cannot seem to control: the meaning to women of sexual encounters.

Thus do legal doctrines, incoherent or puzzling as syllogistic logic, become coherent as ideology. For example, when an accused wrongly but sincerely believes that a woman he sexually forced consented, he may have a defense of mistaken belief in consent or fail to satisfy the mental requirement of knowingly proceeding against her will.[35] Sometimes his knowing disregard is measured by what a reasonable

man would disregard. This is considered an objective test. Sometimes the disregard need not be reasonable so long as it is sincere. This is considered a subjective test. A feminist inquiry into the distinction between rape and intercourse, by contrast, would inquire into the meaning of the act from women's point of view, which is neither. What is wrong with rape in this view is that it is an act of subordination of women to men. It expresses and reinforces women's inequality to men. Rape with legal impunity makes women second-class citizens.

This analysis reveals the way the social conception of rape is shaped to interpret particular encounters and the way the legal conception of rape authoritatively shapes that social conception. When perspective is bound up with situation, and situation is unequal, whether or not a contested interaction is authoritatively considered rape comes down to whose meaning wins. If sexuality is relational, specifically if it is a power relation of gender, consent is a communication under conditions of inequality. It transpires somewhere between what the woman actually wanted, what she was able to express about what she wanted, and what the man comprehended she wanted.

Discussing the conceptually similar issue of revocation of prior consent, on the issue of the conditions under which women are allowed to control access to their sexuality from one penetration to the next, one commentator notes: "Even where a woman revokes prior consent, such is the male ego that, seized of an exaggerated assessment of his sexual prowess, a man might genuinely believe her still to be consenting; resistance may be misinterpreted as enthusiastic cooperation; protestations of pain or disinclination, a spur to more sophisticated or more ardent love-making; a clear statement to stop, taken as referring to a particular intimacy rather than the entire performance."[36] This vividly captures common male readings of women's indications of disinclination under many circumstances[37] and the perceptions that determine whether a rape occurred. The specific defense of mistaken belief in consent merely carries this to its logical apex. From whose standpoint, and in whose interest, is a law that allows one person's conditioned unconsciousness to contraindicate another's violation? In conceiving a cognizable injury from the viewpoint of the reasonable rapist, the rape law affirmatively rewards men with acquittals for not comprehending women's point of view on sexual encounters.

Whether the law calls this coerced consent or defense of mistaken belief in consent, the more the sexual violation of women is routine, the more pornography exists in the world the more legitimately, the more beliefs equating sexuality with violation become reasonable, and the more honestly women can be defined in terms of their fuckability. It would be comparatively simple if the legal problem were limited to avoiding retroactive falsification of the accused's state of mind. Surely there are incentives to lie. The deeper problem is the rape law's assumption that a single, objective state of affairs existed, one that merely needs to be determined by evidence, when so many rapes involve honest men and violated women. When the reality is split, is the woman raped but not by a rapist? Under these conditions, the law is designed to conclude that a rape did not occur. To attempt to solve this problem by adopting reasonable belief as a standard without asking, on a substantive social basis, to whom the belief is reasonable and why—meaning, what conditions make it reasonable—is one-sided: male-sided.[38] What is it reasonable for a man to believe concerning a woman's desire for sex when heterosexuality is compulsory? What is it reasonable for a man (accused or juror) to believe concerning a woman's consent when he has been viewing positive-outcome-rape pornography?[39] The one whose subjectivity becomes the objectivity of "what happened" is a matter of social meaning, that is, a matter of sexual politics. One-sidedly erasing women's violation or dissolving presumptions into the subjectivity of either side are the alternatives dictated by the terms of the object/subject split, respectively. These alternatives will only retrace that split to women's detriment until its terms are confronted as gendered to the ground.

40. West Coast Hotel v. Parrish, 300 U.S. 379 (1937), overruled the previous rejection of minimum wage laws for women (Adkins v. Children's Hospital, 261 U.S. 525 [1923]), finding a minimum wage for women reasonable because the state has a special interest in protecting women from exploitive work contracts because the health of women "becomes an object of public interest and care in order to preserve the strength and vigor of the race" (p. 394). It is thought that this opened the door for later upholding of the Fair Labor Standards Act under constitutional attack in U.S. v. Darby, 312 U.S. 100 (1940). *West Coast Hotel* was also used to uphold state constitutional amendments that make it unlawful to deny employment on the basis of union membership. American Federation of Labor v. American Sash and Door Co., 335 U.S. 538 (1949). See also Lincoln Federal Labor Union v. Northwestern Iron and Metal Co., 335 U.S. 525, 536 (1948) ("that wages and hours can be fixed by law is no longer doubted since West Coast Hotel").
41. For an excellent discussion of this history, see Mary E. Becker, "From Muller v. Oregon to Fetal Vulnerability Policies," 63 *University of Chicago Law Review* 1219 (1986).
42. See, in a different key, Michael Sandel, *Liberalism and the Limits of Justice* (Cambridge: Cambridge University Press, 1982): "The idealist metaphysic, for all its moral and political advantage, cedes too much to the transcendent, and in positing a noumenal realm wins for justice its primacy at the cost of denying it its human situation" (p. 13).
43. Johnnie Tillmon, "Welfare Is a Women's Issue," *Liberation News Service*, February 26, 1972; reprinted in Rosalyn Baxandall, Linda Gordon, and Susan Reverby, eds., *America's Working Women* (New York: Random House, 1976), pp. 355–358.
44. Sexual harassment, designed in pursuit of the jurisprudential approach argued here, is an exception. So is a recent decision by the Ninth Circuit, Watkins v. Army, 837 F.2d 1429 (9th Cir. 1988), which holds that to deprive gays of military employment on the basis of homosexual status is a violation of the Equal Protection Clause.
45. Chapter 12 provides citations and fuller discussion of this argument.
46. Charles Tilly, ed. "Western State-Making and Theories of Political Transformation," in *The Formation of National States in Western Europe* (Princeton: Princeton University Press, 1975), p. 638.
47. John L. Austin, *The Province of Jurisprudence Determined* (New York: Noonday Press, 1954).
48. H. L. A. Hart, *The Concept of Law* (London: Oxford University Press, 1961).
49. Ronald Dworkin, *Law's Empire* (Cambridge, Mass.: Harvard University Press, 1986). The task of this work is to justify the coercive power of the state through an account of authoritative interpretation which disposes of disagreements on the meaning of laws. The proposed solution is "law as integrity," which is "about principle" (p. 221).
50. This is how Bobbio describes Marx's particular orginality; "Is There a Marxist Theory of the State?" p. 15.

9. *Rape: On Coercion and Consent*

1. W. LaFave and A. Scott, *Substantive Criminal Law* (St. Paul: West, 1986), sec. 5.11 (pp. 688–689); R. M. Perkins and R. N. Boyce, *Criminal Law* (Mineola, N.Y.: Foundation Press, 1980), p. 210.
2. One component of Sec. 213.0 of the Model Penal Code (Philadelphia: American Law Institute, 1980) defines rape as sexual intercourse with a female not the wife of the perpetrator, "with some penetration however slight." Most states follow. New York requires penetration (sec. 130.00 [1]). Michigan's gender-neutral sexual assault statute includes penetration by objects (sec. 750.520 a[h]; 720.520[b]). The 1980 Annotation to Model Penal Code (Official Draft and Revised Comments, sec. 213.1[d]) questions and discusses the penetration requirement at 346–348. For illustrative case law, see Liptroth v. State, 335 So.2d 683 (Ala. Crim. App. 1976), *cert. denied* 429 U.S. 963 (1976); State v. Kidwell, 556 P.2d 20, 27 Ariz. App. 466 (Ariz. Ct. App. 1976); People v. O'Neal, 50 Ill. App. 3d 900, 365 N.E. 2d 1333 (Ill. App. Ct. 1977); Commonwealth v. Usher, 371 A.2d 995 (Pa. Super. Ct. 1977); Commonwealth v. Grassmyer, 237 Pa. Super. 394, 352 A.2d 178 (Pa. Super. Ct. 1975) (statutory rape conviction reversed because defendant's claim that five-year-old child's vaginal wound was inflicted with a broomstick could not be disproved and commonwealth could therefore not prove requisite penetration; indecent assault conviction sustained). Impotence is sometimes a defense and can support laws that prevent charging underage boys with rape or attempted rape; Foster v. Commonwealth, 31 S.E. 503, 96 Va. 306 (1896) (boy under fourteen cannot be guilty of attempt to commit offense that he is legally assumed physically impotent to perpetrate).
3. In the manner of many socialist-feminist adaptations of marxian categories to women's situation, to analyze sexuality as property short-circuits analysis of rape as male sexuality and presumes rather than develops links between sex and class. Concepts of property need to be rethought in light of sexuality as a form of objectification. In some ways, for women legally to be considered property would be an improvement, although it is not recommended.
4. For contrast between the perspectives of the victims and the courts, see Rusk v. State, 43 Md. App. 476, 406 A.2d 624 (Md. Ct. Spec. App. 1979) (*en banc*), *rev'd*, 289 Md. 230, 424 A.2d 720 (1981); Gonzales v. State, 516 P.2d 592 (1973).
5. Susan Brownmiller, *Against Our Will: Men, Women, and Rape* (New York: Simon and Schuster, 1975), p. 15.
6. Diana E. H. Russell, *The Politics of Rape: The Victim's Perspective* (New York: Stein & Day, 1977); Andrea Medea and Kathleen Thompson, *Against Rape* (New York: Farrar, Straus and Giroux, 1974); Lorenne M. G. Clark and Debra Lewis, *Rape: The Price of Coercive Sexuality* (Toronto: Women's Press, 1977); Susan Griffin, "Rape: The All-American Crime," *Ramparts*, September 1971, pp. 26–35. Ti-Grace Atkinson connects rape with "the institution of sexual intercourse," *Amazon Odyssey: The First Collection of Writings by the Political*

Pioneer of the Women's Movement (New York: Links Books, 1974), pp. 13–23. Kalamu ya Salaam, "Rape: A Radical Analysis from the African-American Perspective, "in *Our Women Keep Our Skies from Falling* (New Orleans: Nkombo, 1980), pp. 25–40.

7. Racism is clearly everyday life. Racism in the United States, by singling out Black men for allegations of rape of white women, has helped obscure the fact that it is men who rape women, disproportionately women of color.
8. Pamela Foa, "What's Wrong with Rape?" in *Feminism and Philosophy,* ed. Mary Vetterling-Braggin, Frederick A. Elliston, and Jane English (Totowa, N.J.: Littlefield, Adams, 1977), pp. 347–359; Michael Davis, "What's So Bad about Rape?" (Paper presented at the annual meeting of the Academy of Criminal Justice Sciences, Louisville, Ky., March 1982). "Since we would not want to say that there is anything morally wrong with sexual intercourse per se, we conclude that the wrongness of rape rests with the matter of the woman's consent"; Carolyn M. Shafer and Marilyn Frye, "Rape and Respect," in Vetterling-Braggin, Elliston, and English, *Feminism and Philosophy,* p. 334. "Sexual contact is not inherently harmful, insulting or provoking. Indeed, ordinarily it is something of which we are quite fond. The difference is [that] ordinary sexual intercourse is more or less consented to while rape is not"; Davis, "What's So Bad?" p. 12.
9. Liegh Bienen, "Rape III—National Developments in Rape Reform Legislation," 6 *Women's Rights Law Reporter* 170 (1980). See also Camille LeGrande, "Rape and Rape Laws: Sexism in Society and Law," 61 *California Law Review* 919 (May 1973).
10. People v. Samuels, 58 Cal. Rptr. 439, 447 (1967).
11. Julia R. Schwendinger and Herman Schewendinger, *Rape and Inequality* (Berkeley: Sage Library of Social Research, 1983), p. 44; K. Polk, "Rape Reform and Criminal Justice Processing," *Crime and Delinquency* 31 (April 1985): 191–205. "What can be concluded about the achievement of the underlying goals of the rape reform movement? . . . If a major goal is to increase the probability of convictions, then the results are slight at best . . . or even negligible" (p. 199) (California data). See also P. Bart and P. O'Brien, *Stopping Rape: Successful Survival Strategies* (Elmsford, N.Y.: Pergamon, 1985), pp. 129–131.
12. See State v. Alston, 310 N.C. 399, 312 S.E.2d 470 (1984) and discussion in Susan Estrich, *Real Rape* (Cambridge: Harvard University Press, 1987), pp. 60–62.
13. Note, "Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard," 62 *Yale Law Journal* 55 (1952).
14. A similar analysis of sexual harassment suggests that women have such "power" only so long as they behave according to male definitions of female desirability, that is, only so long as they accede to the definition of their sexuality (hence, themselves, as gender female) on male terms. Women have this power, in other words, only so long as they remain powerless.
15. See Comment, "Rape and Battery between Husband and Wife," 6 *Stanford Law Review* 719 (1954). On rape of prostitutes, see, e.g., People v. McClure, 42 Ill. App. 952, 356 N.E. 2d 899 (1st Dist. 3d Div. 1976) (on indictment for rape and armed robbery of prostitute where sex was admitted to have occurred, defendant acquitted of rape but "guilty of robbing her while armed with a knife"); Magnum v. State, 1 Tenn. Crim. App. 155, 432 S.W.2d 497 (Tenn. Crim. App. 1968) (no conviction for rape; conviction for sexual violation of age of consent overturned on ground that failure to instruct jury to determine if complainant was "a bawd, lewd or kept female" was reversible error; "A bawd female is a female who keeps a house of prostitution, and conducts illicit intercourse. A lewd female is one given to unlawful indulgence of lust, either for sexual indulgence or profit . . . A kept female is one who is supported and kept by a man for his own illicit intercourse"; complainant "frequented the Blue Moon Tavern; she had been there the night before . . . she kept company with . . . a married man separated from his wife . . . There is some proof of her bad reputation for truth and veracity"). Johnson v. State, 598 S.W. 2d 803 (Tenn. Crim. App. 1979) (unsuccessful defense to charge of rape that "even [if] technically a prostitute can be raped . . . the act of the rape itself was no trauma whatever to this type of unchaste woman"); People v. Gonzales, 96 Misc. 2d 639, 409 N.Y.S. 2d 497 (Crm. Crt. N.Y. City 1978) (prostitute can be raped if "it can be proven beyond a reasonable doubt that she revoked her consent prior to sexual intercourse because the defendant . . . used the coercive force of a pistol).
16. People v. Liberta, 64 N.Y. 2d 152, 474 N.E.2d 567, 485 N.Y.S. 2d 207 (1984) (marital rape recognized, contrary precedents discussed). For a summary of the current state of the marital exemption, see Joanne Schulman, "State-by-State Information on Marital Rape Exemption Laws," in Diana E. H. Russell, *Rape in Marriage* (New York: Macmillan, 1982), pp. 375–381; Patricia Searles and Ronald Berger, "The Current Status of Rape Reform Legislation: An Examination of State Statutes," 10 *Women's Rights Law Reporter* 25 (1987).
17. On "social interaction as an element of consent" in a voluntary social companion context, see Model Penal Code, sec. 213.1. "The prior social interaction is an indicator of consent in addition to actor's and victim's behavioral interaction during the commission of the offense"; Wallace Loh, "Q: What Has Reform of Rape Legislation Wrought? A: Truth in Criminal Labeling," *Journal of Social Issues* 37, no. 4 (1981): 47.
18. E.g., People v. Burnham, 176 Cal. App. 3d 1134, 222 Cal. Rptr. 630 (Cal. App. 1986).
19. Diana E. H. Russell and Nancy Howell, "The Prevalence of Rape in the United States Revisited," *Signs: Journal of Women in Culture and Society* 8 (Summer 1983): 668–695; and D. Russell, *The Secret Trauma: Incestuous Abuse of Women and Girls* (New York: Basic Books, 1986).
20. Pauline Bart found that women were more likely to be raped—that is, less able to stop a rape in progress—when they knew their assailant, particularly when they had a prior or current sexual relationship; "A Study of Women Who Both

Were Raped and Avoided Rape," *Journal of Social Issues* 37 (1981): 132. See also Linda Belden, "Why Women Do Not Report Sexual Assault" (Portland, Ore.: City of Portland Public Service Employment Program, Portland Women's Crisis Line, March 1979); Menachem Amir, *Patterns in Forcible Rape* (Chicago: University of Chicago Press, 1971), pp. 229–252.

21. Answer Brief for Plaintiff-Appellee, People v. Brown, Sup. Ct. Colo., Case No. 81SA102 (1981): 10.
22. Note, "Forcible and Statutory Rape," p. 55.
23. La. Rev. Stat. 14.42. Delaware law requires that the victim resist, but "only to the extent that it is reasonably necessary to make the victim's refusal to consent known to the defendant"; 11 Del. Code 761(g). See also Sue Bessmer, *The Laws of Rape* (New York: Praeger, 1984).
24. See People v. Thompson, 117 Mich. App. 522, 524, 324 N.W. 2d 22, 24 (Mich. App. 1982); People v. Hearn, 100 Mich. App. 749, 300 N.W. 2d 396 (Mich. App. 1980).
25. See Carol Pateman, "Women and Consent," *Political Theory* 8 (May 1980): 149–168: "Consent as ideology cannot be distinguished from habitual acquiescence, assent, silent dissent, submission, or even enforced submission. Unless refusal of consent or withdrawal of consent are real possibilities, we can no longer speak of 'consent' in any genuine sense . . . Women exemplify the individuals whom consent theorists declared are incapable of consenting. Yet, simultaneously, women have been presented as always consenting, and their explicit non-consent has been treated as irrelevant or has been reinterpreted as 'consent' " (p. 150).
26. Brownmiller, *Against Our Will,* p. 5.
27. Shafer and Frye, "Rape and Respect," p. 334.
28. See R. Emerson Dobash and Russell Dobash, *Violence against Wives: A Case against the Patriarchy* (New York: Free Press, 1979), pp. 14–21.
29. On the cycle of battering, see Lenore Walker, *The Battered Woman* (New York: Harper & Row, 1979).
30. Samois, *Coming to Power* (Palo Alto, Calif.: Alyson Publications, 1983).
31. If accounts of sexual violation are a form of sex, as argued in Chapter 11, victim testimony in rape cases is a form of live oral pornography.
32. This is apparently true of undetected as well as convicted rapists. Samuel David Smithyman's sample, composed largely of the former, contained self-selected respondents to his ad, which read: "Are you a rapist? Reasearchers Interviewing Anonymously by Phone to Protect Your Identity. Call . . ." Presumably those who chose to call defined their acts as rapes, at least at the time of responding; "The Undetected Rapist" (Ph.D. diss., Claremont Graduate School, 1978), pp. 54–60, 63–76, 80–90, 97–107.
33. Nancy Gager and Cathleen Schurr, *Sexual Assault: Confronting Rape in America* (New York: Grosset & Dunlap, 1976), p. 244.
34. Susan Estrich proposes this; *Real Rape,* pp. 102–103. Her lack of inquiry into social determinants of perspective (such as pornography) may explain her faith in reasonableness as a legally workable standard for raped women.

35. See Director of Public Prosecutions v. Morgan, 2 All E.R.H.L. 347 (1975) [England]; Pappajohn v. The Queen, 111 D.L.R. 3d 1 (1980) [Canada]; People v. Mayberry, 542 P.2d 1337 (Cal. 1975).
36. Richard H. S. Tur, "Rape: Reasonableness and Time," 3 *Oxford Journal of Legal Studies* 432, 441 (Winter 1981). Tur, in the context of the *Morgan* and *Pappajohn* cases, says the "law ought not to be astute to equate wickedness and wishful, albeit mistaken, thinking" (p. 437). Rape victims are typically less concerned with wickedness than with injury.
37. See Silke Vogelmann-Sine, Ellen D. Ervin, Reenie Christensen, Carolyn H. Warmsun, and Leonard P. Ullmann, "Sex Differences in Feelings Attributed to a Woman in Situations Involving Coercion and Sexual Advances," *Journal of Personality* 47 (September 1979): 429–430.
38. Estrich has this problem in *Real Rape.*
39. E. Donnerstein, "Pornography: Its Effect on Violence against Women," in *Pornography and Sexual Aggression,* ed. N. Malamuth and E. Donnerstein (Orlando, Fla.: Academic Press, 1984), pp. 65–70. Readers who worry that this could become an argument for defending accused rapists should understand that the reality to which it points already provides a basis for defending accused rapists. The solution is to attack the pornography directly, not to be silent about its exonerating effects, legal or social, potential or actual.

10. *Abortion: On Public and Private*

1. See, e.g., D. H. Regan, "Rewriting Roe v. Wade," 77 *Michigan Law Review* 1569 (1979), in which the Good Samaritan happens upon the fetus.
2. As of 1973, ten states that had made abortion a crime had exceptions for rape and incest; at least three had exceptions for rape only. Many of these exceptions were based on Model Penal Code 230.3 (Proposed Official Draft 1962), quoted in Doe v. Bolton, 410 U.S. 179, 205–207, App. B (1973). References to states with incest and rape exceptions can be found in Roe v. Wade, 410 U.S. 113 n. 37 (1973). Some versions of the Hyde Amendment, which prohibits use of public money to fund abortions, have contained exceptions for cases of rape or incest. All require immediate reporting of the incident.
3. See Kristin Luker, *Taking Chances: Abortion and the Decision Not to Contracept* (Berkeley: University of California Press, 1975).
4. Roe v. Wade, 410 U.S. 113 (1973).
5. Griswold v. Connecticut, 381 U.S. 479 (1965).
6. H. L. v. Matheson, 450 U.S. 398, 435 (1981) (Marshall, J., dissenting).
7. Roe. v. Wade, 410 U.S. 113, 153 (1973) ("a woman's decision whether or not to terminate her pregnancy"); Harris v. McRae, 448 U.S. 297 (1980) (referring to Maher v. Roe, 432 U.S. 464, 474 [1976], on no state responsibility to remove non-state-controlled obstacles).
8. Deshaney v. Winnebago County Dep't of Social Services, 109 S. Ct. 988

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The St. Paul's Rape Case Shows Why Sexual-Assault Laws Must Change

By EMILY BAZELON AUG. 26, 2015

In the rape trial of Owen Labrie, unfolding this month in a county courtroom in Concord, N.H., this much is settled: When Labrie was an 18-year-old senior at the boarding school St. Paul's, he competed with other male students over who could "score with" or "slay" the most girls. In the days before his graduation in June 2014, Labrie invited a girl, then 15, via email to join him for a "senior salute," which could involve anything from kissing to sex. He had a key, passed around by students, to a mechanical room at the school, and the girl went there with him.

The girl testified last week that she and Labrie had sex, though she "said no three times." Labrie, who testified today, denies this. "It wouldn't have been a good move to have sex with this girl," he said. The dispute is a familiar-enough scenario for a rape case. But the fact that it has gone to court is also relatively unusual for a reason that may seem surprising: Labrie's guilt or innocence hinges on the question of consent. This is much less common than you might assume — in fact, in many states, Labrie probably would not face felony charges of sexual assault at all.

The message that "no means no" has been central to the movement to reduce sexual assault on college campuses. "If she doesn't consent, or if she can't consent, it's rape. It's assault," the actor Benicio Del Toro declares in a

video released last year by the White House, and featuring President Obama and Vice President Joe Biden. Some schools, in an effort to make rape easier to prove and punish, have shifted the standard of consent to require a showing of active agreement — "yes means yes" as a substitution for "no means no."

But this message often doesn't line up with legal reality. A majority of states still erect a far higher barrier to prosecution and conviction by relying "on the concept of force in defining rape," as the Northwestern University law professor Deborah Tuerkheimer writes in a forthcoming article in The Emory Law Journal. Tuerkheimer finds that in more than half of the 50 states, a judge or jury must find that a person used force to find him or her guilty of rape. The Model Penal Code, created by the American Law Institute in 1962 to influence and standardize criminal lawmaking, also continues to include a force requirement in its definition of rape.

Beginning in the 1970s, reformers pushed states to stop making victims prove that they physically resisted for a rapist to be convicted. But the idea that rape necessarily includes force has persisted — even though it is "woefully out of step with modern conceptions of sex," Tuerkheimer argues. This idea is changing, but slowly. "The trend is in the direction of removing force requirements, and defining sexual assault in reference to a lack of consent, but there are a lot of laggards," she told me.

New Hampshire is among the minority of states that do *not* require showing force was involved to prove rape. In 1995, the state adopted language providing that a person is guilty of sexual assault if he or she sexually penetrates another person when "the victim indicates by speech or conduct that there is not freely given consent." This explains how the case against Labrie has proceeded — it's the source of the central felony charge against him. And so Labrie's lawyer is trying to convince the jury that the girl did not make her lack of consent clear enough. (The jury also has the option of finding Labrie guilty of the lesser charge of having sex with a 15-year-old, even if she consented, when he was 18. But this is a misdemeanor rather than a felony.)

On cross-examination, the alleged victim conceded that she lifted up her arms so Labrie could take her shirt off and raised her hips so he could pull off her shorts. She also told the police, when they interviewed her soon after the incident, that "other than me saying no to the first part, I don't think he would have known for a fact that I would not want to do that." At trial, she explained, "I wanted to not cause a conflict," and "I felt like I was frozen." Labrie testified, "I thought she was having a great time." He also admitted to wearing a condom, and his former classmates testified earlier this week that he told them he did have sex with the girl. ("I wanted to look good," Labrie said by way of explanation in his own testimony.)

So the crucial question for the jury may well be: Did Labrie know, or should he have known, that the girl did not freely consent? That seems like the right question to ask.

And yet in many cases, consent is still not the test at all. In her article, Tuerkheimer describes a number of such cases around the country. A recent one in Oregon involved a 12-year-old girl who was raped by her father. The girl — who was living with her mother at the time — was visiting her father in his mobile home when he called her into his bedroom, where he was waiting naked, according to the state court of appeals' account. He proceeded to have sex with her, even though she told him that she "didn't want to do it." She also said she did not "put up a fight" because she thought "he would just fight right back."

The father — who sexually abused his daughter several years earlier, too, according to the appeals court — was convicted of rape under an Oregon law that required a showing of "forcible compulsion," which could include "a threat, express or implied, that places a person in fear of immediate or future death or physical injury." But the appeals court reversed his conviction, finding that "nothing in the record suggests that defendant engaged in any force." The court upheld two related convictions the father also appealed, and recognized the history of sexual abuse, saying it "compelled her to submit," but

still found this did not qualify, legally speaking, as a threat.

This is chilling and retrograde. And it shows the gap between the definition of rape in many states and the "culture of consent" at universities, Tuerkheimer argues. As she puts it, "On campus, this is rape; off campus, it often is not." The discrepancy, she argues, diminishes the violation of victims outside universities, even though studies show they are actually more vulnerable to sexual assault than college students.

Tuerkheimer and others are pushing to reform state rape laws and the Model Penal Code. As the American Law Institute re-examines the code's sexual-assault provision for the first time since 1962, a heated debate is taking place over how to replace the old language. Should the code follow states like New Hampshire, or go further and adopt the standard of affirmative consent? States including New York are weighing the same question. It's a hard one. Eliminating the force requirement for rape, on the other hand, is a no-brainer.

Correction: August 26, 2015

An earlier version of a summary that appeared with this article on the home page of NYTimes.com misstated who would, in many states, likely not face felony charges of sexual assault. It is the St. Paul's student accused of rape, Owen Labrie, not the accuser.

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MODEL PENAL CODE

ARTICLE 213

I. PROPOSED SECTIONS 213.0 TO 213.7

SECTION 213.0. DEFINITIONS

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

(1) The definitions given in Section 210.0 apply;

(2) "Commercial sex act" means any act of sexual intercourse or sexual contact in exchange for which any money, property, or services are given to or received by any person.

(3) "Consent" means a person's positive agreement, communicated by either words or actions, to engage in sexual intercourse or sexual contact.

(4) "Nonconsent" means a person's refusal to consent to sexual intercourse or sexual contact, communicated by either words or actions; a verbally expressed refusal establishes nonconsent in the absence of subsequent words or actions indicating positive agreement.

(5) "Recklessly" shall carry only the meaning designated in Model Penal Code § 2.02(2)(c); the provisions of Model Penal Code § 2.08(2) shall not apply to this Article.

(6) "Sexual contact" means . . . . [*reserved*].

(7) "Sexual intercourse" means:

(a) any act involving penetration, however slight, of the anus or vagina by any object or body part, unless done for bona fide medical, hygienic, or law-enforcement purposes; or

(b) direct contact between the mouth or tongue of one person and the anus, penis, or vagina of another person.

SECTION 213.1. RAPE AND RELATED OFFENSES

(1) An actor is guilty of rape, a felony of the second degree, if he or she knowingly or recklessly:

(a) uses physical force, physical restraint, or an implied or express threat of physical force, bodily injury, or physical restraint to cause another person to engage in an act of sexual intercourse with anyone; or

(b) causes another person to engage in an act of sexual intercourse by threatening to inflict bodily injury on someone other than such person or by threatening to commit any other crime of violence; or

(c) has, or enables another person to have, sexual intercourse with a person who, at the time of such act of sexual intercourse:

(i) is less than 12 years old; or

(ii) is sleeping, unconscious, or physically unable to express nonconsent to engage in such act of sexual intercourse; or

(iii) lacks the capacity to express nonconsent to engage in such act of sexual intercourse, because of mental disorder or disability, whether temporary or permanent; or

(iv) lacks substantial capacity to appraise or control his or her conduct because of drugs, alcohol, or other intoxicating or consciousness-altering substances that the actor administered or caused to be administered, without the knowledge of such other person, for the purpose of impairing such other person's capacity to express nonconsent to such act of sexual intercourse.

(2) An actor is guilty of aggravated rape, a felony of the first degree, if he or she violates subsection (1) of this Section and:

(a) uses a deadly weapon to cause the other person to engage in such act of sexual intercourse; or

(b) acts with the active participation or assistance of one or more other persons who are present at the time of the act of sexual intercourse; or

(c) knowingly or recklessly causes serious bodily injury to the other person or to anyone else for the purpose of causing such other person to engage in the act of sexual intercourse; or

(d) the act of sexual intercourse in violation of subsection (2) of this Section is a commercial sex act.

SECTION 213.2. SEXUAL INTERCOURSE BY COERCION OR IMPOSITION.

(1) An actor is guilty of sexual intercourse by coercion, a felony of the third degree, if he or she:

(a) knowingly or recklessly has, or enables another person to have, sexual intercourse with a person who at the time of the act of sexual intercourse:

(i) has by words or conduct expressly indicated nonconsent to such act of sexual intercourse; or

(ii) is undressed or is in the process of undressing for the purpose of receiving nonsexual professional services from the actor, and has not given consent to sexual activity; or

(b) obtains the other person's consent by threatening to:

(i) accuse anyone of a criminal offense or of a failure to comply with immigration regulations; or

(ii) expose any information tending to impair the credit or business repute of any person; or

(iii) take or withhold action in an official capacity, whether public or private, or cause another person to take or withhold action in an official capacity, whether public or private; or

(iv) inflict any substantial economic or financial harm that would not benefit the actor; or

(c) knows or recklessly disregards the risk that the other person:

(i) is less than 18 years old and the actor is a parent, foster parent, guardian, teacher, educational or religious counselor, school administrator, extracurricular instructor, or coach of such person; or

(ii) is on probation or parole and that the actor holds any position of authority or supervision with respect to such person's probation or parole; or

(iii) is detained in a hospital, prison, or other custodial institution, and that the actor holds any position of authority at such facility.

(2) An actor is guilty of aggravated sexual intercourse by coercion, a felony of the second degree, if he or she violates subsection (1)(b) or (1)(c) of this Section and in doing so causes a person to engage in a commercial sex act involving sexual intercourse.

(3) An actor is guilty of sexual intercourse by imposition, a felony of the third degree, if he or she knowingly or recklessly has, or enables another person to have, sexual intercourse with a person who, at the time of the act of sexual intercourse:

(a) lacks the capacity to express nonconsent to such act of sexual intercourse, because of intoxication, whether voluntary or involuntary, and regardless of the identity of the person who administered such intoxicants; or

(b) is less than 16 years old and the actor is more than four years older than such person; or

(c) is mentally disabled, developmentally disabled, or mentally incapacitated, whether temporarily or permanently, to the extent that such person is incapable of understanding the physiological nature of sexual intercourse, its potential for causing pregnancy, or its potential for transmitting disease; or

(d) is mentally or developmentally disabled to the extent that such person's social or intellectual capacities are no greater than that of a person who is less than 12 years old.

(4) An actor is guilty of aggravated sexual intercourse by imposition, a felony of the second degree, if he or she violates subsection (3) of this Section and in doing so causes a person to engage in a commercial sex act involving sexual intercourse.

SECTION 213.3. SEXUAL INTERCOURSE BY EXPLOITATION

An actor is guilty of sexual intercourse by exploitation, a felony of the fourth degree, if he or she has sexual intercourse with another person and:

(1) is engaged in providing professional treatment, assessment, or counseling for a mental or emotional illness, symptom, or condition of such person over a period concurrent with or substantially contemporaneous with the time when the act of sexual intercourse occurs, regardless of the location where such act of sexual intercourse occurs and regardless of whether the actor is formally licensed to provide such treatment; or

(2) represents that the act of sexual intercourse is for purposes of medical treatment or that such person is in danger of physical injury or illness which the act of sexual intercourse may serve to mitigate or prevent; or

(3) knowingly leads such person to believe falsely that he or she is someone with whom such person has been sexually intimate.

SECTION 213.4. SEXUAL INTERCOURSE WITHOUT CONSENT.

An actor is guilty of sexual intercourse without consent, a misdemeanor, if the actor knowingly or recklessly has, or enables another person to have, sexual intercourse with a person who at the time of the act of sexual intercourse has not given consent to that act.

SECTION 213.5. CRIMINAL SEXUAL CONTACT

[*Reserved*]

SECTION 213.6. SEXUAL OFFENSES INVOLVING SPOUSES AND OTHER INTIMATE PARTNERS

[*Reserved*]

SECTION 213.7. PROCEDURAL AND EVIDENTIARY PRINCIPLES APPLICABLE TO ARTICLE 213

(1) *Sexual Activity of the Complainant.*

(a) General Rule

(i) In a prosecution under this Article, notwithstanding any other provision of law, reputation or opinion evidence about the sexual activity of the complainant is not admissible, unless constitutionally required.

(ii) Evidence of specific instances of sexual activity of the complainant, other than sexual activity with the accused, shall be inadmissible, except as provided in subsection (b), or when its admissibility is constitutionally required. If the proffered sexual activity alleges a prior instance of false accusation of a sexual offense, such evidence is further inadmissible unless the falsehood of the prior accusation is established by a preponderance of evidence, with proof beyond mere evidence that the complaint was judged unfounded or was otherwise not pursued.

The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform

Ilene Seidman & Susan Vickers†

I. INTRODUCTION

In the past thirty years there has been a movement in the law seeking gender equality in sex and sexual relations. The treatment of crimes specifically targeting women, sexual assault and domestic violence, has been at the core of this gender equality movement. The rape reform movement has succeeded in lobbying for significant revisions in antiquated and gender-biased rape statutes. Specifically, state and federal legislatures have enacted rape shield laws, provided for privileged protection of rape counseling records, repealed marital rape exceptions, eliminated evidentiary corroboration requirements and cautionary instructions regarding the absence of corroboration, and abolished the statutory "reasonable mistake of fact" defense.[1]

Although these reforms represent significant steps towards an appropriate response to rape, many of these statutory reforms, which focus primarily on rape victims' existence within the criminal justice system, have been a profound disappointment.[2] Few commentators can point to any data suggesting that criminal rape reform laws have deterred the commission of rape, increased

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1. *See generally* Rosemary C. Hunter, *Gender in Evidence: Masculine Norms vs. Feminist Reforms*, 19 HARV. WOMEN'S L.J. 127 (1996).

2. *See* David P. Bryden, *Forum on the Law of Rape*, 3 BUFF. CRIM. L. REV. 317, 320-21 (2000); Hunter, *supra* note 1, at 134, 140, 155-56; Cassia C. Spohn, *The Rape Reform Movement: The Traditional Common Law and Rape Law Reforms*, 39 JURIMETRICS J. 119, 128-30 (1999).

its prosecution, or increased conviction rates.[3] In short, the "outcomes" of the criminal justice system—arrest, indictment, and conviction—have remained fairly constant.

Why have these reforms failed to produce changed outcomes? Scholars point to the fact that societal attitudes, including those of many key decision-makers in the criminal justice system, have not kept pace with statutory reform.[4] While laws about rape have changed, attitudes about sexual autonomy and gender roles in sexual relations have not. The vast majority of people—including law enforcement personnel, judges and potential jurors—remain conflicted about what constitutes "consensual" sex.[5] They are ambivalent about placing criminal sanctions on "non-violent" sexual assault or, for that matter, anything short of violent penetration that results in physical injuries.[6] Jurors, prosecutors and police are confused about the boundary line between sex and rape.[7]

The result of our society's ambivalence and confusion about sexual autonomy and gender roles in sex is that rape victims, especially acquaintance rape victims, continue to encounter the same hurdles that they did thirty years ago.[8] These hurdles include the centralizing of the victim's dress, behavior and state of mind,[9] the brutalizing attack on her privacy by the threat of public use

3. *See* CASSIA SPOHN & JULIA HORNEY, RAPE LAW REFORM: A GRASSROOTS REVOLUTION AND ITS IMPACT, 77-104 (1992) (finding no change in number of reports, indictments, and convictions in majority of jurisdictions studied); Stacy Futter & Walter R. Mebane Jr., *The Effects of Rape Law Reform on Rape Case Processing*, 16 BERKELEY WOMEN'S L.J. 72, 83-85 (2001) (discussing various empirical studies of rape law reform impact).

4. *See* SPOHN & HORNEY, *supra* note 3 at 173.

5. STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF THE LAW 2 (1998).

6. *Id.*

7. *Id.* at 95-98.

8. Rape victims will encounter additional difficulties when the defense's theory is based on one of consent, which constitutes the vast majority of cases. Seventy-eight percent of rape victims are assaulted by someone they know, and the most common defense in these cases is consent. PATRICIA TJADEN & NANCY THOENNES, U.S. DEP'T OF JUSTICE, A PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 2, 5 (Nov. 1998), *available at* http://www.ncjrs.org/pdffiles1/nij/183781.pdf.

9. *See* SUSAN ESTRICH, REAL RAPE 45-46 (1987); David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1196 (1997) (noting "officials deny justice to women who have engaged in nonmarital sex, or other 'improper' activities such as heavy drinking or hitchhiking"); Gary D. LaFree et al., *Jurors' Responses to Victims' Behavior and Legal Issues in Sexual Assault Trials*, 32 SOC. PROBS. 389, 401 (1985) (stating jurors with conservative notions regarding appropriate female behavior tend to find defendant not guilty if the victim allegedly violated conservative notions of 'proper' female behavior, such as drinking or committing adultery). Estrich cites *Barker v. Commonwealth*, 95 S.E.2d 135, 137 (Va. 1956), a case in which a woman accepted a ride from two male strangers at a bus station instead of waiting for the bus. ESTRICH, *supra*, at 45-46. The men later hit her and forced her to have intercourse. *Id.* She later paid for additional gas and did not complain until a friend asked her why she was not on the bus. *Id.* The court was troubled not only by the woman's delay in complaining, but also by her acceptance of the ride in the first place, stating:

[I]t is improbable and contrary to human experience for an innocent and chaste woman to permit two

of rape crisis, medical, and therapy records,[10] the continuing ability of the defense to litigate the character, conduct and mental health of the victim in an effort to prove consent or motive to lie,[11] and the continuing view that victims should demonstrate a set of behaviors consistent with someone who has really suffered the trauma of assault.[12] Jurors still expect evidence of fresh complaints by victims with accompanying hysteria and torn clothes, as well as other indicia of resistance even when resistance is not a statutory element.[13]

This Article proposes an agenda for the next thirty years of rape law reform. Part I briefly reviews the first wave of rape law reform. In Part II, this Article proposes the establishment of the right to independent civil representation for rape victims. Part III of this Article recommends the reconceptualiztion of the legal response to rape, focusing on a victim's most basic human needs in the first few months after assault. Part III further addresses the core areas of civil legal needs that are crucial to a victim's healing, safety and well-being immediately following an assault. Part IV proposes the establishment of an affirmative standard for consent and the elimination of force as a necessary element to the crime. Finally, Part V advocates the establishment of a national database to track criminal justice outcomes in sexual assault cases to enable future reforms based on reliable data.

II. THE FIRST WAVE OF RAPE REFORM (1970-2000)

In the wake of demands for equal rights for women under the law and tighter criminal justice controls during the 1970s, reform of rape laws became a legislative priority.[14] As a result, over the next thirty years, every state in the

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strange men to introduce themselves to her in a public place and after one of them had hugged her and felt her legs to voluntarily ride with them as far as she did.

Id.

10. Anna Y. Joo, *Broadening the Scope of Counselor-Patient Privilege to Protect the Privacy of the Sexual Assault Survivor*, 32 HARV. J. ON LEGIS. 255, 284 (1995) (discussing that "[i]t was likely that sexual assault survivors viewed foregoing legal action as a tradeoff for receiving effective counseling treatment").

11. Bryden & Lengnick, *supra* note 9, at 1367 (stating defendants seek to portray victims as troubled to discredit victim's testimony and reinforce their fabricated charge); Joo, *supra* note 10, at 2, 25, 38.

12. SCHULHOFER, *supra* note 5, at 4.

13. *See* Bryden & Lengnick, *supra* note 9, at 1196 (declaring juries often conform to system norms by blaming victims and acquitting defendant rapists).

14. *See* Futter & Mebane, *supra* note 3, at 75. Before the first wave of reform, the traditional common-law approach to rape had persisted for hundreds of years. Rape was primarily seen as a crime of theft of a father or husband's property, thus rendering it impossible for a father or husband to rape his daughter or wife under the law. *Id.* at 74. The traditional definition of rape, "unlawful carnal knowledge of woman by force and against her will," remained widespread until the beginning of the rape reform movement in the early 1970s. *Id.* at 75. Most, if not all, jurisdictions placed additional burdens on victims to demonstrate that they resisted to the utmost, demonstrated active and forceful lack of consent, that their prior sexual conduct could not have reasonably suggested consent to the defendant, and that physical evidence corroborated their claims.

The introduction of the Model Penal Code in 1962 was the first attempt to modernize rape law. MODEL PENAL CODE § 3.1 (1962). The Model Penal Code defined rape as follows: "A male who has sexual intercourse with a female not his wife is guilty of rape if . . . he compels her to submit by force, or by threat of

country and the District of Columbia redrafted their rape statutes in some way.[15] Though the reforms were not identical, they each focused almost exclusively on the victim's role within the criminal justice system.[16] These criminal justice reforms fell into four categories: (1) redefinition of the offense (repealing spousal exemptions and abolishing specific gender roles for the accuser and accused); (2) evidentiary reforms (elimination of corroboration requirements, enactment of rape shield statutes); (3) reforms in statutory age requirements; and (4) reforms in statutory structures (grading of offenses according to severity of force and resulting injuries).[17]

The intent of this massive legal reform was both symbolic and substantive. On a symbolic level, the overarching goal was to alleviate the rape victim's second class status within the criminal justice system in order to make the treatment of rape victims, the overwhelming majority of whom are female, more consistent with that of other victim-witnesses in the system.[18] The substantive goals were to deter occurrence, increase the likelihood that victims will report the crime and cooperate with law enforcement, reduce the intense credibility attacks on victims during investigation and at trial, and increase rates of prosecution and conviction.[19]

Sadly, it now appears that by any available measure, the reforms have had no significant substantive impact. No major scholar in the area of rape law and rape reform has argued that these reforms have produced significant results.[20] Perhaps most disheartening is that trial, appellate and state supreme courts are still arguing over the same old ground: the meaning of consent, degrees of force, the victim's role as an active or passive participant in the event, and the victim's privacy.[21]

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imminent death, serious bodily injury, extreme pain or kidnapping to be inflicted on anyone." *Id.* While the Model Penal Code specifically sought to shift the focus from the victim to the accused, resistance remained an implicit requirement, and the code remained focused on non-consent. *Id.* Force was not defined, but the threat of force had to be lethal or extremely serious. *Id.* The Model Penal Code also contained a corroboration requirement. *Id.* § 213.1. The Code retained the centuries-old notion that in matters of sex (if not others), women were or could be vengeful liars, and the code therefore required the presence of "fresh complaints." *See* Futter & Mebane, *supra* note 3, at 3.

15. Futter & Mebane, *supra* note 3, at 79.

16. Futter & Mebane, *supra* note 3, at 79.

17. Futter & Mebane, *supra* note 3, at 3.

18. Spohn, *supra* note 2, at 121.

19. Spohn, *supra* note 2, at 121.

20. Futter & Meban, *supra* note 3, at 81.

> Although their reasoning differs, legal scholars generally agree that the reforms have not been successful. Three of the most prominent legal scholars in the area of rape reform law are Catherine Mackinnon, Susan Estrich, and Lynne Henderson [all of whom conclude that rape reforms to this point have largely failed].

Id.

21. *See* Bryden & Lengnick, *supra* note 9, at 1196 (arguing "men who control the justice system are irrationally obsessed with the dangers of false rape accusations"); *see also* ESTRICH, *supra* note 9, at 42-43 (suggesting "the underlying theme [in the criminal justice system surrounding rape] is distrust of women").

Given that significant statutory reforms have failed to produce significant changes in rape outcomes within the criminal justice process, should we give up on the law as an instrument for addressing social attitudes about rape? Are social and cultural prejudices about the devious at worst and ambivalent at best nature of female sexuality and the deeply held, unstated belief that men are inherently aggressive and violent in expressions of their own sexuality too tenacious to legislate against?[22] Should lawyers get out of the way and leave the "real" work to therapists, educators, and sociologists? If we have faith that the law can be used as a tool for healing victims of sexual assault, we must answer no to these questions.

The reforms of the past thirty years have reached the limits of their success, and a second wave of reform is badly needed. The agenda suggested in this Article arises from our study of rape laws, and rape law reform, and from our experience representing or supervising the representation of over 600 sexual assault victims in Massachusetts. We believe our work with rape survivors provides a clear and distinctive roadmap to the work that is crucial to their healing, safety, and well-being that has national applicability and is strongly supported by social science research.

III. CHANGE THE DOMINANT PARADIGM OF RESPONSE TO RAPE BY RECONCEPTUALIZING THE RIGHTS AND REMEDIES AVAILABLE TO RAPE VICTIMS OUTSIDE THE CRIMINAL JUSTICE SYSTEM

The failure of rape law reform is in part the result of an almost exclusive focus on the criminal justice process. Rape victims deserve more from the legal system than just a prosecution.[23] Rape causes a tidal wave effect on a victim's life. The profound emotional, physical, economic, and social harm to the victim affects a broad range of life activities impacted by civil law. The goal of refocusing the legal response to rape should be to prevent the acute trauma of rape from triggering a long-term, downward economic and social

22. Perhaps our disappointment in the results of reform lies in the mistaken belief that the reforms of the past thirty years would produce radical, rather than incremental, changes in social attitudes as well as in the application of law. One notable exception is rape shield laws which have had impact in deterring the irrelevant introduction of prior sexual history now routinely upheld by judges, but nonetheless subject to debate again as a result of the Kobe Bryant case. For instance, Massachusetts' rape shield law governs the admissibility of evidence of a victim's sexual conduct, and requires that certain evidence shall not be admissible in criminal proceedings. MASS. GEN. LAWS ch. 233, § 21B (2004). Evidence of the victim's reputation for promiscuity or sexual conduct is not admissible under the statute, however, the statute is subject to certain exceptions including the victim's sexual history with the accused and evidence of specific sexual conduct with someone other than the accused when it is relevant to explain the presence of "any physical feature, characteristic, or condition of the victim." *Id.*

23. Even if outcomes were successful, because over half of all rape prosecutions are either dismissed before trial or result in an acquittal, focusing legal remedies exclusively on the criminal justice system is not adequate. MAJORITY STAFF OF THE SENATE JUDICIARY COMMITTEE, VIOLENCE AGAINST WOMEN: THE RESPONSE TO RAPE: DETOURS ON THE ROAD TO EQUAL JUSTICE (May 1993), *available at* http://www.mith2.umd.edu/WomensStudies/GenderIssues/Violence+Women/ResponsetoRape/full-text.

spiral for the victim, and to preserve the integrity of the victim's privacy and social relations.

The most obvious place where the criminal justice process is inextricably tied to civil remedies is the area of victim's compensation. Most victim compensation statutes require some form of involvement with the criminal justice system in order for the victim to pursue a compensation claim.[24] Placing the availability of civil remedies in the hands of the criminal justice process causes real harm to victims and is terrible social policy for at least three reasons.

First, rape is the least reported, least indicted, and least convicted non-property felony in America.[25] Second, the criminal justice process is too slow and poorly equipped to protect against the immediate devastating consequences of assault.[26] Third, many victims simply do not view the criminal justice system as one that will provide them with protection.[27] These victims will forego the criminal process and will unwittingly deprive themselves of civil remedies that should be available to them to stabilize their daily lives, protect their privacy, and ensure their emotional and physical safety.

A. Hierarchy of Rape Victims' Legal Needs

Abraham Maslow's hierarchy of human needs provides a vantage point from which to reconceptualize the legal system's response to rape. Maslow's theory suggests that unsatisfied needs exist in a predictable, sequential and universal hierarchy that motivate humans to act.[28] The most primal needs cited by Maslow are physiological: air, food, drink, shelter, warmth, sex, and sleep.[29] The second level of needs include safety and security, protection from elements, order, law, limits and stability.[30] The third level includes

24. For example, in Michigan, the commission operating the Victim's Compensation Fund notifies the prosecuting attorney of the county in which the crime occurred upon receipt of the claim. MICH. COMP. LAWS §§ 18.351-18.368 (2004). The commission defers the proceedings until the criminal prosecution has concluded. *Id.*

25. TIMOTHY C. HART & CALLIE RENNISON, U.S. DEP'T OF JUSTICE, REPORTING CRIME TO THE POLICE 5 (Mar. 2000), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/rcp00.pdf. Between 1992 and 2000, only 31% of rapes or sexual assaults were brought to the attention of the police compared with 57% of robberies and 55% of aggravated assaults. *Id.*

26. In Massachusetts, for example, it can take two or more years for a case to move from indictment to trial alone. This figure does not account for pre-indictment investigation, or post-conviction appeals, which can add years to the process. VICTIM RIGHTS LAW CENTER, BEYOND THE CRIMINAL JUSTICE SYSTEM: TRANSFORMING OUR NATION'S RESPONSE TO RAPE: A PRACTICAL GUIDE TO REPRESENTING SEXUAL ASSAULT VICTIMS ch. 9 at 16 (2003).

27. *See Gender and Justice in the Courts: A Report to the Supreme Court of Georgia by the Commission on Gender Bias in the Judicial System*, 8 GA. ST. U. L. REV. 539, 622 (1992) (noting how many victims find themselves forced to "reveal intimate, painful details [of their assault] to different prosecutors and different judges").

28. ABRAHAM MASLOW, MOTIVATION AND PERSONALITY 15 (1954).

29. *Id.*

30. *Id.* at 18.

belongingness, love, work group, family, affection and relationships.[31] The fourth includes social esteem, self-esteem, achievement, mastery, independence, status, dominance, prestige and managerial responsibility.[32] The fifth and highest level of need in the hierarchy is self-actualization, which includes realization of personal potential, self-fulfillment and the seeking of justice and personal growth.[33]

Maslow's conceptual framework articulates perfectly what we have seen in practice. The vast majority of rape victims' basic need for economic stability, emotional security, and physical safety take precedence over criminal justice remedies, which offer deeper meaning, vindication, and self-actualization. In our experience representing sexual assault victims, this appears to be especially true during the first six months after the assault.[34]

What the legal system offers victims should, therefore, be designed to meet their most immediate needs: preventing the traumatic economic and psychological downward spiral that frequently begins within the first six months after assault. As Maslow's theory suggests, what little the criminal justice process actually offers victims does not meet their primary needs at the time it is offered, and does not protect them from the most traumatic and devastating consequences to their well-being after the assault. We have identified eight core areas of civil legal needs that affect the well-being and recovery of rape victims. These needs are consistent with our experience representing victims and with Maslow's hierarchy of needs.

1. Privacy

For most sexual assault victims, privacy is like oxygen; it is a pervasive, consistent need at every step of recovery. Within the context of the legal system, if a victim is without privacy, all other remedies are moot. Privacy imperatives begin with the very fact of the assault, and in small, enclosed communities, the privacy imperative is even more acute. For example, on high

31. *Id.* at 20.

32. MASLOW, *supra* note 28, at 21.

33. MASLOW, *supra* note 28, at 22.

34. In the current dominant legal paradigm, however, such "basic" needs of victims are at best placed at the periphery of our legal response to rape, and, at worst, such needs are conceptualized as a "personal" rather than "legal" problem. We hypothesize that this acute disjuncture between what victims are seeking and what the criminal justice system is offering somewhat accounts for failure of rape law reform over the last thirty years. In 1996, more than two-thirds of rape/sexual assaults committed in the United States remained unreported. CHERYL RINGEL, U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION 1996: CHANGES 1995-96 WITH TRENDS 1993-96, at 3 (Nov. 1997), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/cv96.pdf. Because the criminal justice system offers remedies to victims (vindication, meaning, and sense of justice) consistent with "higher" level needs, and fails to offer solutions for any more basic needs, it makes sense that many victims do not engage the criminal justice system immediately after an assault. *See generally* Pearl Goldman & Leslie Larkin Cooney, *Beyond Core Skills and Values: Integrating Therapeutic Jurisprudence and Preventative Law Into Law School Curriculum*, 5 PSYCHOL. PUB. POL'Y & L. 1123 (1999) (describing victims' use of criminal justice system).

school and college campuses it is exceedingly difficult to contain the gossip that is usually generated by an allegation of rape. University rape victims are painfully aware of the devastating impact of gossip that accompanies the reporting of a sexual assault. As a result, university students have an extraordinarily low reporting rate.[35] Approximately 5% of university students who experience a sexual assault report it to campus or non-campus police.[36] Victims understand that they have much to lose in making public disclosures. This was recently confirmed when Harvard University acknowledged that their existing way of handling peer-on-peer rape complaints often caused more harm than good to the victim.[37] The social division, resulting in harassment and isolation caused by public disclosure, particularly in peer-on-peer assault, can cause irreparable educational harm.

Once rape is reported, the victim's privacy is vulnerable in sadly familiar ways. Protection of medical, psychiatric, and rape crisis center records is crucial from the minute the victim seeks medical care and counseling. Outside of the criminal justice process, privacy violations may easily occur in relation to employment, education, housing, and financial compensation.[38] Further, there is a complex interaction between the criminal justice and civil systems that must be taken into account.[39] For example, in a suspected drugging case, victims often do not recall whether sexual penetration occurred and therefore toxicology testing can be vital to determining what happened.[40] Comprehensive toxicology testing, however, will detect the presence of all substances, medications and drugs both illegal and legal.[41] If a victim regularly takes an anti-depressant, uses marijuana, cocaine, or prescription drugs, these substances will appear in the analysis and expose the victim in ways unintended by the toxicology analysis.[42]

Protecting privacy in the criminal, civil, and educational realms should be at the center of all representation of sexual assault victims. The next wave of rape law reform should focus on meaningful privacy protections that can be invoked

35. BONNIE S. FISHER ET AL., U.S. DEP'T OF JUSTICE, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 23 (2000), *available at* http://www.ncjrs.org/pdffiles1/nij/182369.pdf.

36. *Id.*

37. *See* David White, *Harvard's New Sex Harassment Policy: Brilliance at Last*, YALE DAILY NEWS (New Haven, Conn.), Sept. 17, 2002. In 2002, Harvard University changed its sexual assault policy to require students filing complaints to bring to the school's disciplinary board sufficient corroborating evidence of misconduct before it will investigate. White, *supra.*

38. *See* Family Education Rights and Privacy Act, 20 U.S.C. § 1232g (2001). For example, if the victim is involved in an education-related case, the Family Education Rights and Privacy Act and individual school regulations may require parties involved in disciplinary matters to keep material confidential. *Id.*

39. *Id.*

40. *See* KRISTIN LITTLE, U.S. DEP'T OF JUSTICE, A NATIONAL PROTOCOL FOR SEXUAL ASSAULT MEDICAL FORENSIC EXAMINATIONS ADULTS/ADOLESCENTS 99-104 (Sept. 2004), *available at* http://www.ncjrs.org/pdffiles1/ovw/206554.pdf.

41. *Id.*

42. *Id.*

both within and outside of the criminal justice process.

2. *Immigration Status*

Immigration status is a gate keeping issue for rape victims. Immigrant victims face greater actual and perceived barriers to obtaining the civil remedies that assist in recovery (safety protections, medical assistance, counseling, housing, and employment benefits) particularly if the victim does not have legal status.[43] Fear and misinformation prevent many non-citizen victims from applying for and receiving the public benefits they are qualified to receive as a result of a sexual assault.[44] This problem arises particularly because of non-citizen victims' fear of the "public charge" grounds for inadmissibility.[45]

A sexual assault and its attendant consequences can disrupt or alter a victim's immigration status. For example, if the victim is in the country on a student visa and she drops out of school as a result of the assault, she may lose her legal status and be forced to leave the country. Similarly, a victim's immigration status may be linked to her employment status. Immigrants with employment-based visas are at risk of being deported or losing legal status if they miss work as a result of an assault. If a victim is in danger of losing her employment as a result of a sexual assault, she may also be in jeopardy of losing her immigration status.[46] Maintaining immigration status is of primary

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43. Leslye E. Orloff et al., *With No Place To Turn: Improving Legal Advocacy For Battered Immigrant Women*, 29 FAM. L.Q. 313, 315 (1995).

44. *Id.* Despite perception and information to the contrary, some public services are available to individuals without any status qualification, meaning that providers should not inquire into a client's immigration status or require a social security number in order to provide services. Final Specification of Community Programs Necessary for Protection of Life or Safety Under Welfare Reform Legislation, 66 C.F.R. §§ 3613-3616 (2001). According to the Attorney General, available services include: free emergency Medicaid and mental health, disability, or substance abuse treatment necessary to protect life or safety; free crisis and counseling services; free violence and abuse prevention/protection services; free emergency shelter and transitional housing assistance; victim compensation; and other services provided by non-profit charitable organizations. *Id.*

45. *See* Immigration and Nationality Act, 8 U.S.C. § 1182 (2003). The United States may prohibit non-citizens currently applying for green cards (permanent resident status), or Green Card holders who have traveled abroad for six months or longer from entering the United States if they fail to meet the admissibility criteria set out in the Immigration and Nationality Act, which includes the likelihood of becoming a "Public Charge." *Id.* The Department of Homeland Security uses a "prospective test" when determining whether a non-citizen will become a public charge, taking into consideration all circumstances, including age, health, family status, assets, education, and skills. 8 U.S.C. § 212(a)(4)(B)(i) (2001). If a victim uses benefits on a temporary basis only, it is unlikely that she will be denied admission based on the "public charge" criteria. 8 U.S.C. §§ 1641-1642 (2004). More detailed information on public benefits can be found at the National Immigration Law Center's website at www.nilc.org (last visited Feb. 14, 2005).

46. VICTIM RIGHTS LAW CENTER, *supra* note 26, ch. 8 at 6. There are new adjunctive immigration status possibilities for victims of sexual assault related to their involvement with the criminal justice system. *See* Victims of Trafficking and Violence Prevention Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000). The federal government has created a new visa specifically for victims of sexual abuse, trafficking, and many other crimes. *Id.* Under the Victims of Trafficking and Violence Prevention Act of 2000, the U-Visa is available to

concern to immigrant rape victims. Law reform should focus on creating avenues for immigrant assault victims to petition for change of status or to maintain status, despite the life-altering consequences of assault.

3. Access to Medical and Counseling Benefits that Preserves Privacy and Financial Welfare

Sexual assault causes profound medical and emotional harm to victims, resulting in significant financial cost.[47] Costs of basic necessary medical care after an assault can be as high as four thousand dollars.[48] Counseling and prescription drugs such as anti-depressants, and drugs for prophylactic HIV treatment and prevention of sexually transmitted disease are costly. Further, accessing medical insurance for HIV prophylaxis, or treatment of depression and Post Traumatic Stress Disorder can lead to long-term disqualification for life insurance and other insurances. In order to ease the financial burden that a rape victim will incur, civil attorneys must provide the victim with referrals to confidential, free medical and counseling care, as well as medical and disability coverage through employer benefit plans, government benefits such as unemployment compensation, victim's compensation, school health plan compensation and tuition remission, and state and federal disability benefits.

4. Access to Protective Orders

Within the criminal justice process, the courts may issue stay-away orders at the time of arrest or arraignment. Rape victims may also use civil protective orders to insulate themselves from many of the negative social and economic impacts of rape, as well as to provide for limited restitution of direct costs associated with rape. In addition, their speed and limited scope make stay-away orders less burdensome for victims to secure and, therefore, more likely to be sought.[49]

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victims who report the crime to law enforcement officials and cooperate in criminal investigations. *Id.* Victims who have "suffered substantial physical or mental abuse as a result of having been a victim of criminal activity," including "sexual assault, abusive sexual contact, and felonious assault," are eligible for the three year visa and can receive work authorization. *Id.; see also* National Lawyer's Guild, *National Immigration Project Training Materials, at* http://www.nationalimmigrationproject.org (last visited Feb. 21, 2005) (providing additional information on visas and sample forms).

47. *See generally* JUDITH HERMAN, TRAUMA AND RECOVERY (1997).

48. Lori A. Post et al., *The Rape Tax: Tangible and Intangible Costs of Sexual Violence*, 17 J. INTERPERSONAL VIOLENCE 773, 778 (2002).

49. *See* Frizado v. Frizado, 651 N.E.2d 1206, 1211 (Mass. 1995) (describing legislative purpose in creating layman friendly procedures). Protective order hearings in particular may be speedier and more victim-friendly than other avenues for holding the accused accountable. They tend to be resolved within two weeks, instead of the one to two years of a criminal prosecution or the two to four months of a school or employment disciplinary process. Filing procedures, court personnel, and hearings for protective orders are often more victim-friendly than criminal procedures and other types of protection orders because the legislature drafted Massachusetts General Laws chapter 209A with victims (albeit domestic violence victims) in mind, and also because the rules of evidence are applied with flexibility to allow plaintiff/victims, and defendants, to speak

Unfortunately, most civil restraining order statutes across the country[50] require a degree of relationship (marriage, substantial dating relationship, blood relative) that makes such orders not readily available or strategically advisable for stranger or acquaintance rape victims.[51] As a result, many victims are left without remedies that are designed to be easily secured on a pro se basis, because they do not have a substantive ongoing relationship with their assailant.[52]

A key area for legislative reform should be the enactment of statutes creating civil sexual assault restraining orders. Currently, a few states have enacted statutes specifically designed to provide civil protective orders to sexual assault victims in the absence of a substantive relationship with the alleged perpetrator.[53] The absence of such statutes leaves victims with inadequate alternatives. In Massachusetts, for example, a sexual assault victim may seek injunctive relief in Superior Court.[54] Similar injunctive remedies are available

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freely. In Massachusetts, for example, there is no right to a jury trial in Chapter 209A proceedings, and while there is a general right to cross-examination, the judge may limit cross-examination for good cause. *See id.* at 1210-11.

50. For example, the Alaska statute pertaining to civil restraining orders protects household members, including "adults or minors who live together or have lived together . . . who are dating or have dated . . . who are engaged in or have engaged in a sexual relationship . . . who are related to each other up to the fourth degree of consanguinity." ALASKA STAT. § 18.66.990 (Michie 2004).

51. *See* MASS. GEN. LAWS ch. 209A, § 1 (2004) (requiring familial or intimate relationship). Under chapter 209A, household and family members include

> persons who: 1) are or were married to one another; 2) are or were residing together in the same household; 3) are or were related by blood or marriage; 4) having a child in common . . .; or 5) are or have been in a substantive dating or engagement relationship.

Id.

52. The National Women's Study found that 22% of rape victims were assaulted by someone they had never seen before or did not know well, and an additional 29% were assaulted by non-relatives, such as friends and neighbors. D. KILPATRICK ET AL., NATIONAL VICTIM CENTER, RAPE IN AMERICA: A REPORT TO THE NATION 25 (Apr. 1992).

53. *See* CAL. CIV. PROC. CODE § 527.6 (West 2004) (allowing person who suffered harassment to seek temporary restraining order and injunction prohibiting harassment); *see also* FLA. STAT. ch. 784.046 (2004). The Florida statute states that a victim of sexual violence or the parent or legal guardian of a minor child who is living at home and who is the victim of sexual violence has standing in the circuit court to file a sworn petition for an injunction for protection against sexual violence on his or her own behalf or on behalf of the minor child. FLA. STAT. ch. 784.046(2)(a).

54. MASS. R. CIV. P. 65(a) (describing procedural process). The standard for an *ex parte* temporary restraining order (TRO) is:

> A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if it clearly appears from specific facts shown by an affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition.

Id. The next level, a preliminary injunction, requires more from the requesting party before the court will issue the order. *Id.* R. 65(b)(1). A court will not issue a preliminary injunction without weighing the moving party's claim and their chance of success on the merits. Planned Parenthood League of Mass., Inc. v. Operation Rescue, 550 N.E.2d 1361, 1370 (Mass. 1990) (recognizing public interest weighed by court as fourth factor); Packaging Indus. Group, Inc. v Cheney, 405 N.E.2d 106, 111-12 (Mass. 1980); Alexander & Alexander, Inc. v. Danahy, 488 N.E.2d 22, 31 (Mass. App. Ct. 1986).

in every state in the nation.[55] Enforcement mechanisms, however, are cumbersome for the victim and offer significantly less protection in case of a violation than the abuse prevention orders available to domestic violence victims.[56]

5. *Access to Safe Housing*

In our experience, we have found that many sexual assaults take place in or near the victim's home. As a result, many victims feel the need to vacate their homes, move to different dorms, or relocate to different housing projects. Yet, for the most part, rape victims are not specifically protected from lease termination actions, nor do they have specific emergency transfer or admission rights in public housing.[57] Although the domestic violence movement has made significant strides in this arena for victims of domestic violence, sexual assault victims with housing crises have minimal legal options and protections.[58] Therefore, housing access and relocation is a crucial area for legislative reform to provide sexual assault victims with, at least, the protections that have been afforded victims of domestic violence.

6. *Education*

The incidence of sexual assault is disturbingly high in both universities and high schools, and results in a massive barrier to equal access to education.[59] The United States Department of Justice estimates that thirty-five out of every 1,000 undergraduate females are sexually assaulted every year.[60] In Boston alone, that translates into an estimated 3,500 college victims yearly based on the current student population of approximately 100,000 female students.[61]

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55. *See, e.g.*, ALA. CODE § 30-5-1 (2004); ALASKA STAT. § 18.66.990; CAL. FAM. CODE § 6211 (West 2004); GA. CODE ANN. § 19-13-1 (2004).

56. The requirements for preliminary injunctive relief are: 1) the likelihood of success on the merits; 2) the risk of irreparable harm to the plaintiff if the injunction is not issued; and 3) the absence of irreparable harm to the defendant if the injunction is granted. *Alexander & Alexander*, 488 N.E.2d at 26. For example, in Massachusetts, if the defendant violates the preliminary injunction, the plaintiff has two remedies: civil enforcement or criminal enforcement. Violation of a preliminary injunction is contempt of court. The procedures for civil contempt are described in detail in the Massachusetts Rules of Civil Procedure 65.3. A finding of civil contempt must be based on a "clear and undoubted disobedience of a clear and unequivocal command." Peggy Lawton Kitchens, Inc. v. Hogan, 532 N.E.2d 54, 55 (Mass. 1989).

57. *See* CODE OF MASS. REGS. tit. 760 § 5.09 (2002) (stating priorities for receiving Massachusetts public housing).

58. Eliza Hurst, *The Housing Crisis for Victims of Domestic Violence: Disparate Impact Claims and Other Housing Protection for Victims of Domestic Violence*, 10 GEO. J. ON POVERTY L. & POL'Y 131, 148 (2003) (stating "throughout the country, lawyers, policymakers and social workers are beginning to make safe housing more accessible to victims of domestic violence").

59. *See* FISCHER, *supra* note 35, at 11.

60. *See* FISCHER, *supra* note 35, at 11.

61. U.S. CENSUS BUREAU, 2002 AMERICAN COMMUNITY SURVEY PROFILE: POPULATION AND HOUSING PROFILE: BOSTON, MA (2002), *available at* http://www.census.gov/acs/www/Products/Profiles/Single/2002/ACS/Narrative/385/NP38500US11221120.htm (estimating 213,000 enrolled in college in Boston,

The figures are no less staggering for high school students. One in ten high school students in Boston report being victims of sexual assault every year.[62] Forty-seven percent of the sexual assault reports received by the Boston Police Sexual Assault Unit involve victims aged seventeen and younger.[63]

Pursuant to Title IX of the Civil Rights Act,[64] the Jeanne Clery Campus Safety Act,[65] and the Family Education Rights and Privacy Act,[66] educational institutions have specific duties regarding the prevention of and response to on campus sexual assault.[67] Further, using third party liability theories, colleges and universities may be held civilly liable for intentional torts committed on their campuses, by or against their students.[68]

In our experience, we have found that physical safety, privacy protections, maintenance of some semblance of educational stability, housing as it pertains to both victim and perpetrator, class and exam schedules, employment and work-study maintenance, tuition-loss prevention, and financial aid loss are all immediate issues student rape victims face.

A peer sexual assault causes an especially severe threat to the victim's education. Educational institutions must be accountable for protecting victims' educational stability, privacy, and right to receive special education services.[69] The alarming rate of assault on high school and college campuses, and the resulting loss of educational stability for victims, creates the need for enforcement and expansion of the educational rights of rape victims, including the aggressive application of Title IX to institutions that turn a blind eye to campus conditions in which peer-on-peer rape and gang rape thrive.

7. Obtaining and Maintaining Employment

A rape victim's employment is likely to suffer major disruptions after a sexual assault. Absenteeism may sky rocket, and productivity often plummets.[70] An assault by a co-worker or at a work location will usually

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approximately half female).

62. MASS. DEP'T OF PUBLIC EDUC., YOUTH RISK BEHAVIOR SURVEY (2001), *available at* http://www.doe.mass.edu/lss/yrbs99/toc.html.

63. SEXUAL ASSAULT UNIT, BOSTON POLICE DEP'T, AGE OF SEXUAL ASSAULT VICTIMS IN BOSTON IN 2001, *available at* http://www.ci.boston.ma.us/police/pdfs/VAge2001.pdf.

64. 20 U.S.C. § 1681 (2004).

65. 20 U.S.C. § 1092 (1998).

66. 20 U.S.C. § 1232g (2001).

67. *E.g.*, 20 U.S.C. § 1092(f) (2002) (codifying Cleary Act campus security policy and campus crime statistics disclosure requirement).

68. *See* Mullins v. Pine Manor Coll., 449 N.E.2d 331, 337 (Mass. 1983). Colleges must act "'to use reasonable care to prevent injury' to their students 'by third persons whether their acts were accidental, negligent, or intentional.'" *Id.* at 337 (quoting Carey v. New Yorker of Worcester, Inc., 245 N.E.2d 420, 422 (1969)).

69. *See* 20 U.S.C. § 1232g.

70. *See generally* Rebecca Smith et al., *Unemployment Insurance and Domestic Violence: Learning From Our Experiences*, 1 SEATTLE J. FOR SOC. JUST. 503 (Fall/Winter 2002).

trigger an even more acute employment crisis that, without legal intervention, will likely result in resignation or termination of the victim.[71] For those victims who were assaulted by assailants unrelated to work, the medical and psychological impact of rape often trigger less acute, but nevertheless employment threatening crises, with employers subjecting the employee to warnings and often dismissal.[72]

Legal interventions are critical to protect the victim's privacy rights and insure continued employment. One remedy currently available entitles a victim, who needs time off from work to seek medical attention, to job-protected leave under the federal Family and Medical Leave Act or similar state laws.[73] Furthermore, disabilities caused by rape or sexual assault may qualify victims for protection from discrimination, as well as reasonable accommodation in the workplace under the Americans with Disabilities Act.[74] Some victims may also qualify for unemployment compensation.[75]

Victims who have lost wages or employment as a direct result of an assault may apply for victim compensation in many states.[76] Victim compensation, however, usually requires cooperation with law enforcement and often becomes a fund of last resort. For example, if compensation for lost wages is available through some other source, such as worker's compensation or unemployment insurance, the victim will be deemed ineligible for victim's compensation.[77]

If the assault is directly related to employment (i.e., when the assailant is a co-worker or the assault takes places at work), a victim may need and be entitled to more protection in her work environment. Sexual assault at work, and an employer's failure to remedy or protect against that assault, may constitute sexual harassment in violation of federal and state law prohibiting

71. *See generally id.*

72. *See generally id.*

73. *See* 29 C.F.R. § 825.114 (2004); Robin R. Runge et al., *Domestic Violence as a Barrier to Employment*, 34 CLEARINGHOUSE REV. 552, 554 (2001).

74. 42 U.S.C. § 12112 (2004). A disability is defined as any impairment that "substantially limits a major life activity," such as walking, standing, thinking, lifting, or taking care of one's self. *Id.* § 12102. Victims are also protected under the Americans with Disabilities Act even if they are only *perceived* as being disabled, regardless of whether they have some actual disability. *Id.* The Americans with Disabilities Act requires that the employer provide reasonable accommodations to the victim, so long as she is able to perform the essential function of her job. *Id.* § 12112. A modified work schedule, transfer to a different location, and changes in the workspace or equipment all qualify as reasonable accommodation. *Id.* Employers cannot discriminate against qualified employees who request such accommodations. *Id.*

75. *See* MASS. GEN. LAWS ch. 151A, § 25(e) (2004). In Massachusetts, for example, an employee who leaves work or is discharged from her job because of domestic violence is eligible for unemployment compensation. *Id.* Although the statute is intended to benefit battered women, the definition of "domestic violence" is broad enough to include many victims of sexual assault. *See id.* § 1 (g 1/2) (defining domestic violence as "abuse committed against an employee"). The statute specifically provides benefits to victims who have been in a "dating or engagement relationship" with the assailant. *Id.* The statute also defines "abuse" as "(1) attempting to cause or causing physical harm; (2) placing another in fear of imminent serious physical harm; (3) causing another to engage involuntarily in sexual relations by force, threat or duress." *Id.*

76. *See* CAL. GOV'T. CODE § 13950-67 (West 2004).

77. *Id.*

sex discrimination in the workplace.

8. Financial stability

The loss of wages, cost of health care and counseling, loss of tuition, expenses of moving, and the loss of financial support if the assailant is a spouse are among the staggering economic consequences of rape. Advocacy for the victim to prevent these losses may include insurance claims against third parties, application for disability, unemployment, other public benefits or insurance programs, actions for child support, applications under victim compensation statutes, as well as tort claims against assailants, employers, hosts, landlords, universities and others.[78]

The simplest financial remedy could be a claim under a state victim compensation fund if the requirements of the compensation statute have been met. State victim compensation schemes cover medical, dental and counseling expenses; lost wages; lost homemaker services; and lost financial support for dependants of victims of homicide.[79] Most compensation schemes do not cover lost tuition, relocation and housing expenses, and lost work due to non-physical injuries, such as mental health harms.[80] While victim's compensation statutes can offer much needed temporary financial relief immediately after an assault, their almost exclusive tie to the criminal justice process renders them useless to many victims. Legislative reform should untie these remedies and provide an alternate route for victims to obtain such compensation.

IV. ESTABLISHMENT OF A VICTIM'S RIGHT TO INDEPENDENT LEGAL COUNSEL WITHIN THE CRIMINAL JUSTICE SYSTEM AND FOR THEIR CIVIL LEGAL NEEDS

Rape victims need counsel to represent their civil legal needs within the criminal justice system and in the educational disciplinary process. In the first six months following an assault, the victim's cognitive, behavioral and physical faculties are under extreme stress and the rape often triggers acute medical

78. *See* Ellen M. Bublick, *Citizen No-Duty Rules: Rape Victims and Comparative Fault*, 99 COLUM. L. REV. 1413, 1428 (1999) (describing comparative apportionment approach to assigning fault in civil rape actions). Civil tort actions against assailants are based on theories of assault and battery, rape, sexual harassment, infliction of emotional distress, and other torts as defined by law. Remedies in such actions can include compensatory damages, including medical expenses, lost wages and earning capacity, pain and suffering, and equitable relief. In some cases punitive damages, are allowed. *See* MASS. GEN. LAWS ch. 151B, § 9. Victims also have a right of action against third parties who owe them a duty of care and who failed, by their negligence, to prevent the assault. Such cases are generally referred to as negligent security or premises liability cases. Bublick, *supra*, at 1428. A court may impose liability on owners or operators of convenience stores, universities and colleges, commercial landlords, bus stations, hospitals, high schools, restaurants, bars, parking lots, hotels, and other third parties if the victim can establish that a legal duty existed to protect individuals from foreseeable violent acts.

79. *See* CAL. GOV'T CODE § 13950-67.

80. *Id.*

conditions.[81] During the acute physiological stress time (zero to six months), the victim's most vital legal interests are at stake.

Managing the complex array of civil and criminal issues that impact a victim after an assault challenges even the most experienced attorney. In the case of a physically and emotionally compromised victim, the task becomes virtually impossible. This is particularly true for the vast majority of victims who are younger than twenty-four at the time of the assault and often lack independent resources.[82] Moreover, it is precisely the physiological symptoms associated with rape—memory impairment, depression, use of alcohol, panic attacks, and avoidance of rape related stimuli—that make rape victims less credible in the eyes of decision makers and impair their ability to sustain themselves in any judicial process.[83]

The victim's role in the criminal justice process is the subject of increasing legislation and debate. Thousands of relatively recent legislative enactments provide victims with various rights pertaining to restitution, privacy, the right to be informed in matters of trial and sentencing, and the right to make statements of victim impact at sentencing.[84] Thirty-two states have enacted victim's rights amendments to their Constitutions, and a Victims Rights Constitutional Amendment has been proposed in the United States Congress.[85]

If victims are going to succeed in enforcing their current rights under existing law, they need legal representation.[86] Navigating the criminal justice system is a difficult and complex task for any layperson. Moreover, victims' interests in the process cannot be left to prosecutors, because prosecutors' interests lie solely in successfully prosecuting the case on behalf of the state.[87]

The potential conflict between victims and prosecutors is most profoundly apparent in the realm of privacy rights. Courts across the country have

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81. HERMAN, *supra* note 47, at 57-58. Mental health symptoms directly caused by both violent and non-violent rape include: post-traumatic stress disorder, depression, insomnia, panic attacks, increased use of drugs and alcohol, and increased suicidal ideation. *Id.* Medical harms/conditions directly associated with rape in the weeks and months following an assault can include treatment for pregnancy and sexually transmitted diseases. *Id.*

82. VICTIM RIGHTS LAW CENTER, *supra* note 27, ch. 1 at 3. We urge that empirical social science research be undertaken with a control group to assess whether or not having legal counsel makes a long term difference in the social and economic life expectancy of the victim. Empirical information is critical to the next wave of law reform—that is also why we call for a national database on criminal justice outcomes on rape complaints.

83. HERMAN, *supra* note 47, at 68-69.

84. John W. Gillis & Douglas E. Beloof, *The Next Step for a Maturing Victim Rights Movement: Enforcing Crime Victims Rights in the Courts*, 33 MCGEORGE L. REV. 689, 690 (2002) (explaining trends supporting criminal victim's rights).

85. *Id.*

86. *See generally* Douglas E. Beloof, *The Third Model of Criminal Process: The Victim Participation Model*, 1999 UTAH L. REV. 289 (1999).

87. *See* Gillis & Beloof, *supra* note 84, at 695 (discussing adequacy of prosecutorial enforcement). "[B]ecause conflicts between victims and prosecutors are commonplace, prosecutorial enforcement alone is inadequate." *Id.*

acknowledged that the state's interests often conflict with the victim's privacy interests, and this conflict may arise for several reasons.[88] In some instances, the prosecution may want evidence from the victim's personal life to strengthen their case, while the victim wishes to keep her personal life private, despite the impact on prosecution.

The more common conflict is a practical one. In order to adequately protect a rape victim's privacy rights, an attorney must take a full inventory of the "negative facts" about the victim. Negative facts routinely include sensitive information about the victim's mental health treatment, drug or alcohol history, and sexual history.

Pursuant to the holding in *Brady v. Maryland*,[89] prosecutors who complete an inventory of the victim's history are required to provide the defense with exculpatory information learned from the victim during the process.[90] While it is possible for a prosecutor to complete such an inventory, the fate of the case as well as the victim's privacy is at risk.[91] Given that prosecutors are compromised in their ability to represent rape victims' privacy rights, non-lawyer rape crisis advocates have been struggling alone for years to protect rape victims once the criminal process begins.[92] While non-lawyer rape advocates have played the largest and most vital role in protecting these rights, their role is obviously limited.[93] Therefore, it is critical that victims' lawyers are present in the courtroom at the preliminary stages of the process, if privacy protections have any meaning for rape victims.[94] Further, when viewed in the larger context of the victim's entire "negative fact" picture, the issue of psychiatric and rape crisis counseling records is often only one front where the battle for the victim's privacy is waged.

Although each victim's recovery follows a distinct path, we have found that a majority of victims experience the most acute trauma related symptoms in the first three months following the assault, followed by stabilization in the next three months. Furthermore, sexual assault victims make a clear distinction between "defensive" legal actions that help to stabilize their personal lives and

88. Commonwealth v. Oliviera, 780 N.E.2d 453, 457 (Mass. 2002); Commonwealth v. Neumyer, 731 N.E.2d 1053, 1058 (Mass. 2000).

89. Brady v. Maryland, 373 U.S. 83 (1963).

90. *Id.* at 87.

91. *Id.*

92. *See generally* Lois Kanter, *Invisible Clients: Exploring Our Failure to Provide Civil Legal Services to Rape Victims*, 38 SUFFOLK U. L. REV. 253 (2005).

93. *See generally id.*

94. Ensuring compliance with the *Bishop-Fuller* protocol is an essential element in protecting the victim's privacy in Massachusetts. The protocol involves five stages: (1) privilege determination; (2) relevancy determination; (3) access to relevant material; (4) disclosure of relevant communications; and (5) trial. Commonwealth v. Bishop, 416 Mass. 169, 181-83 (1993) (identifying five stage process for release of privileged records created by court); Commonwealth v. Fuller, 423 Mass. 216, 226-27 (1996) (modifiying stage two and requiring *Bishop* protocol to apply to defendant's request for access to any privileged records including rape counselor records).

"offensive" legal actions that seek to hold the perpetrator accountable. Often, in the initial crisis stage after the assault, victims take the necessary steps to protect their safety, privacy, immigration status, education, housing, and employment, and to preserve their financial stability. Victims are far less likely to file police reports, follow through on a criminal complaint process, seek university disciplinary action, or initiate a tort suit.[95] Therefore, legal efforts to stabilize the victim should be focused on what the victim actually needs, and not merely what the legal system currently offers. Representation in these victim focused areas requires independent counsel exclusively committed to the interests of the victim.

V. DEFINE CONSENT

Elimination of force as a statutory element of rape is essential to the reformation of rape laws. After thirty years of law reform, society still expects rape to be a horrifically violent crime. If the limited report, arrest, indictment, prosecution, and conviction rates serve as a benchmark, despite the redrafting of virtually every rape law in the nation, rape by anything other than physical violence with attendant physical harm still appears to be tolerated by law enforcement. While efforts to stratify rape into aggravated and lesser offenses began this process, further steps are needed towards codifying degrees of offenses that are more nuanced and eliminating the requirement of physical force entirely.

Stephen Schulhofer, in his book *Unwanted Sex: The Culture of Intimidation and the Failure of the Law,* first articulated the concept that interference with sexual autonomy, whether enabled by force, threats, abuse of trust, exploitation of psychological or physical incapacity, intoxication, or exploitation of psychological or economic power or authority should be illegal, and should be codified and incorporated into the statutory framework.[96] Reform minded legislators have largely failed to incorporate into reform statutes the concept that bodily integrity, or sexual autonomy, is not measured by "freedom from fists," but rather by a continuum of conduct in which physical force is one extreme example.[97] The crime of sexual coercion may in fact be less egregious than one in which an invasion of sexual autonomy is accompanied by fists, but the invasion of an individual's physical integrity by coercion should be recognized as an assault, just as coercion is recognized as a factor in other crimes, such as obtaining property by fraud and indecent assault and battery.

Further, it is crucial that silence be eliminated as an indicator of consent, and that consent be defined, as it is in other areas of the law in which consent is an

95. *See* RINGEL, *supra* note 35, at 8 (stating more than two-thirds of rape/sexual assaults committed in United States remain unreported).

96. SCHULHOFER, *supra* note 5, at 99-113.

97. SCHULHOFER, *supra* note 5, at 99-113.

element. "Consent is the defense most likely to result in an acquittal, and it is the defense most commonly used in acquaintance rape cases."[98] Yet most state legislatures have still failed to define consent.[99] Indeed, the victim's behavior (drinking alcohol), dress (wearing tight clothes), and conduct (voluntarily entering a room with the defendant and permitting the door to be closed) will remain at the center of a criminal trial as long as juries are allowed to consider an undefined consent or implied consent standard.

The failure of current consent standards, at the root of the failure of criminal justice rape reforms, perpetuates the most vexatious issue in rape law for both victims and defendants: the distinction between seduction and assault.[100] The difference is not as complicated as the past thirty years suggest. First, consent ought to be verbal and in the affirmative, eliminating the defense of implied consent altogether. The law should not assume that women are or must be coy about sex. Women cannot be viewed as consenting merely by their conduct, appearance, reaction, or silence. Women must directly and explicitly express their sexual desire or agreement to have intercourse in a given situation, and men must respond accordingly. Instead of assuming that a woman's sexual ambivalence indicates consent, the law should assume that sexual ambivalence means no. Let us legislate the right of women to express sexual desire, by making the direct verbal expression of desire or agreement to sex necessary to establish affirmative consent, and by defining a lack of verbal expression of affirmative desire or agreement to sex as a dispositive lack of consent.[101]

The presence of alcohol in large numbers of acquaintance rape cases exacerbates the problem. The majority of sexual assaults on college campuses involve alcohol or drugs.[102] In a study of college gang rapes, researchers found that every case involved the use of alcohol.[103] Not surprisingly, courts consider a victim's intoxication differently than intoxication by accused assailants. Courts view women who drink, especially those who drank with their assailants, as more likely to be sexually available and contributorily negligent in the subsequent assault.[104] Society believes that men who drink suffer from impaired judgment, which may legitimately cause them to misread social cues from a woman.

The law does not clarify the confusion between rape that occurs under the influence of alcohol and consensual encounters between intoxicated

98. Karen M. Kramer, *Rule by Myth: The Social and Legal Dynamics Governing Alcohol-Related Acquaintance Rapes*, 47 STAN. L. REV. 115, 128 (1994).

99. SCHULHOFER, *supra* note 5, at 31-32.

100. SCHULHOFER, *supra* note 5, at 31-32.

101. *See generally* Kramer, *supra* note 98, at 149 (proposing modified version of consent legislation already adopted in Canada); Lani Ann Remick, Comment, *Read Her Lips: An Argument for a Verbal Consent Standard in Rape*, 141 U. PA. L. REV. 1103 (1993) (advocating requirement of verbal consent).

102. Kramer, *supra* note 98, at 116.

103. Kramer, *supra* note 98, at 116.

104. Kramer, *supra* note 98, at 121-22.

participants. As one commentator states, "If you pour liquor on it, it's not a crime."[105] The victim is alleged to be either sober enough to have resisted if consent really was not present, or too drunk to remember what actually happened.

There is no bright line test that defines precisely how much alcohol or drugs result in a person's inability to consent to sex. Every jurisdiction in the country except Massachusetts, Georgia, and the Uniform Code of Military Justice, however, has attempted some statutory reform on the issue of consent and intoxication.[106] Many universities recognize the ubiquitous presence of alcohol in campus acquaintance assaults and have amended their codes of conduct to deem consent as presumptively absent in the presence of alcohol.[107] The Model Penal Code (MPC) states that actual consent is not legal consent if "it is given by a person who by reason of youth, mental disease or defect, or intoxication is manifestly unable or known by the actor to be unable to make a reasonable judgment as to the nature of harmfulness of the conduct."[108] The MPC requires, however, that the alleged assailant administered the intoxicant for no consent to be presumed.[109] Some states have adopted the MPC language but eliminated the requirement that the defendant administered the intoxicant.[110] Louisiana, for instance, draws a distinction between cases where the intoxication was independent of the assailant ("simple rape") and where assailant administered the intoxication ("forcible rape").[111]

While there is no bright line test for determining how much alcohol or drugs inhibits a person's ability to consent, there must be a bottom line. If implied consent is eliminated as a defense and mere submission without affirmative permission is no longer adequate to demonstrate consent, what standard is reasonable in the presence of intoxication? We propose that if alcohol is present, non-consent must be presumed unless the woman makes an explicit

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105. Kramer, *supra* note 98, at 124.

106. Patricia J. Falk, *Rape by Drugs: A Statutory Overview and Proposals for Reform*, 44 ARIZ. L. REV. 131, 156-57 (2002) (evaluating statutes by jurisdiction).

107. *See* NORTHEASTERN UNIVERSITY, CODE OF STUDENT CONDUCT LEVEL I GRIEVOUS VIOLATIONS, Violation 5 (2002). The Code as amended in July 2002, states:

> [R]ape . . . is defined as the oral, anal or vaginal penetration by an inanimate object, penis, or other bodily part, without consent. 'Consent' means a voluntary agreement to engage in sexual activity proposed by another .... 'Consent' requires mutually understandable and communicated words and/or actions demonstrating agreement to participate in proposed sexual activity. 'Without consent' may be communicated by words and/or actions demonstrating unwillingness to engage in proposed sexual activity. For instance, the act of penetration will be considered without consent if the victim was unable to give consent because of a condition of which the offending student was or should have been aware, such as drug and /or alcohol intoxication, coercion, and/or verbal or physical threats, including being threatened with future harm.

Id.

108. MODEL PENAL CODE § 2.11(3)(b) (defining ineffective consent).

109. *Id.*

110. *See* LA. REV. STAT. ANN. §§ 14:42.1, 14.43 (West 2004).

111. *Id.*

verbal statement that she wishes to engage in sexual intimacy that includes penetration. Women do not have to be cold sober to engage in consensual sexual intimacy, but they ought to be sober enough to say yes. If a woman is not sober enough to say yes, then no consent should be presumed.

These concepts of consent in sexual assault are not unique, and other areas of the law in which consent plays a central role are instructive. The law of search and seizure requires consent to be explicit and affirmative, and consent cannot be implied from the circumstances or conduct of the subject.[112] In order to obtain consent for a search, police must specifically request it from the individual or the court.[113] Even when consent is affirmatively given, the court may determine that the police obtained consent through coercion based on age, education, lack of understanding of rights, or by wearing down the subject in a repetitive or psychologically coercive manner.[114] The law suggests that the power differential between law enforcement and the subject require extensive precautions to protect the subject from the state's exertion of such power, which necessitates a knowing and explicit agreement by the subject to be searched. Silence and ambivalence do not constitute consent under the Fourth Amendment.[115]

Consent to police interrogation pursuant to the Fifth Amendment and under *Miranda* similarly requires an explicit and affirmative statement of consent by the subject.[116] Consent cannot be implicit and cannot be indicated by silence to meet the requirements of the Fifth Amendment.[117] Circumstantial evidence indicating that the subject was aware of his right to refuse interrogation cannot be used to demonstrate consent, and consent cannot be based on the subject's behavior.[118] While some commentators criticize the *Miranda* approach to consent to sex as impractical, these commentators have taken too broad a view of the analogy.[119] Likening an entire date to a police interrogation, Schulhofer rejects the approach because it does not permit a woman to change her mind during the course of the date.[120] A seemingly more appropriate analogy to interrogation is the initiation of intercourse, when issues of physical and psychological power and the possibility of coercion become significantly

112. SCHULHOFER, *supra* note 5, at 72. During a police interrogation, a suspect's consent to talk about the crime is considered involuntary if he first says "no" but changes his mind because police cajolery or questioning persuaded him to speak. *Id.*

113. *See* Mustafa T. Kasubhai, *Destabilizing Power in Rape: Why Consent Theory in Rape Law is Turned on its Head*, 11 WIS. WOMEN'S L.J. 37, 70-72 (1996) (discussing consent to searches under Fourth Amendment).

114. *Id.*

115. *Id.*

116. *Id.* at 72.

117. Kasubhai, *supra* note 113, at 72.

118. Kasubhai, *supra* note 113, at 72.

119. SCHULHOFER, *supra* note 5, at 72-74 (comparing use of *Miranda* in police interrogation to consent in sexual assault cases); Bryden, *supra* note 2, at 391-92 (evaluating need for reform in rape law).

120. SCHULHOFER, *supra* note 5, at 72-74 (criticizing application of *Miranda* rules to sexual interactions).

present. Silence and ambivalence do not constitute consent under the Fifth Amendment.

As Susan Estrich has discussed, in other areas of criminal law, submission does not equate with consent.[121] For example, consent in the form of passive submission fails as a defense to robbery, unless the owner of the property actively participates in the theft.[122] Similarly, criminals can commit trespass and battery against submissive victims.[123] As Estrich points out, the frequently claimed excuse that consensual sex constitutes part of everyday life and therefore cannot be subjected to such nuanced scrutiny does not explain the disparity in the law that permits submission to pass for consent in the rape context but not in other contexts.[124] Other everyday events include visiting (trespass with consent), philanthropy (robbery with consent), and surgery (battery with consent).[125] The fact that women are expected to be sexually submissive permits the violation of their sexual and physical integrity, while the law protects their more highly prized wallets and homes by holding that silence and ambivalence do not constitute consent to robbery, trespass, invasion of property or battery.

In contract law, passive submission ordinarily does not constitute acceptance of an offer.[126] Usually, only where the parties had a prior contractual relationship, will acceptance be inferred from silence or submission.[127] Otherwise, words, either written or oral, provide the indicia of the existence of the contract.[128] While cultural resistance impedes the notion of sexual intimacy as a contractual relationship, the public widely understands and accepts the idea of contractual offer and acceptance as a two party affirmative communication. Silence and ambivalence do not constitute consent to enter into a contract.

Consent to medical treatment is another area of the law where, unlike rape law, consent and the conditions of consent have been relatively well-defined.[129] This area of law has developed on the premise that medical treatment without consent constitutes a form of battery, an unwanted physical invasion of personal physical autonomy.[130] The doctrine provides a bright line test for consent, requiring affirmation by more than mere silence or deduction from

121. Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1126 (1986) (noting unique burden on rape victim to prove nonconsent).

122. *Id.*

123. *Id.*

124. *Id.*

125. Estrich, supra note 121, at 1126.

126. *See* RESTATEMENT (SECOND) OF CONTRACTS § 69 (2004).

127. *Id.*

128. *See* RESTATEMENT (SECOND) OF CONTRACTS § 30; Katherine E. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 688-89 (1999) (noting words necessary to manifest consent in contract context).

129. Kasubhai, *supra* note 113, at 68-70.

130. Kasubhai, *supra* note 113, at 68.

circumstances or behavior.[131] Further, prior consent to treatment does not impute current consent, requiring an affirmative statement of consent for every incident of treatment.[132] Silence and ambivalence do not constitute consent to medical treatment.

These analogies confirm that silence and ambivalence may only substitute for consent in the area of rape, where the absence of non-consent is a proxy for actual consent. This derives from the centuries old idea, certainly once true, that women cannot affirmatively consent to sex outside of marriage without fear of being labeled whores. Our cultural norm no longer endorses this idea. Many, if not most women are free to have sex outside of marriage if they choose to do so. Once we acknowledge that women can choose sex, we can acknowledge that they can also reject it. Consent under the law then must be defined in a way that potential victims and defendants can easily understand and interpret.

We propose that for "legally safe sex" to take place, consent must take the form of an affirmative and unequivocal verbal "yes" to sexual intercourse. Critics have maligned this proposition and deemed it unworkable in the context of sexual behavior on the theory that sexual intimacy is a runaway train that can be stopped for nothing as rational as a yes.[133] We disagree and point to the highly visible and largely successful public health campaign to promote condom use as a result of the AIDS epidemic.[134] Getting people about to engage in intercourse to stop and think about safe sex was once thought to be impossible. The concept and practice of safe sex has become part of the everyday landscape of sex. Getting an affirmative "yes" before engaging in sexual intercourse is no more an imposition on sexual expression than condom use, and the same public health strategies used to normalize the concept of safe sex can be employed to establish the principle that sex without an affirmative yes is unwanted, and therefore, illegal.

In 1996, Antioch College issued a sexual offense prevention policy that attempted to define nonconsensual sexual conduct.[135] Consent to sex is defined

131. Kasubhai, *supra* note 113, at 68.

132. Kasubhai, *supra* note 113, at 69-70.

133. SCHULHOFER, *supra* note 5, 272-73.

134. *See generally* Lesley Stone & Lawrence O. Gostin, *Using Human Rights to Combat the HIV/AIDS Pandemic*, 31 HUM. RTS. MAG. 2 (2004), *available at* http://www.abanet.org/irr/hr/fall04/pandemic.htm.

135. SEXUAL OFFENSE PREVENTION & SURVIVOR'S ADVOCACY PROGRAM, ANTIOCH COLLEGE, ANTIOCH COLLEGE SURVIVAL GUIDE, *available at* http://www.antioch-college.edu/Community/survival_guide/campus_resources/sopsap.htm (last visited Feb. 15, 2005) (identifying and discussing Antioch College's Sexual Offense Prevention Policy). Antioch College's Sexual Offense Prevention Policy states that:

- All sexual contact and conduct between any two (or more!) people must be consensual;
- Consent must be obtained verbally before there is any sexual contact or conduct;
- Silence is never interpreted as consent;
- If the level of sexual intimacy increases during an interaction (i.e., if two people move from kissing while fully clothed, which is one level, to undressing for direct physical contact, which is another level), the people involved need to express their clear verbal consent before

as "the act of willingly and verbally agreeing to engage in specific sexual behavior."[136] The policy emphasizes the use of explicit verbal communication in request for and acceptance of an offer of sex, while it expressly prohibits silence as a form of consent.[137] In addition, the policy states that such requests for and assent to intimacy must be renewed at every stage as intimacy increases.[138] While the policy has been maligned as unworkable in the contemporary sexual environment, we agree with the fundamental principle of the policy: to be consensual, intimacy must be accompanied by an affirmative and verbal assent. We disagree, however, with the apparent equality of all acts of sexual touching or contact as set forth in the Antioch policy. We propose, instead, that to be consensual, affirmative verbal consent must be obtained immediately prior to an act of penetration, which eliminates the most maligned part of Antioch's policy as well as the possibility that one party is acting on prior given consent that has since been withdrawn.

VI. ESTABLISHMENT OF A NATIONAL DATABASE FOR MANDATORY STATE REPORT, ARREST, PROSECUTION AND CONVICTION FIGURES

The first multi-state empirical study of the impact of rape reforms was performed in 1985.[139] In the few studies that have been conducted since then, researchers have concluded that these reforms have not had a significant or relevant impact on any reports, prosecutions, or convictions.[140] In fact, only one study has found statistically significant increases in arrests and reduction in the variability of arrest outcomes.[141] The failure of law enforcement and other agencies, including universities, to accurately disclose reports and outcomes

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moving to that new level;

- If one person wants to initiate moving to a different level of sexual intimacy in an interaction, that person is responsible for getting the consent of the other person(s) involved before moving to that level;
- If you have a particular level of sexual intimacy before with someone, you must still be sure there is consent each and every time;
- If you have a sexually transmitted disease, you must disclose this fact to a potential partner before engaging sexually;
- If anyone asks you to stop a particular kind of sexual attention or behavior, you must stop it immediately no matter what your intentions are with the attention.
- Don't ever make assumptions about consent; assumptions can hurt someone and get you in trouble. Consent must be clear and verbal (i.e., saying, "Yes, I want to kiss you, too.").

Id.

136. *Id.*

137. *Id.*

138. *Id.*

139. *See* Futter & Mebane, *supra* note 3, at 83-85.

140. *See supra* note 2 and accompanying text.

141. Futter & Mebane, *supra* note 3, at 111. This study found that "defining sex crimes on a single continuum, subjecting spouses and cohabitants to prosecution, limiting the admissibility at trial about the victim's past sexual history with the defendant . . . and denying a mistake of incapacity defense all led to an increase of 'actual' rapes" that were investigated by the police. *Id.*

and to make this information available to the public, however, significantly hampers our ability to understand the actual results of past reforms, and the likely success of those proposed in the future. Therefore, we propose the institution of a national sexual assault database, similar to the Hate Crimes Statistics Act, in which states must report yearly numbers of actual reports, arrests, prosecutions and conviction rates for all sexual assault crimes.[142]

VII. CONCLUSION

The past thirty years have seen a sea of change in sexual assault laws, but the promise of these initiatives has been largely unfulfilled. As long as the impact of legislative change is virtually unknown by the public, our ability to move forward with creative solutions to century old problems will continue to be impeded. To correct this, law enforcement efforts in the area of sexual assault must be accurately reported and subject to public scrutiny and analysis. In addition, sexual attitudes that have damaged the implementation of progressive rape law reform, particularly as to the concepts of consent and implied consent, must be challenged and refuted. The crimes encompassed by sexual assault should be redefined for an era when woman can take responsibility for their sexual choices, and where affirmative verbal consent to sex is a realistic and clear alternative to unclear and gender stereotyped guessing. The ubiquitous presence of alcohol in sexual assault must also be addressed definitively and in a manner that is free from double standards and gender bias. Finally, sexual assault victims should be understood as suffering from a myriad of brutal consequences that impact their civil wellbeing and may be remedied by the civil law, as well as put them at risk of re-victimization by the criminal justice process. Lawyers must step forward and take up their struggle.

142. 18 U.S.C. §§ 241, 245, 247 (2004); 42 U.S.C. § 3631 (2004) (giving FBI jurisdiction pertaining to hate crimes). Congress enacted the Hate Crimes Statistics Act of 1990 to mandate the gathering of statistics about crimes motivated by bias against a person's race, religion, sexual orientation, or origin. *See* UNIFORM CRIME REPORTING PROGRAM, FEDERAL BUREAU OF INVESTIGATION, HATE CRIME STATISTICS OF 1999, *available at* http://www.fbi.gov/ucr/99hate.pdf.


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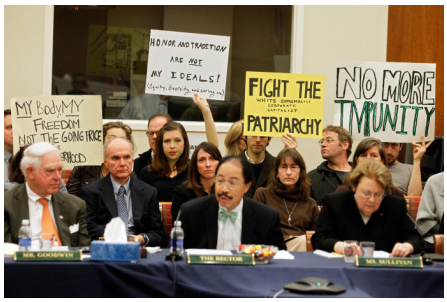
DECEMBER 15, 2014

THE TROUBLE WITH TEACHING RAPE LAW

BY JEANNIE SUK



Members of the audience hold signs during a board of visitors meeting about sexual assault at the University of Virginia.

PHOTOGRAPH BY RYAN M. KELLY/THE DAILY PROGRESS/AP

Imagine a medical student who is training to be a surgeon but who fears that he'll become distressed if he sees or handles blood. What should his instructors do? Criminal-law teachers face a similar question with law students who are afraid to study rape law.

Thirty years ago, their reluctance would not have posed a problem. Until the mid-nineteen-eighties, rape law was not taught in law schools, because it wasn't considered important or suited to the rational pedagogy of law-school classrooms. The victims of rape, most often women, were seen as emotionally involved witnesses, making it difficult to ascertain what really happened in a private encounter. This skepticism toward the victim was reflected in the traditional law of rape, which required a woman to "resist to the utmost" the physical force used to make her have intercourse. Trials often included inquiries into a woman's sexual history, because of the notion that a woman who wasn't virginal must have been complicit in any sex that occurred. Hard-fought feminist reforms attacked the sexism in rape law, and eventually the topic became a major part of most law schools' mandatory criminal-law course. Today, nobody doubts its importance to law and society.

But my experience at Harvard over the past couple of years tells me that the environment for teaching rape law and other subjects involving gender and violence is changing. Students seem more anxious about classroom discussion, and about approaching the law of sexual violence in particular, than they have ever been in my eight years as a law professor. Student organizations representing women's interests now routinely advise students that they should not feel pressured to attend or participate in class sessions that focus on the law of sexual violence, and which might therefore be traumatic. These organizations also ask criminal-law teachers to warn their classes that the rape-law unit might "trigger" traumatic memories. Individual students often ask teachers not to include the law of rape on exams for fear that the material would cause them to perform less well. One teacher I know was recently asked by a student not to use the word "violate" in class

—as in “Does this conduct violate the law?”—because the word was triggering. Some students have even suggested that rape law should not be taught because of its potential to cause distress.

When I teach rape law, I don’t dwell on cases in which everyone will agree that the defendant is guilty. Instead, I focus on cases that test the limits of the rules, and that fall near the rapidly shifting line separating criminal conduct from legal sex. These cases involve people who previously knew each other and who perhaps even previously had sex. They cover situations in which the meaning of each party’s actions, signals, and desires may have been ambiguous to the other, or misapprehended by one or both sides. We ask questions like: How should consent or non-consent be communicated? Should it matter whether the accused realized that the complainant felt coerced? What information about the accused and the complainant is relevant to whether or not they should be believed? How does social inequality inform how we evaluate whether a particular incident was a crime? I often assign students roles in which they have to argue a side—defense or prosecution—with which they might disagree.

These pedagogical tactics are common to almost every law-school topic and classroom. But asking students to challenge each other in discussions of rape law has become so difficult that teachers are starting to give up on the subject. About a dozen new teachers of criminal law at multiple institutions have told me that they are not including rape law in their courses, arguing that it’s not worth the risk of complaints of discomfort by students. Even seasoned teachers of criminal law, at law schools across the country, have confided that they are seriously considering dropping rape law and other topics related to sex and gender violence. Both men and women teachers seem frightened of discussion, because they are afraid of injuring others or being injured themselves. What has made everyone so newly nervous about discussing sexual-assault law in the classroom?

In the nineteen-seventies and eighties, feminist reformers developed the idea that the disrespectful treatment of rape complainants in the criminal process—including cross-examinations meant to show that complainants were promiscuous—made the courtroom the scene of a “second rape.” An influential book with that title by the psychologists Lee Madigan and Nancy Gamble, published in 1991, characterized the “second rape” as “more devastating and despoiling than the first.” Evidence laws were reformed to limit cross-examination about a rape complainant’s sexual history and reputation. Disbelieving a complainant’s account, questioning her role in the interaction, and not vindicating her claim also all came to be seen as potential re-victimizations. On college campuses, the notion that a complainant should not have to see the accused, because it would inflict further trauma, is now commonplace.

Something similar to the “second rape” concept now appears to be influencing the way we think about the classroom. I first encountered this more than a year ago, when I showed “Capturing the Friedmans,” an acclaimed documentary about a criminal-sex-

abuse investigation, to my law students. Some students complained that I should have given them a "trigger warning" beforehand; others suggested that I shouldn't have shown the film at all. For at least some students, the classroom has become a potentially traumatic environment, and they have begun to anticipate the emotional injuries they could suffer or inflict in classroom conversation. They are also more inclined to insist that teachers protect them from causing or experiencing discomfort—and teachers, in turn, are more willing to oblige, because it would be considered injurious for them not to acknowledge a student's trauma or potential trauma.

We are currently in the middle of a national effort to reform how sexual violence is addressed on college campuses. This effort is critical, given the apparent prevalence of sexual violence among students. But it's not clear that measures taken to protect victims always serve their best interests. At Harvard, twenty-eight law professors, myself included, have publicly objected to a new sexual-harassment policy on the grounds that, in an effort to protect victims, the university now provides an unfair process for the accused. This unfairness hurts the cause of taking sexual violence and its redress seriously. Similarly, when *Rolling Stone* published an account of an alleged gang rape at the University of Virginia without seeking out the accused, and likely got the story wrong, it arguably damaged the credibility of sexual-assault victims on that campus and elsewhere. These events are unfortunately of a piece with a growing rape exceptionalism, which allows fears of inflicting or re-inflicting trauma to justify foregoing usual procedures and practices of truth-seeking.

Now more than ever, it is critical that law students develop the ability to engage productively and analytically in conversations about sexual assault. Instead, though, many students and teachers appear to be absorbing a cultural signal that real and challenging discussion of sexual misconduct is too risky to undertake—and that the risk is of a traumatic injury analogous to sexual assault itself. This is, to say the least, a perverse and unintended side effect of the intense public attention given to sexual violence in recent years. If the topic of sexual assault were to leave the law-school classroom, it would be a tremendous loss—above all to victims of sexual assault.

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Women and Black Lives Matter: An Interview with Marcia Chatelain

Marcia Chatelain and Kaavya Asoka ▪ Summer 2015

At the Millions March in Oakland, December 1 , 2014 (Daniel Arauz via Flickr)

In recent months, the deaths of Michael Brown, Eric Garner, Freddie Gray, and others have mobilized an unprecedented mass movement against police brutality and racism that we now know as Black Lives Matter.

So far, the movement's attention primarily to the experiences of black men has shaped our understanding of what constitutes police brutality, where it occurs, and how to address it. But black women—like Rekia Boyd, Michelle Cusseaux, Tanisha Anderson, Shelly Frey, Yvette Smith, Eleanor Bumpurs, and others—have also been killed, assaulted, and victimized by the police. Often, women are targeted in exactly the same ways as men—shootings, police stops, racial profiling. They also experience police violence in distinctly gendered ways, such as sexual harassment and sexual assault. Yet such cases have failed to mold our analysis of the broader picture of police violence; nor have they drawn equal public attention or outrage.

A growing number of Black Lives Matter activists—including the women behind the original hashtag—have been refocusing attention on how police brutality impacts black women and others on the margins of today's national conversation about race, such as poor, elderly, gay, and trans people. They are not only highlighting the impact of police violence on these communities, but articulating why a movement for racial justice must necessarily be inclusive. Say Her Name, for example, an initiative launched in May, documents and analyzes black women's experiences of police violence and explains what we lose when we ignore them. We not only miss half the facts, we fundamentally fail to grasp how the laws, policies, and the culture that underpin gender inequalities are reinforced by America's racial divide.

How are black women affected by police brutality And how are they shaping the concerns, strategies, and future of Black Lives Matter Marcia Chatelain, professor of history at Georgetown University, creator of the FergusonSyllabus, and author of *South Side Girls: Growing Up in the Great Migration*, shares her insights on the role of black women in today's vibrant and necessary movement for racial justice.

Kaavya Asoka: In addition to your historical work, you're the creator of a valuable resource for educators—the FergusonSyllabus—which crowdsourced reading materials from Twitter and elsewhere to help teachers discuss Ferguson and race in their classrooms. Could you begin by telling us about your own relationship to Black Lives Matter

Marcia Chatelain: As a black woman in America, this movement is fundamentally about my life and the lives of those I love. I've participated in student-led actions—like die-ins and social media campaigns—and I consider myself a student of all these amazing activists. I am a beloved observer and a participant to the extent that I incorporate the movement in my teaching and encourage my students to get involved.

Asoka: "Black Lives Matter" was created by three black women, Alicia Garza, Patrisse Cullors, and Opal Tometi, after George Zimmerman's acquittal for Trayvon Martin's death. Women have been organizing marches, die-ins, protests, and otherwise leading various responses to police brutality. Why are women playing such a key role in today's movement

Chatelain: Women across the generations are participating in this movement, but I think we've had a wonderful opportunity to see especially young, queer women play a central role. It's important to recognize that while they are organizing on behalf of victims of police brutality and cruelty broadly, they have to constantly remind the larger public that women are among those victims too. So, although these women are putting their bodies on the line for the movement, they also have to articulate that they are fighting for all lives, including their own.

Asoka: We know that there is currently no comprehensive national data on police killings. But the information we have shows that black women are targeted in similar ways to black men—police killings, stops, and racial profiling; targeting of poor, disabled, or trans women; deaths in custody. In some cases, they're also targeted at similar rates—research released by the African American Policy Forum and Columbia University showed that in New York in 201 , 5 .4 percent of all women stopped by the police were black, while 55.7 percent of all men stopped were black. Women also face gender-specific risks from police encounters—sexual harassment, assault, strip-searching, and endangerment of children in their care. How prominently is the impact of police brutality on women featuring in today's movement

Chatelain: I think *any* conversation about police brutality must include black women. Even if women are not the majority of the victims of homicide, the way they are profiled and targeted by police is incredibly gendered. There are now renewed conversations about how sexual violence and sexual intimidation are part of how black women experience racist policing. You don't have to dig deep to see how police brutality is a women's issue—whether it's the terrifying way that Oklahoma City police officer Daniel Holtzclaw preyed on black women in low-income sections of the city, or the murder of seven-year-old Aiyana Stanley-Jones inside her Detroit home. We know that girls and women of color are also dying. The question is: does anyone care

We also have to consider that sexual harassment, exploitation, and assault not only

happen on the streets, they also occur in the home and in the detention center. In other words, black women are often targets of violence inside homes and in private spaces where people cannot easily see them or galvanize around them. When we consider how and where people organize, it's important to remember these victims of brutality too, even if we can't gather at their specific sites of victimization. I think the most important part of all this is that black women are fighting for their names to be known as part of this issue—there is a real desire to complicate the notion that it is only young, black men who are living in fear for their lives.

When we look at this issue historically, women activists were often targeted by police, and the sexual violence that civil rights activists experienced in places like Mississippi's Parchman Farm raised the consciousness of other activists about the need for prison reform. Women like Fannie Lou Hamer were abused behind the walls of a detention center. So for black women and black female activists, police brutality is a very real concern.

Asoka: We tend to see violence and racism against black men as a barometer of racism against the black population at large, whereas violence against black women is often invisible. We're all familiar with the names Michael Brown, Eric Garner, and Freddie Gray, but Rekia Boyd is one of the few names of black women that we've heard. Why haven't the killings of women of color received the same attention as those of men

Chatelain: Yes, I agree with Dani McClain, Melinda Anderson, and Kali Gross, among others, who are calling out the fact that the conversation about police violence is mostly framed around the endangerment of men of color. Kimberl Crenshaw has criticized the silence around women's victimization, as well as initiatives like My Brother's Keeper, which excludes girls and young women. Sexism is a factor, but so are market forces—an industry built on saving, rehabilitating, and disciplining men of color has emerged, which has attracted state funding and enriched some leaders of color and their organizations. Since the 1980s, private and public dollars have been devoted to solving the problems of boys and young men of color in ways that they haven't for girls. This reinforces the notion that in times of scarcity, girls and young women are a low priority. So the fact that the killings of women of color do not galvanize people—whether we are talking about state actors or progressive organizers—doesn't surprise me. But I'm heartened that there are activists and collectives that have been critical of the unchecked sexism in this fight.

Asoka: You mention Dani McClain. Last August she argued in the *Nation* that the killing of black men is a reproductive justice issue for women, who have a right to see their children live in safety. Are there others who are articulating this fight for racial justice in explicitly feminist terms

Chatelain: Black Lives Matter is feminist in its interrogation of state power and its critique of structural inequality. It is also forcing a conversation about gender and racial politics that we need to have—women at the forefront of this movement are articulating that "black lives" does not only mean men's lives or cisgender lives or respectable lives or the lives that are legitimated by state power or privilege.

Historically, movements for racial justice have often framed the question of equality as one that could be answered by men. From the abolitionist movement to the civil rights movement, many of the key issues were framed around concerns that racial injustice harmed masculinity. I think that today's movement has this in mind when calling for the names of women and girls to be included among those who inspire the

fight. No community wants to see its daughters die, or for women to be unable to support their families because of the death of their partners or other family members. I think the reproductive justice issue inherent in all of this is that violence undermines the ability to keep families and communities strong. The stress of violence and intimidation affects child protection and child development. The anxiety of parenting a child of color in a world where they are often targets can certainly shape one's decision to have children and one's approach to parenting.

Asoka: What are the challenges of trying to address issues like domestic violence against black women (a leading cause of death) when we know that calling the police seldom spells safety for either black men or women

Chatelain: I think the tension between demanding attention to police violence and developing strategies to ensure the safety of black women and children is very real right now. When black women weigh whether they can trust law enforcement, it's a dilemma, given the reality of mass incarceration.

The next step in this movement is to consider alternatives to the current approach to policing, which relies all too often on a labor force that does not come from a particular community or alienates communities in the name of public safety. One group that supports this is Project NIA, which encourages alternatives to calling the police on youth. Another model from Chicago is the Cure Violence project (featured in the documentary film *The Interrupters*) in which respected citizens intervene in heated situations. We're now seeing organizers developing community leadership and community-based models of accountability to ensure the safety and well-being of people, while continuing to challenge the ways in which patriarchy reinforces racism and oppression.

Asoka: Many Black Lives Matter activists are using the momentum behind this movement against police brutality to also raise other issues, like economic inequality and discrimination against black LGBT people. Why is this intersectional approach to activism important

Chatelain: Gendered police violence against cisgender and trans women, and the criminalization of poor black women and how that affects their families and communities are both key issues, although I don't know if they've been adequately captured in the protests. Protests often have to deliver a sliver of a larger message in order to prompt a deeper conversation. But the protests have also opened up a space for discussing specific structural issues—the state of our schools, unemployment, access to public spaces—and shown how police violence is one of many issues that communities have to contend with.

I am proud of Black Lives Matter's attention to intersectionality. These women and other young organizers are consciously resisting the mistakes of previous movements, especially the classism and sexism that all too often shaped the direction of older civil rights and feminist struggles. What we see now is a result of what these organizers have learned from each other about the pitfalls of narrow focus and exclusivity. This movement's openness to other movements—like the battles against mass incarceration and mass deportation—allows us to see how deeply these issues resonate across different communities.

In the early days of Ferguson, we heard messages from a wide swath of the organizing sector lending their support. From the Dream Defenders to the undocumented youth movement to the various queer organizing communities to Amnesty International, you saw a wide array of groups—along a political spectrum

from relatively mainstream to radical—moved to speak out against police violence. “Black Lives Matter” became a rallying cry to identify the places in which black life is cut short, whether it is in highly publicized instances of police brutality or through the slow suffocation of black communities facing poverty and economic inequality.

The movement’s reliance on community strength rather than dependence on a single establishment voice, and the fact that throughout we’ve seen shifts in protest strategies—from vigils, to die-ins, to shutting down highways—reveals its creativity and flexibility. Ferguson, Staten Island, Chicago, and Baltimore are different, and different leaders emerged to organize those communities. But Black Lives Matter was able to collectivize the will of communities in each of these places where a critique of policing was severely needed.

Black Lives Matter activists come as they are—there is no management or slick manipulation of the image of the movement by anyone. It was wonderful how young activists resisted the performance surrounding December’s Justice For All march because they believed that the movement they had literally put their lives on the line for was not being respected. The confrontation between a young movement and establishment groups like the National Action Network and the Urban League is deeply necessary, and I see it as another iteration of the youth driven SNCC’s struggle with Martin Luther King’s more established SCLC, and other moments when seemingly like-minded constituents have challenged each other.

Asoka: Like Occupy, Black Lives Matter is a bottom-up, collaboratively organized movement. Yet people often call it “leaderless.” Could you put this lack of recognition of women’s leadership and political participation in a historical context for us

Chatelain: I hate it when I hear people call Black Lives Matter leaderless. If there are no leaders, then who is getting the word out Who is getting the young people on buses and cars to appear before state houses and to lie down in train stations Who is sending out the calls for protests Who is managing the social media presence Leaders, that’s who. I think women are leading without suggesting they are the only leaders or that there is only one way to lead. Some of the criticism of Black Lives Matter as “leaderless” is generational. It isn’t a coincidence that a movement that brings together the talents of black women—many of them queer—for the purpose of liberation is considered leaderless, since black women have so often been rendered invisible.

Across history, any time a movement has had black women at its helm or in its leadership—from Ida B. Wells and the Niagara movement to Ella Baker in the civil rights movement—there have been sexist and racist attempts to undermine them. The most damaging impact of the sanitized and oversimplified version of the civil rights story is that it has convinced many people that single, charismatic male leaders are a prerequisite for social movements. This is simply untrue.

Asoka: Women have historically been (and continue to be) perceived as the cultural and moral anchors of their communities. This has allowed societies to police women’s behavior, their reproductive choices, and their sexual autonomy, while arguing that it’s for their own “protection.” Can you talk about this in the context of your book, *South Side Girls*

Chatelain: In *South Side Girls* I examine the experiences of black girls and young women during the Great Migration, a period in which black people also confronted challenges in housing discrimination, hyperpolicing, and racist violence. These girls were part of a massive movement in black life, and they were often looked to as the

models of black success or failure; they in fact shouldered many aspirations and hopes for a community that did not always treat them like their lives mattered. The rigid ways that black community leaders viewed black girls was fascinating to me because they were in an impossible position—too young, too female, and too black to be heard. Yet despite this, I found moments in which they were given—or simply took—opportunities to discuss what mattered to them. I found some interviews with pregnant teenage girls in the 1920s and 19 0s—they were the most marginalized of the marginalized. But in these interviews, I argue, they make it clear that they are citizens and that the state, families, and institutions have failed them. Some of the girls I include in my book resist blaming themselves; instead, they make it clear that they, as citizens, have rights, which are not being respected.

I think about these girls often as I watch today's movement unfold—where young women, some still teenagers and others barely older, are making it known that they will not tolerate state failure, or the failure of their communities to recognize the value of their lives or their leadership. The women involved in Black Lives Matter are not concerned about representing the race in any particular light or bending to the demands of respectability politics. Rather, they are carving out the space for black women to fight for justice—from the trans woman who is dying for it, to the woman in elective office, to the attorney representing protestors, to the little girl holding up a sign for Rekia Boyd, to the sorority member holding vigil in front of a police station, to the college women wearing Black Lives Matter T-shirts on campus. I'm looking forward to seeing what influence Black Lives Matter will have on the national presidential race in 2016—front and center, I hope, will be the black women who started this movement and a legion of even more behind them.

Marcia Chatelain is assistant professor of history at Georgetown University. Her book *South Side Girls: Growing Up in the Great Migration* is just out from Duke University Press.

Kaavya Asoka is an associate editor at *Dissent*.

Black Women and Black Lives Matter: Fighting Police Misconduct in Domestic Violence and Sexual Assault Cases [1]

Author(s):

Sandra Park

In the year since Ferguson, we have been reminded that police misconduct and brutality don't discriminate, at least not based on gender. We know that Black women, like Sandra Bland and others before her, aren't spared from police violence. Several commentators, including Charles Blow [2], Lisalyn Jacobs [3], and Roxane Gay [4], have authored profound pieces about Black women's experiences and the cloak of invisibility that too often surrounds them, particularly when the discussion turns to violence, police misconduct, and holding law enforcement accountable.

Fortunately, that is changing. #SayHerName has elevated and honored Black women's experiences and the dynamic #BlackLivesMatter social justice movement has broadened the conversation to highlight the many ways in which all Black people are affected by violence, police misconduct, and injustice.

But the lens must expand even further. When we speak of the reality of Black women's lives and efforts to reform the criminal justice system, we must continue to also speak about gender bias in policing and how it results in improper, and often illegal, police responses to domestic violence and sexual assault cases.

The reality is domestic violence-related calls constitute the single largest category [5] of calls received by the police. Over one million women are sexually assaulted each year, and more than a third of women are subjected to rape, physical violence and/or stalking by an intimate partner in their lifetime. And have no doubt: Black women and other women of color are disproportionately impacted [6].

Here are just a handful of stories about police misconduct in domestic violence and sexual assault cases that acknowledge the experiences of women at the intersection of racial and gender biased policing:

- In *Detroit* [7], researchers documented how stereotyping of sexual assault victims – a significant percentage of whom were African-American – led to poor criminal investigations and failure by police to submit thousands of sexual assault kits for testing.
- In *Oklahoma* [8], 13 women reported that a police officer sexually molested them while

he was on duty; that officer now faces 36 charges including felony rape, forcible oral sodomy and sexual battery.
- In *Puerto Rico* [9], the police department systematically underreported rape crimes and rarely took action when their own officers committed domestic violence, allowing 84 officers who had been arrested two or more times for domestic violence to remain active.
- In *Norristown, PA* [10], Lakisha Briggs, an African-American woman, faced eviction because police concluded that acts of domestic violence perpetrated against her – including a stabbing that required her to be taken by helicopter to a trauma center – should be considered nuisances under a local ordinance.

There are countless [11] stories just like these and even more that are untold or forgotten. These types of discriminatory police practices – abuses committed by officers, refusal to enforce established laws, misclassification or dismissal of domestic violence or sexual assault complaints – are deeply harmful and violate victims' civil rights. They jeopardize women's lives and safety, undermine efforts to end domestic violence and sexual assault, reduce confidence in the criminal justice system, and further the perpetuation of violence by discouraging victims from coming forward and allowing abusers to continue to commit crimes with impunity.

In spite of these troubling patterns, systemic discrimination by law enforcement is receiving attention due to the critical dialogue sparked by the Black Lives Matter movement. Indeed, The U.S. Department of Justice [12] has highlighted and investigated gender-biased policing. And just last month the ACLU took lead in drafting a letter signed by 88 national organizations and 98 state and local groups asking [13] DOJ to issue guidance to law enforcement agencies about how to ensure that their policies and practices are free of gender bias. These harmful and violative practices will not disappear on their own. We hope DOJ will act soon.

Until then, we will keep fighting.

Links
[1] https://www.aclu.org/blog/speak-freely/black-women-and-black-lives-matter-fighting-police-misconduct-domestic-violence
[2] http://www.nytimes.com/2015/07/20/opinion/charles-blow-sandra-and-kindra-suicides-or-something-sinister.html?_r=0
[3] http://www.huffingtonpost.com/legal-momentum/sayhername-centering-the-_b_7852078.html
[4] http://www.nytimes.com/2015/07/25/opinion/on-the-death-of-sandra-bland-and-our-vulnerable-bodies.html
[5] https://www.ncjrs.gov/pdffiles1/nij/225722.pdf
[6] http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf
[7] https://www.ncjrs.gov/pdffiles1/nij/grants/248680.pdf
[8] http://www.buzzfeed.com/jtes/daniel-holtzclaw-alleged-sexual-assault-oklahoma-city#.xawK0WOJ4G
[9] https://www.aclu.org/failure-police-crimes-domestic-violence-and-sexual-assault-puerto-rico
[10] https://www.aclu.org/cases/briggs-v-borough-norristown-et-al
[11] http://www.incite-national.org/sites/default/files/incite_files/resource_docs/3696_toolkit-final.pdf
[12] https://www.aclu.org/blog/justice-department-police-misconduct-responding-domestic-and-sexual-violence-can-violate

[13] https://www.aclu.org/sites/default/files/field_document/policing-coalition_letter_to_ag_lynch-doj-re_guidance_on_gender-biased_policing-final-7-6-15.pdf

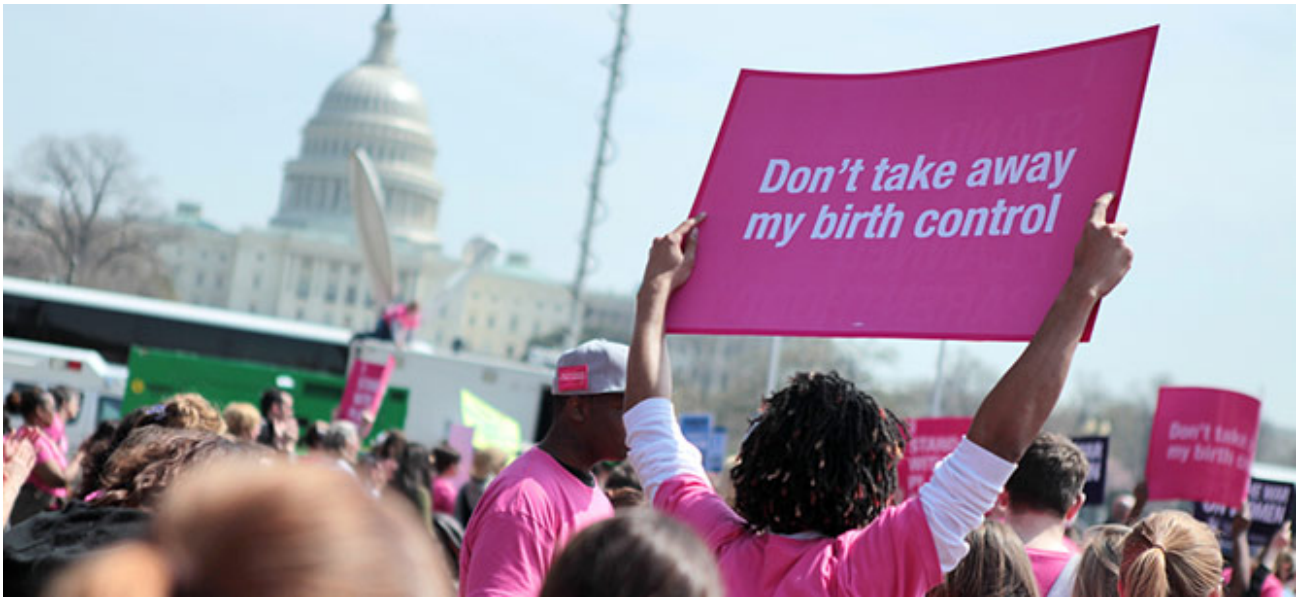
Reproductive Justice, Not Just Rights

Reproductive Justice, Not Just Rights

The language of choice has proved useless for claiming public resources that most women need in order to maintain control over their bodies and their lives.

With a counter-argument from Katha Pollitt.

Dorothy Roberts ▪ Fall 2015



Planned Parenthood rally in Washington, D.C., April 7, 2011 (American Life League / Flickr)

This article is part of Dissent's *special issue of "Arguments on the Left." To read its counterpart, by Katha Pollitt, click here.*

The last time I was filled with euphoric confidence that the left would win the battle for reproductive freedom was when I linked arms with black women activists at a march in Washington, D.C. in 2004. My elation stemmed partly from a victory of one of the co-sponsors, SisterSong: it had shifted the march's focus from "choice" to "social justice." This shift was dramatically symbolized by deleting the words "freedom of choice" from

the march's original name—Save Women's Lives: March for Freedom of Choice—to rename it the March for Women's Lives.

For too long, the rhetoric of "choice" has privileged predominantly white middle-class women who have the ability to choose from reproductive options that are unavailable to poor and low-income women, especially women of color. The mainstream movement for reproductive rights has narrowed its concerns to advocate almost exclusively for the legal right to abortion, further distancing its agenda from the interests of women who have been targets of sterilization abuse because of the devaluation of their right to bear children.

A caucus of black feminists at a 1994 pro-choice conference coined the term "reproductive justice," a framework that includes not only a woman's right not to have a child, but also the right to have children and to raise them with dignity in safe, healthy, and supportive environments. This framework repositioned reproductive rights in a political context of intersecting race, gender, and class oppressions. The caucus recognized that their activism had to be linked to social justice organizing in order to gain the power, resources, and structural change needed for addressing the well-being of all women. Back in 2004, SisterSong brought a reproductive justice approach to the march's leadership and helped to mobilize busloads of newly energized, diverse supporters, making the march one of the largest of its kind in U.S. history. The success of the March for Women's Lives demonstrates a winning strategy; under the leadership of women of color, the left needs to ditch the dominant reproductive rights logic and replace it with a broader vision of reproductive justice.

The language of choice has proved useless for claiming public resources that most women need in order to maintain control over their bodies and their lives. Indeed, giving women "choices" has eroded the argument for state support, because women without sufficient resources are simply held responsible for making "bad" choices. The reproductive rights movement was set on this losing trajectory immediately after *Roe v. Wade*, when mainstream organizations failed to make funding for abortion and opposition to coercive birth control policies central aspects of their agenda. There was no sustained major effort to block the Hyde Amendment, which has been attached to annual appropriations bills since 1976 and excludes most abortions from Medicaid funding. Mainstream reproductive rights organizations practically ignored the explosion of government policies in the 1990s, such as welfare "family caps" and prosecution for using drugs while pregnant, principally aimed at punishing childbearing by black women who received public assistance. This myopia not only alienated women of color, but also failed to address the connection between criminalization of pregnant women and abortion rights. Today, a resurgence of prosecutions for crimes against a fetus makes crystal clear a unified right-wing campaign to regulate pregnant women—whether these women plan to carry their pregnancies to term or not. There is little to distinguish criminal charges against women for "feticide" and for abortions.

The impediment to winning is not just the current right-wing onslaught of state laws; also pernicious is a nasty, resilient strain of thinking within the left that views birth

control as a means of addressing social and environmental problems like poverty and "overpopulation." On one hand, the right has recently exploited the history of eugenics to falsely portray abortion as a form of black "genocide" and to ban abortions intended to avoid having a baby with Down syndrome. On the other hand, however, the left has yet to purge its advocacy of family planning of some of its racist and eugenicist roots, which can be traced back to the early twentieth century when progressives promoted controlling reproduction of "unfit" populations. Margaret Sanger allied with eugenicists to further her crusade for women's access to birth control, entangling the issue of reproductive rights with both liberating and oppressive aims.

Today, the mainstream reproductive rights movement has failed to confront liberals' promotion of birth control as a way to save taxpayer money spent on unintended, welfare-dependent children. For example, the *New York Times*, *Slate*, and the *American Journal of Public Health* recently published articles recommending increased use of provider-controlled long-acting contraceptives among low-income populations in order to reduce poverty, high school drop-out rates, and Medicaid costs. The troubling legacy of the U.S. biologist Paul R. Ehrlich is also perpetuated today by some environmentalists like Population Connection (formerly Zero Population Growth) and the Sierra Club's Global Population and Environment Program, which continue to see birth control as a way of addressing global "overpopulation." Framing birth control as a cost-reducing and problem-solving measure masks its potential for racial and class bias and coercion, as well as the systemic and structural reasons for social inequities.

Moreover, pro-choice groups have used the "tragedy" of fetal anomalies as an argument for supporting abortion rights without considering discrimination against people with disabilities or the potential for alliances with disability rights activists to improve the wellbeing of women and children, or the history of approved therapeutic abortions and unapproved elective abortions. The liberal notion of reproductive choice aligns with a neoliberal market logic that relies on individuals' purchase of commodities to manage their own health, instead of the state investing in health care and the other social needs of the larger public. The rhetoric of choice obscures the potential for reproductive and genetic selection technologies to intensify regulation of women's childbearing decisions in order to privatize remedies for illness and social inequities. While we should point a finger at right-wing legislators for creating wedge issues, the dominant framework for reproductive rights advocacy has created colossal political chasms within the left all by itself.

A reproductive justice framework can attract support from tens of thousands of women alienated by the mainstream agenda—poor and low-income women, women of color, queer women, women with disabilities, and women whose lives revolve around caregiving. In addition, the movement's social justice focus provides a concrete basis for building radical coalitions with organizations fighting for racial, economic, and environmental justice, for immigrant, queer, and disabled people, and for systemic change in law enforcement, health care, and education. True reproductive freedom requires a living wage, universal health care, and the abolition of prisons. Black women

see the police slaughter of unarmed people in their communities as a reproductive justice issue. They recognize that women are frequent victims of racist police violence and that cutting short the lives of black youth violates the right of mothers to raise their children in healthy, humane environments. The reproductive justice movement and Black Lives Matter are likely allies because, at their core, both insist that American society must begin to value black humanity. Black, Latina, Asian-American, and indigenous reproductive justice organizations have a history of solidarity, exemplified by SisterSong, and they have begun to forge links with other social justice movements.

The galvanizing impact of reproductive justice extends beyond these mobilization and coalition-building strategies. The movement articulates the rationale for reproductive freedom in positive moral and political terms, as a requirement for social justice, human rights, and women's well-being. Reproductive justice activists treat abortion and other reproductive health services as akin to the resources all human beings are entitled to—such as health care, education, housing, and food—in an equitable, democratic society.

In January 2015, the leaders of five black reproductive justice organizations launched a national initiative called In Our Own Voice: National Black Women's Reproductive Justice Agenda to mobilize black women, initially highlighting three key policy issues: abortion rights and access, contraceptive equity, and comprehensive sex education. The initiative plays off black women's unique strategic position: they have a long legacy of grassroots organizing for reproductive justice and they are the most progressive voting block in the nation's electorate. Reproductive justice initiatives spearheaded by women of color are important, not because they allot these women a marginalized voice within the same losing reproductive rights agenda, but because they let women of color lead a reproductive justice movement that can win.

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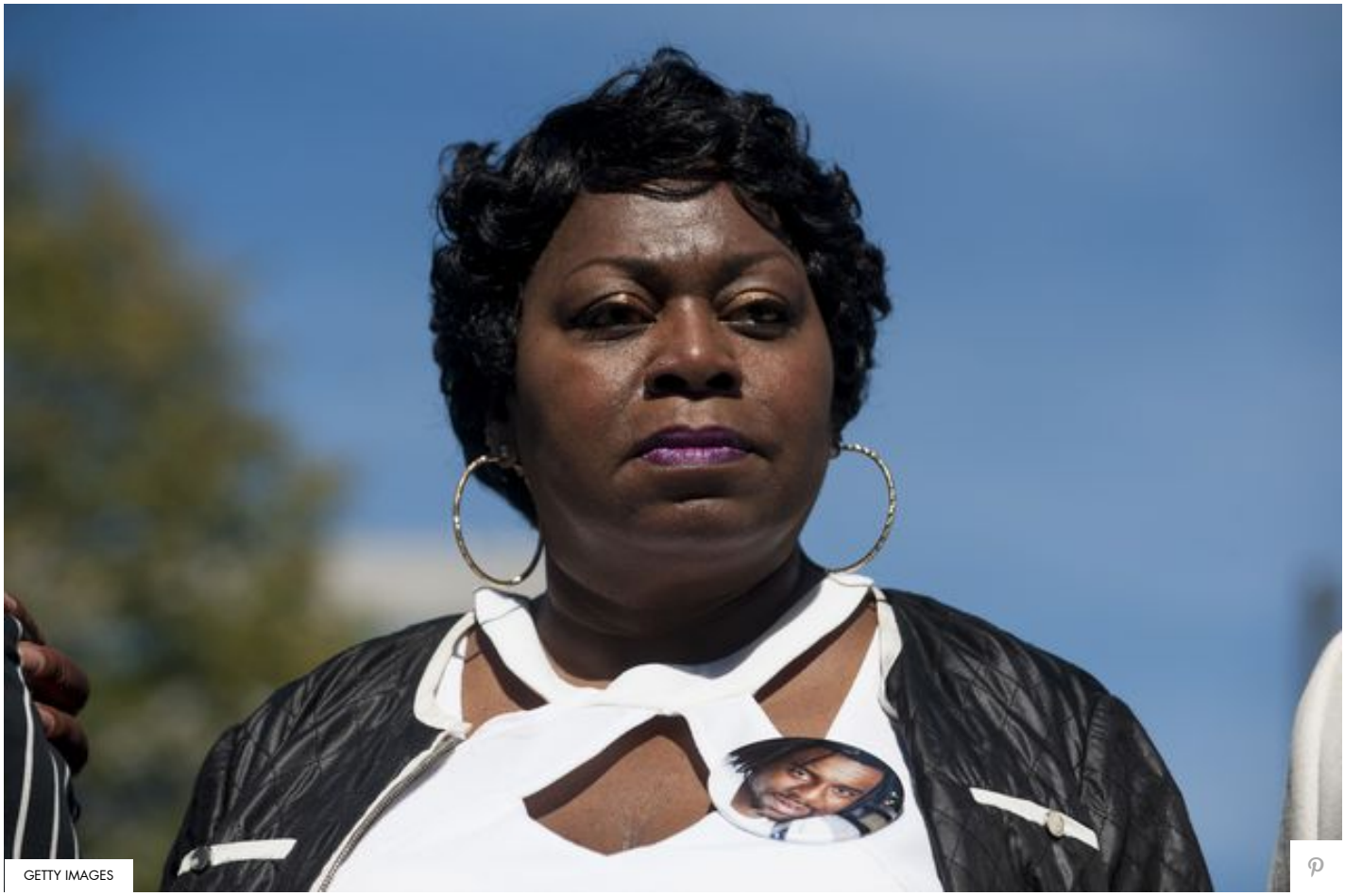
Police Violence Is a Reproductive Justice Issue

Women must have the right to choose to bring a child into this world and raise them in an environment free from violence.

by LESLIE WATSON MALACHI JUL 18, 2016



GETTY IMAGES

I pulled over my car twice this week when I saw an African American man surrounded by police officers. At a time when almost daily a new mother is faced with the unthinkable news that her child was the latest victim of senseless violence, I felt the need to stop at a non-intrusive distance and make sure everyone was safe. I thought of Quinyetta McMillon, the mother of Alton Sterling's oldest child, now forced to raise their child without his father. I thought of Valerie Castile, the mother of Philando Castile, who says her son is now "a driving force in me to make sure this doesn't happen to another mother."

The wrenching police shootings this month of these two men, both just in their 30s, has been widely reported on through the lenses of excessive police force and pervasive racism. Less attention however has been given to the ways in which death at the hands of police is also a critical issue of reproductive justice. How? Women must not only have the right to choose abortion, but also the right to choose to bring a child into this world and raise them in an environment free from violence. It's a right that is demolished every time young people of color are questionably gunned down by the police.

When a child is born, the hope is always that violence in any form will not be a part of their lives, whether they are entrepreneurs, like Sterling, employees of a school system, like Castile, or police officers, like the five officers killed in Dallas while protecting a Black Lives Matter march. The hope is that their lives will not be cut short while walking to buy Skittles, like Trayvon Martin, or while preparing to start a new job, like Sandra Bland, or while playing outside a recreation center, like

Tamir Rice. Even as the African American community is under siege from so many different directions, from restrictions on voting rights, to the criminal and juvenile justice system, to the prison industrial complex, to the right-wing politicians and organizations that try to demonize our families, the hope is that it will be possible to keep our children out of harm's way.

The reproductive justice movement, which was launched by African American women more than 20 years ago, has long situated the need for reproductive rights within the larger context of the well-being of women, their families, and their communities. As someone who has been a reproductive justice advocate for many years, I know that abortion rights cannot be isolated from the other issues impacting women's lives. Prime among those issues is the ongoing police violence that disproportionately affects African Americans. Yes, reproductive justice is about the constitutionally protected right to control our own bodies, but for me, it is also about keeping safe in every area of their lives the women and girls, the boys and men, who are birthed, watched, raised, and loved.

Valerie Castile, the mother of Philando Castile, is now a part of an unfortunate and growing sisterhood of women whose children died because of police mishandling of a range of situations. It is a unique and all too large body including Samaria Rice, mother of Tamir Rice; Lezley McSpadden, the mother of Michael Brown; and Geneva Reed-Veal, the mother of Sandra Bland; whose time of grief will be a part of the historical changes to the policing systems from North to South, East to West. They stand shoulder to shoulder with Sybrina Fulton, the mother of Trayvon Martin; Lucia McBath, the mother of Jordan Davis; and so many others who join them in calling for a world where no one has to live in fear of their children's lives being cut short by those they are taught to trust because their job is to help and protect.

If we are serious about fighting for women's rights, for lives free from the fear of being targeted for being non-white, and for an end to gun violence of any kind, then the reproductive and social justice rights of women of color to safely raise a child in our country has to be front and center in that conversation.

More than 150 years after Sojourner Truth asked, "Ain't I a woman?" this week I found myself asking: Aren't we women, like other women of different racial backgrounds who decide to have children? Shouldn't we also have access not only to comprehensive health care, and job opportunities, and educational opportunities, but also to the most fundamental right of all — the right for our families to survive? Police violence is a reproductive justice issue because a mother's care for her child starts with their first breath and does not end with their last.

Minister Leslie Watson Malachi is the director of African American Religious Affairs at People For the American Way Foundation.