What Lies Beneath

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In the last decade, legal scholars and philosophers have increasingly turned their attention to the "riddle" of the criminal law's treatment of sex that involves deception in some form, including lies, misrepresentations, informational omissions, broken promises, and even just informational asymmetries.[1] The discussion gained momentum with internet buzz over "stealthing" or "nonconsensual condom removal" in the late 2010s and the ensuing public debate over whether it constituted rape. Scholars thus set out to "solve" the puzzle, find the real logic of rape law, and determine which deceptive scenarios fit into that logic. Scholars appealed to, among other things, structural frames (i.e., "looking at rape law as a whole, it is clear that it is about forcible bodily invasions"); normative organizing principles (i.e., "criminal law protects/should protect autonomy, dignity, vulnerable people, gender equality"); and practical considerations (i.e., "criminalizing X deception would overwhelm the courts").[2] While these various accounts are interesting, important, and further our understanding, most are ahistorical and decontextualized.

In *Inducing Intimacy*, Chloë Kennedy importantly reminds us that the law of deceptive sex is not a riddle to be answered but an epic tale that unfolds over centuries, during which cultures—sexual, marital, and legal—change, intellectual traditions go in and out of style, and social relations are constantly renegotiated.[3] This history, she says, helps us understand the promises and dangers of certain forms of reasoning, doctrinal choices, and legal interventions. Kennedy traces the shift in the logic of Scottish law of deceptive sex from protecting marriage to vindicating "thin" autonomy—choice for choice's sake.[4] She critiques the latter as arbitrary, detached, and unable to account for how contemporary rules parse the legality of different deceptions. In short, "deception has not been seen as immoral because it invalidates consent; rather, it has been seen as invalidating (or precluding) consent because it is (sometimes) immoral."[5] Rather than hiding behind thin consent, Kennedy

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[1] Jed Rubenfeld, The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy, 122 Yale L.J. 1372 (2013); see also Luis E. Chiesa, Rape by Deception, Autonomy, and the Principle of Fairness: A Comment on Jed Rubenfeld, 123 Yale L.J. F. 347 (2014); Deborah Tuerkheimer, Rape On and Off Campus, 123 Yale L.J. F. 225 (2014); Joseph J. Fischel, Sex and Harm in the Age of Consent 202-10 (2016).

[2] See sources cited supra note 1; see also Kimberly Kessler Ferzan, Consent, Coercion, and Sexual Autonomy: Rethinking Rape by Deception, 19 Legal Theory 1 (2013).

[3] Chloë Kennedy, Inducing Intimacy: Sex, Deception and the Law (2024).

[4] Id. at 4.

[5] Id. at 197.

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asserts, we should openly discuss the ideologies, cultural norms, and value systems that inform these moral determinations. She suggests a frame of "identity nonrecognition," involving a culturally embedded inquiry into the categories of sexual deceptions that impinge on people's ability to define who they are.[6] The need for identity recognition, she says, is morally intuitive, and it has adhered over time and across cultures.[7]

In this essay, I examine this late-twentieth-century consent turn in sex-crime law from an American perspective. This may just make for an interesting, if fairly irrelevant, comparative story. Still, I think the American experience may shed light on *Inducing Intimacy's* account of the demise of marriage mores, the relationship between consent and criminalization, and when sex is identity-defying. I should note here that I am far less agnostic than Kennedy about the decline of the marriage regime—to me, it is a good thing—and the fact that seemingly consensus values about sex may yet reflect gendered chastity norms—a bad thing.[8] My remarks draw on research from my book in progress, *The Crime of Sex*,[9] which, like *Inducing Intimacy,* turns to the past to illuminate a present legal phenomenon in the United States, namely, "sex exceptionalism in criminal law."[10] Lying beneath law, theory, and advocacy about sex, including deceptive sex, I argue, is the presumption that sex crimes and wrongs are categorically different, worse, and indeed more identity-producing than similar nonsexual crimes and wrongs. Sex exceptionalism rests on deeply gendered notions about who harms, who is harmed, and the degree to which sexual misconduct harms. Sex exceptionalism is the connective tissue that unites the old marriage regime and the new commitment to thin autonomy and helps explain how liberal notions of individual autonomy underwrote the late twentieth-century program of penal sex regulation.

The very condensed history I provide connects late-twentieth-century carceral rape reform, including the turn to thin autonomy, to older patriarchal chastity mores that constructed sex as a ruinous proposition for women. Briefly, marriage and chastity norms dictated the contours of sexual law and culture in the U.S., albeit in a declining manner, until approximately the 1960s and 1970s. During this time, courts and legislatures, relying on autonomy and privacy rationales, started to limit government regulation of individual sexual behavior. The sexual revolution opened up a cultural space for women to reject marital priority and persistent chastity norms, which strictly divided the virtuous and the fallen. But as sexual liberation opened up sexual spaces that marriage once tightly cabined, the line between acceptable and unacceptable was uncertain. Men fashioned the new sexual

[6] Id. at 214.

[7] Id. at 215.

[8] Kennedy does not, however, "suggest that we should wish for the return of the marriage regime," given that it "was exclusionary and hierarchical, and it rested on narrow and gendered understandings of intimacy." Id. at 203.

[9] Aya Gruber, The Crime of Sex (forthcoming 2027).

[10] Aya Gruber, Sex Exceptionalism in Criminal Law, 75 Stan. L. Rev. 755 (2023).

culture in their image and used sex to push back against women's socio-economic advances. Some feminists, in response, adopted an anti-sexual-liberation stance that characterized the new sexual culture as the domination of women. This position gained momentum in part because it did not challenge, and sometimes openly endorsed, chastity mores. Ultimately, this "dominance feminist" position became the dominant feminist position on sex and, alongside family-values moralism and a tough-on-crime politics, influenced the ever-expanding construction of nonconsent and the carceral trajectory of rape reform.

I. A Note on the "Genetic Fallacy"

Professor Kennedy is one of the most eloquent contemporary defenders of genealogical methodology against charges of its irrelevance to normative theorizing. Critics argue that it is a fallacy to assert that the origin or history of a law, institution, principle, practice, or system impacts whether it is good or bad, true or untrue, right or wrong. However, as Professor Kennedy explains:

> [Historically informed] research can play a generative as well as constraining role in evaluating legal developments and cautiously suggesting ideas for reform. In other words, on top of providing a reality check on ideal theorising, by warning against potential unintended consequences and pointing out the degree of contingency that marks out all human-made laws and institutions, historically informed scholarship might help articulate alternative normative bases for laws and legal systems, predicated on features of human behaviour and institutions observed over time. . . . Furthermore, since it aims to provide both a deep understanding of contemporary predicaments and new ways to respond to these, this approach can be used as a basis for both critique—an enriched sense of the complexity of the problem—and criticism—potential ways forward.[11]

In recent years, in the U.S., it has become popular to charge historians, legal scholars, and philosophers with committing the "genetic fallacy." Critics strawman genealogies and critical histories as fallaciously relying on a law or system's past to prove its current normative desirability. This post-genealogical recoil came to recent prominence as critical race historians began to tell alternative American histories that cast venerable political figures, celebrated institutions, and unquestionably valid laws in a more negative light. To put it in the current vernacular, critics decried woke arm-chair historians trying to cancel perfectly good laws, theories, and institutions.[12] It has indeed been strange to see conservatives who generally embrace originalism decrying references to the past.[13] Their reliance is as much a reliance on non-transcendental deduction as those who look to history

[11] Kennedy, supra note 3, at 11-12.

[12] See, e.g., Lee S., Critical Race Theory Defended With Falsehoods and Informal Fallacies (June 25, 2021) (https://perma.cc/QAZ3-FYD5); Hiram R. Diaz III, The Genetic Fallacy: Critical Race Theory's Indispensable Tool (Pt. 1) (June 28, 2019) (https://perma.cc/NP8Q-XPRW); Douglas Groothuis, Critical Race Theory in Six Logical Fallacies, 35 Academic Questions 1 (2022) (https://perma.cc/5ZXY-BZY6).

[13] Ramos v. Louisiana, 590 U.S. 83, 141-42 (2020) (Alito, J., dissenting) ("If Louisiana and Oregon originally adopted their laws allowing non-unanimous verdicts for [racist] reasons, that is deplorable, but what does it have to do with the broad constitutional question before us?").

to expose laws' continued connections to discriminatory norms that people widely assume reside in the dustbins of history.[14]

Explanations and rationalizations of the genealogical method have amassed since Nietzsche's time, and they do not bear repeating here.[15] In recent years, American legal scholars have provided detail on just what genealogy is—it is not canceling the Constitution—and why it bears on the normative desirability of a rule.[16] To be sure, history is particularly important when analyzing sex-crime laws, because many progressives understand current laws and reform efforts as products of the feminist movement of the 1970s and 1980s. Within this legal imaginary, "second-wave" feminism is conceived as a singular and organic egalitarian moment of unity around a criminal law expansionist project to fight male sexual domination. In reality, feminists hotly debated whether to embrace a sex-regulatory agenda, criminal or civil. The pro-regulation camp simply won out.[17]

This imaginary of a feminist founding paints with egalitarian credibility most contemporary efforts to expand the reach of the sex-crime system, which in the U.S. is particularly, even gratuitously, punitive. In this feminist-originalist view, there is no reason to trace the system to its older moralistic and patriarchal roots because the foremothers fully reinscribed criminalization as gender justice.[18] At that founding moment, state sex regulation ceased to be a mechanism of controlling women and other disfavored groups and became a liberatory corrective to rampant sexual abuse. Ironically, this second-wave feminist tough-on-rape first principle was itself a reaction to a particular understanding of history, namely, that the state had systematically undercriminalized sexual assault and underenforced rape laws.[19] Nevertheless, in the stock feminist account of rape reform, everything before late-twentieth-century feminism is merely the prehistoric primordial soup, shielding from view how today's "progressive" laws operate within legal structures and reinforce ideas forged by ancient patriarchy and morality.[20]

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[14] See Bernard Williams, Truth and Truthfulness: An Essay in Genealogy 41 (2002) (noting that genealogy may be vindicatory).

[15] See, e.g., Friedrich Nietzsche, On the Genealogy of Morals, preface § 7 (Walter Kaufmann trans., 1989) (1887); Michel Foucault, Nietzsche, Genealogy, History, in Language, Counter-Memory, Practice: Selected Essays and Interviews 139, 139-40 (Donald F. Bouchard ed., Donald F. Bouchard & Sherry Simon trans., 1977); Duncan Kennedy, The Structure of Blackstone's Commentaries, 28 Buff. L. Rev. 205, 211-12 (1979); Nancy Fraser, Foucault on Modern Power: Empirical Insights and Normative Confusions, 49 Praxis Int'l 272, 278 (1981); Bernard Williams, Truth and Truthfulness: An Essay in Genealogy (2002); Chloë Kennedy, The Genealogy of Morals and Modern Law: A Nietzschean History, 10 Crim. L. & Phil. 623 (2016).

[16] See, e.g., Charles L. Barzun, The Genetic Fallacy and a Living Constitution, 34 Const. Comment. 429 (2019); W. Kerrel Murray, Discriminatory Taint, 135 Harv. L. Rev. 1190 (2022); Charles W. Tyler, Genealogy in Constitutional Law, 77 Vand. L. Rev. 1713 (2024); Bernard E. Harcourt, On Critical Genealogy, 24 Contemp. Pol. Theory 167 (2025).

[17] See infra notes 70-72 & accompanying text.

[18] See, e.g., Michelle J. Anderson, Campus Sexual Assault Adjudication and Resistance to Reform, 125 Yale L.J. F. 1940, 1943 (2016).

[19] See infra note 21 & accompanying text.

[20] Gruber, supra note 10, at 846.

II. Marriage's Reign

Second-wave American feminism constructed a surprisingly powerful and simple mythos that rapes committed by individual men, in the collective, were, for thousands of years and across cultures, male society's preferred mechanism of subordinating women. In her 1975 bestseller Against Our Will—a highly influential accounting of sexual assault as systematized subordination—feminist activist Susan Brownmiller famously remarked that rape is a "process of intimidation by which all men keep all women in a state of fear."[21] Professor Kennedy's genealogy of intimate deception reveals that the simple sex-license account is "marred by its ahistorical assumptions," as feminist Linda Gordon and Ellen DuBois remarked of Brownmiller's book.[22] Through a scrupulous accounting of Scottish cases, she shows that, in fact, eighteenth- and nineteenth-century Scottish civil and criminal law took deceptive sex seriously. Especially after women became the aggrieved parties—instead of husbands or fathers—the laws on seduction, false promises of marriage, and impersonating a spouse provided them real relief in the form of money and reputation redemption.[23] Still, Kennedy observes, this legal regime that provided tangible benefits to women stemmed not from a concern for their control over their own sexuality but from a desire to preserve one of the greatest restraints on female sexuality—the institution of marriage.[24] Deceptive sex laws in pre-twentieth-century Scotland protected the institution by enforcing marriage's monopoly on sex, maintaining the priority of female chastity, and making men take marital promises seriously.

Similarly, in early America, the preoccupation with formal marriage and worries about unaccountable parentage informed a range of sex-crime laws, including rape and seduction. Historians observe that colonial leaders were preoccupied with *legally* formalizing marriage through licensure processes with strict requirements like parental consent. This presaged a wave of seventeenth-century prosecutions of "fornication," defined as living as husband and wife but not being legally betrothed.[25] As in Scotland, marriage was gendered and patriarchal, formally relegating wives to subordinate status. The marital monopoly on sex reflected authorities' concerns over sin and worries about "bastardy," and in theory, it controlled both male and female sexual behavior.[26] But especially as the rural enclaves turned into larger cities in the late eighteenth and nineteenth centuries, men enjoyed increasing leeway to partake in nonmarital sex—even or especially with prostitutes. By

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[21] Susan Brownmiller, Against Our Will: Men, Women and Rape 15 (1975).

[22] Ellen Carol DuBois & Linda Gordon, Seeking Ecstasy on the Battlefield: Danger and Pleasure in Nineteenth-Century Feminist Sexual Thought, in Pleasure & Danger: Exploring Female Sexuality 49, n. 41 (Carole S. Vance ed., 1984).

[23] Kennedy, supra note 3, at 5-10 & passim.

[24] Id. at 193.

[25] Richard Godbeer, Sexual Revolution in Early America 24 (2002).

[26] John D'Emilio & Estelle B. Freedman, Intimate Matters: A History of Sexuality in America 32-34 (2012).

contrast, for a woman, committing a mere etiquette transgression or having been ravished by force could cast her into the denigrated category of "fallen."[27]

Professor Kennedy observes that the dual operation of the marriage priority and the imperative of female chastity shaped the early contours of Scottish deceptive-sex law in some unique ways. Courts were sympathetic to seduction claims because seducers openly flouted the norm that marriage proposals should be serious, not toyed with for sex. In addition, by "ruining" chaste women, seducers decreased the supply of eligible wives while contributing to the social and moral scourge of prostitution.[28] Importantly, when controlling libertines' marriage-flouting ways and maintaining female chastity conflicted, Scottish courts prioritized punishing unchaste women over controlling flagrant seducers. Women accused of being "unvirtuous" were largely unsuccessful in seduction suits. Courts reasoned that an already fallen woman lost little from the seduction and should have realized that no gentleman would have seriously courted her.[29] Further, courts worried that allowing lower-class women to bring seduction suits would encourage female grifters *to* engage in immoral nonmarital sex so they could sue. "Women therefore made a point of arguing that they were of approximately equal status to the men they were suing, and men would argue the opposite," Kennedy observes.[30]

Professor Kennedy mostly does not differentiate between marriage and chastity as social phenomena shaping sex-crime law. However, in America—and I would presume in Scotland—they were mutually constitutive but not fully coextensive. Moreover, both marriage and chastity norms reflected and reinforced race and class as well as gendered social orders. In Western history, the division of female sexuality into proper and sinful well-predated marriage and adhered in communities that were not organized around discrete heterosexual kinship units. Rape-law doctrines and decisions frequently reflected concerns over women's inherent sinfulness. For example, the law presumed that an attacker tempted a woman if she failed to resist to the utmost.[31] Moreover, the fallen and ruined woman icon served as more than just a warning against nonmarital sex; it disciplined women generally, maintained racial and socio-economic hierarchies, and even whipped up pro-war fervor.

Throughout American history, legal authorities insisted that rape was a "fate worse than death" for women, and the penalties should so reflect. The earliest codes put rape alongside murder and treason as a capital offense. But execution—even prosecution at all—was largely reserved for American Indians, Black men, transients, and the occasional low-

[27] See, e.g., Victoria Woodhull, And the Truth Shall Make You Free: A Speech on the Principles of Social Freedom, Steinway Hall, New York (Nov. 20, 1871) (https://perma.cc/S8WB-5K49) (decrying this double standard).

[28] Kennedy, supra note 3, at 127.

[29] Id. at 130.

[30] Id. at 133.

[31] Sharon Block, Rape and Sexual Power in Early America 126 (2006).

class laborer.[32] The trend of executing predominantly men of color continued until the death penalty for rape was abolished in 1970.[33] In the late-nineteenth- and early-twentieth-century South, chaste white women's aversion to court became a primary justification for the extrajudicial lynching of Black men.[34] Chastity was often not a function of marriage at all. Married and monogamous Black women, especially when they were "idle" housewives, were considered prostitution risks. The least respectable white woman in the South was presumptively chaste if she accused a Black man.[35] Turn-of-the-century urbanization brought with it warnings from the media and state officials that women, married or unmarried, dare not venture into the public sphere alone, unless willing to lose their appearance of chastity and face the high risk of a worse-than-death rape.[36]

III. Marriage's Decline

Professor Kennedy observes that over time, formal marriage lost much of its grip on Scottish sex-crime law. The rise of companionate marriage centered love and intimacy—not formality, duty, and status—as the cornerstone of the family unit. In theory, this opened a space for recognizing status-defying, non-sanctioned, and even informal love matches—and the sex therein—as legitimate. The rise of no-fault divorce further undermined the stability of the institution, allowing for exit—although not adultery—when love faded.[37] Still, it was not until the late twentieth century that marriage's firm grip on acceptable sexuality loosened to a meaningful degree.[38] Until just the last decade in the U.S., any rumors of marriage's demise were premature. Although the drafters of the 1962 Model Penal Code (MPC) made clear that criminal law was appropriate only "to prevent injury," not to control "immorality," they singled out forced heterosexual penetration for first-degree felony status, citing the "impairment of [victims'] marital eligibility."[39] And the MPC currently has a robust section on crimes against the family with an abortion criminalization provision, which, in fairness, was revolutionarily permissive for its time. Still, the liberal male drafters had rejected the view of "European feminists" that under the "banner of personal liberty .

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[32] See generally id.

[33] Between 1930 and 1972, when the Supreme Court temporarily struck down capital punishment, 455 men were executed for rape, 90 percent (405) of whom were Black. No white man has ever been executed for raping a Black woman or child. Death Penalty Information Center, Race, Rape, and the Death Penalty (https://perma.cc/RDK8-Y2K4).

[34] Michael J. Klarman, The Racial Origins of Modern Criminal Procedure, 99 Mich. L. Rev. 48, 54 (2000).

[35] Darlene Clark Hine, Rape and the Inner Lives of Black Women in the Middle West, 14 Signs 912 (1989).

[36] Molly Miller Brookfield, Watching the Girls Go By: Sexual Harassment in the American Street, 1850-1980, at 7 (2020).

[37] Kennedy, supra note 3, at 62.

[38] Id. at 14.

[39] Model Penal Code and Commentaries § 213.6 (note on adultery and fornication), at 437 (Am. L. Inst., Official Draft & Revised Comments 1980); Model Penal Code § 207.1 cmt. at 280 (Am. L. Inst., Tentative Draft No. 4, 1955) [hereinafter 1955 MPC TD4].

. . a woman has exclusive right in respect of the functioning of her own body."[40] Strikingly, it was only after 2010 that a bare majority of American women (52%) came to agree with the proposition that premarital sex is "not wrong at all."[41]

Regardless of the extent of marriage's dethroning, *chastity* in the U.S., and I suspect in Scotland, remained remarkably relevant to sex law and women's sexual self-construction. As formal marriage gave way to intimacy and monogamy, so did the construction of chastity. In the late nineteenth century, the American free-love movement, notable for its many women leaders, lodged a frontal attack on the marital monopoly on sex.[42] Free lovers reversed the Victorian moral order by declaring sex within a loveless marriage as the real sin and labeling unvirtuous any woman who participated in it. Now, the movement's trafficking in chastity discourse may have been strategic, and indeed free-love feminists were quite sympathetic to the plight of prostitutes and opposed to vice laws.[43] Nevertheless, even within their radically anti-marriage philosophy, the free-lovers adopted a new love-based chastity norm that would continue to stigmatize sex workers and constrain women's and, they very much hoped, men's sexual choices.[44] Ezra Heywood insisted, "Legalized marriage is the house of prostitution sanctified. To sell the body, with or without the sanction of Church or State, is alike immoral; the difference is only in degree, not in kind."[45] For these early anti-marriage crusaders, sex remained a weighty proposition, but love marked the line between spirituality and immorality.

The free love movement was crushed by Anthony Comstock's moralist crusade, and the following years saw a general preoccupation with vice and prostitution.[46] The Progressive-era temperance movement's social purity agenda melded marital priority with feminist sentiments about protecting wives. For them, alcohol produced slovenly wifebeaters, and prostitution introduced filth and degradation into the marital home.[47] Narratives about sexual deception, namely that of unaware country girls being duped into sexual bondage, drove new criminal laws and figured prominently in the anti-prostitution crusades that helped build the U.S. immigration enforcement apparatus and the FBI.[48]

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[40] Model Penal Code § 207.11 cmt. at 126 (Am. L. Inst., Council Draft No. 8, 1956).

[41] Jean M. Twenge, Ryne A. Sherman & Brooke E. Wells, Changes in American Adults' Sexual Behavior and Attitudes, 1972-2012, 44 Arch. Sex. Behav. 2273 (2015).

[42] Helen Lefkowitz Horowitz, Victoria Woodhull, Anthony Comstock, and Conflict over Sex in the United States in the 1870s, 87 J. Am. Hist. 403 (2000).

[43] See, e.g., Woodhull, supra note 27 (comparing marriage and prostitution).

[44] Id.

[45] Ezra H. Heywood, Cupid's Yokes: The Binding Forces of Conjugal Life 8 (Princeton, Mass., The Word 1878) (https://perma.cc/WMV8-FL6G).

[46] Horowitz, supra note 42, at 434.

[47] Susan B. Anthony, Social Purity (speech delivered at the Grand Opera House, Chicago, Ill., Mar. 14, 1895) (https://perma.cc/RBE8-TJ88).

[48] Jessica R. Pliley, Policing Sexuality: The Mann Act and the Making of the FBI (2014).

Consequently, even as companionate marriage took off in the twentieth century, the imperative of distinguishing chaste women from harlots remained and even grew more important. The government directed extraordinary efforts toward controlling prostitution during World War I, and in World War II, it also turned its attention to "victory girls," the non-prostitute, loose women who were a "V.D." menace.[49] Into the 1960s and the era of the sexual revolution, the imperative for women not to cross the chastity line remained, even as that line became ever harder to identify.

Today, even as marriage hardly monopolizes sex, gendered notions of sexual propriety and ruination continue to abound. Within the dominant legal and cultural frame, sex is rarely a "no big deal" proposition for women. For women, when sex is right, it is transcendent—packed with desired baby-making potential, emotional bonding, and physical ecstasy. When it is wrong, it is shattering—packed with unwanted pregnancy risk, emotional trauma, disease risk, and physical agony.[50] Marginalized poor women "take" back-breaking minimum wage jobs, but they "resort" to higher-paying and less physically taxing sex work. Sex that commentators characterize as utterly traumatizing to women may not even register as a harm to a man. Men who have nonconsensual—say, overly intoxicated—heterosexual sex are invisible, if not "lucky." When men admit to fearing sex, they express horror at being emasculated and rendered de facto gay by another man.[51]

IV. Thin Autonomy's Rule

Presently, "consent" is the official line between the transcendent and the shattering, culturally and legally. After marriage loosened its grip on law, Kennedy writes, Scottish jurists displayed an unwavering faith that consent was the objective key to resolving disputes over the deceptive sexual or sex-adjacent behaviors. But in fact, consent was so plastic that it tended to reflect diverse, often conflicting, sexual values iterated over hundreds of years.[52] Still, legal actors and theorists remained faithful to autonomy even as it led them to contradictory conclusions and failed to adequately explain the lines they drew between bad versus wrongful, wrongful versus illegal, and civilly actionable versus criminal conduct. In the latter twentieth century, liberalism became all the rage among those with the power to decide and influence decisions about sex law, Kennedy asserts, and the commitment to

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[49] Eva Payne, Empire of Purity: The History of Americans' Global War on Prostitution ch. 3 (2024); Marilyn E. Hegarty, Victory Girls, Khaki-Wackies, and Patriotutes: The Regulation of Female Sexuality during World War II 127 (2007).

[50] Ariella Brenner, Resisting Simple Dichotomies: Critiquing Narratives of Victims and Perpetrators in Sexual Assault, 36 Harv. J.L. & Gender 503 (2013); Joanna Bourke, Sexual Violence, Bodily Pain, and Trauma: A History, 29 Theory Culture & Soc'y 25 (2012).

[51] Leslee R. Kassing, Denise Beesley & Lisa L. Frey, Gender Role Conflict, Homophobia, Age, and Education as Predictors of Male Rape Myth Acceptance, 27 J. Mental Health Counseling 311 (2005); Michelle Davies, Male Sexual Assault Victims: A Selective Review of the Literature and Implications for Support Services, 12 Aggression & Violent Behavior 203 (2007).

[52] Kennedy, supra note 3, at 123.

choice crowded everything else out.[53] Indeed, one can understand jurists' preference for analyzing detached ideas about consent over addressing the contours of sexual culture and the details of sexual behaviors. This adherence to the cult of choice, Kennedy maintains, produced "an increased and more punitive reliance on criminal law."[54]

Professor Kennedy does not make entirely clear whether there is any causal connection between autonomy and criminalization. One possibility is that, unlike communal values, "free choice" is highly manipulable and thus provides few guardrails against overcriminalization. Perhaps the autonomy turn simply coincided with the rising criminal law demand due to "sex . . . acquir[ing] a new and heightened cultural significance over the last fifty years or so."[55] Professor Kennedy has some reservations about criminal law, but hers is not a normative anticarceral, criminal-law minimalist, or penal-skeptical stance.[56] Kennedy's issue with the autonomy frame is not that it veils carcerality but that it is empty, detached, obfuscating, and unable to truly capture why certain deceptions, omissions, and information deficits are worse than others. That thin autonomy might enable the state to punish too large (or small) a range of sex-adjacent actions, is just a bug. But where Professor Kennedy arguably sees a bug, I see a feature. Consent was a good, perhaps the best, legal vehicle for expanding rape law to cover the harmful "acquaintance" or "date" sex that proliferated after the sexual revolution and drew feminist ire.

In the latter half of the twentieth century in the U.S., liberal courts and legal scholars increasingly embraced a sexual autonomy rationale that individuals have a right to make sexual and reproductive choices freed from legal strictures based in "morality." The 1962 Model Penal Code exemplified this liberal shift. Its drafters were clear that sex became a crime only when it "harmed" another, not when it offended cultural conventions.[57] Applying this logic, states began to decriminalize fornication, adultery, sodomy, homosexuality, and abortion.[58] Regarding rape, liberals sought to reconceive the crime as physical violence analogous to physical assault and battery—even renaming it as such—rather than the spoliation of chastity and usurpation of marriage. The MPC scaled back the exorbitant penalties of old and graded offenses by the level of force and injury involved, not by the fact of heterosexual penetration or deviance.[59]

The move from morality and marriage to bodily integrity did not necessarily dictate that sexual harm be defined in terms of the victim's consent. In fact, the MPC focused more

[53] Id. at 201.

[54] Id. at 4.

[55] Id. at 201.

[56] Mine, however, is. Aya Gruber, The Feminist War on Crime: The Unexpected Role of Women's Liberation in Mass Incarceration 17 (2020) ("I propose the following as a basic tenet of modern feminist thought: Criminal law is a last, not first, resort").

[57] 1955 MPC TD4, supra note 39, § 207.5 cmt. at 277.

[58] See State ex rel. M.T.S., 609 A.2d 1266, 1275-76 (N.J. 1992) (discussing this name change).

[59] 1955 MPC TD4, supra note 39, § 207.5 cmt. at 280.

on the perpetrator's use of physical force or coercion to induce sex than on the victim's state of mind.[60] At that time, consent often played the role of maintaining the older chastity rules, like resistance, as cases declared that women could still consent to sex in the face of physical force. These courts also adopted a "thin" version of autonomy where the victim's choice, as constructed by the court, trumps everything else. But in this version, sexual choice was not fragile and easily defeated but so resilient as to survive intense coercive pressure.[61] Judges, lawyers, and juries frequently interpreted consent on the background presumption that once a person engages in some intimacy, they must clearly and unambiguously opt out of sex. Feminists like Lynne Henderson critiqued consent as an outdated standard that invited courts and legal actors to scrutinize the victim's behavior and mindset.[62] Catharine MacKinnon called consent "a pathetic standard of equal sex."[63]

But eventually, consent became the primary tool of sexual assault law's expansion and the presumptively enlightened standard for determining criminal liability. Let me briefly sketch how that happened. The sexual revolution was a turning point in sexual culture. Far from giving a "heightened significance" to sex, it provided women the first real chance for sex *not* to be so central to their life's meaning.[64] For some women, the moment meant liberation from the shackles of marriage and chastity, destigmatization of lesbians and sex workers, and the opportunity for all women to refrain from sex altogether or pursue the "zipless fuck"—Erica Jong's term for "pure" sex "free of ulterior motives."[65] Sex-radical feminists of the 1970s believed that state and social repression of female sexuality had always been one of the main sites of female subordination, and welcomed a liberalized sexual space, perhaps too liberalized. Kathy Abrams remarks, "What was foregrounded in the sex radicals' arguments was a surprisingly laissez-faire approach—avoid legal encumbrance, and women may interrogate and re-imagine their sexuality."[66]

In fact, women struggled with the new double bind of free love's casual-sex demands and the chastity norms that yet subjected "slutty" women to social reprobation and material disadvantage.[67] A powerful feminist movement arose in response to the vagaries of the sexual revolution and sought to use the law to ease its burdens on women. Feminists targeted not the chastity system that punished women for liberal sex practices, but sexual liberation itself. This feminist theorizing and discourse left little room for

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[60] Gruber supra note 10, at 795-97.

[61] See, e.g., People v. Warren, 446 N.E.2d 591, 594 (Ill. App. 1983) (despite force, lack of resistance "conveys the impression of consent").

[62] Lynne N. Henderson, Review Essay: What Makes Rape a Crime?, 3 Berkeley Women's L.J. 193, 214 (1987).

[63] Catharine A. MacKinnon, Rape Redefined, 10 Harv. L. & Pol'y Rev. 431, 465 (2016).

[64] Brenda Cossman, The New Sex Wars: Sexual Harm in the #MeToo Era (2021).

[65] Jong, Erica, Fear of Flying 431, 465 (1973).

[66] Kathryn Abrams, Sex Wars Redux: Agency and Coercion in Feminist Legal Theory, 95 Colum. L. Rev. 304, 317-18 (1995).

[67] Wendy Brown, States of Injury: Power and Freedom in Late Modernity 86-87 (1995).

pluralism as it insisted that the male sexuality unleashed by the sexual revolution—and any female sexuality that enabled it—was a threat to all women.[68] Training their initial focus on pornography and prostitution, areas where female participants had always and remained highly stigmatized, feminists prosecuted their agenda alongside and sometimes in tandem with the pro-marriage and morality conservative family values movement.[69]

What ensued was an extremely heated battle between sex-radical and antipornography feminists in the late 1970s and 1980s, known as the "sex wars," the story of which is too long to tell here. The upshot is that the antipornography camp lost their immediate battle against smut, but they won the war for narrative control over women's relationship to sexuality. Sex radicalism faded from view as the official feminist position became that men's dominating and predatory sexuality required the government to create more robust criminal rules dictating the boundaries of sex. Derided as "neo-Victorians" by critics, "dominance feminism," a theory honed by Catherine MacKinnon and others, held that for women, most heterosexual sex is subordination and suffering, not liberation and pleasure.[70] According to dominance feminists, women who did not understand sex this way, for example, non-ruined sex workers and sex-positive lesbians, suffered from "false consciousness."[71] In these feminists' view, women who asserted that commercial or otherwise male-dominant sex was not devastating were either so damaged by their victimization as to be delusional, or worse, they were gender traitors—the "Uncle Toms" of womankind, as MacKinnon called her opponents.[72]

MacKinnon did not at that time articulate a vision of acceptable heterosexual sex or sexual imagery, but other antipornography "cultural" feminists did. Their vision of proper sexuality was strikingly similar to that of the chastity regime, with commitment, pair bonding, and mutual care forming the line between acceptable sex and sex that harmed the individual and every woman. Feminist Sally Gearhart remarked in 1982, "Perhaps it is time to dare to admit that some of the sex-role mythology is in fact true and to insist that the qualities attributed to women (specifically empathy, nurturance and cooperativeness) be affirmed."[73] Activist and poet Robin Morgan further explained that "genital sexuality, objectification, promiscuity, emotional noninvolvement, and coarse invulnerability was the *male style* [whereas] women placed greater trust in love, sensuality, humor, tenderness, commitment."[74] Anti-prostitution activist Kathleen Barry forthrightly embraced a return to

[68] Infra note 70 & accompanying text.

[69] Cossman, supra note 64, at 58-59.

[70] Catharine A. MacKinnon, Toward a Feminist Theory of the State 113 (1989).

[71] Id. at 115.

[72] Catharine A. MacKinnon, Liberalism and the Death of Feminism, in The Sexual Liberals and The Attack on Feminism 12 (Dorchen Leidholdt & Janice G. Raymond eds., 1990).

[73] Alice Echols, The Taming of the Id: Feminist Sexual Politics, 1968-83, in Pleasure and Danger: Exploring Female Sexuality 52 (Carole S. Vance ed., 1984) (quoting Sally Gearhart).

[74] Robin Morgan, Going Too Far 171 (1978).

pre-sexual-revolution culture. Feminists' "new" sex-averse values, she offered, "are really going back to the values women have always attached to sexuality, values that have been robbed from us, distorted and destroyed as we have been colonized through . . . so-called liberation."[75]

This feminist ethic, which defined "male style" sex as assault and continued to link sex to female devastation, greatly influenced the rape reform agenda of the late twentieth century up to today. Gone were the calls to moderate the ancient exorbitant penalties for rape, even as predator panic made the consequences of conviction ever more draconian.[76] The project was to expand the definition of rape to account for issues raised by the increasing participation in casual sex. Influential rape reform advocate Susan Estrich explained the effort as using "the legitimacy and power of the [criminal] law to reenforce what is best, not what is worst, in our changing sexual mores."[77]

As feminists agitated for this expansion, the war on crime and the associated crime victims' rights movement popularized the idea that victims, by virtue of having experienced crime, develop a unique and marginalized identity, which can only be respected by processes that produce swift and summary convictions and laws that carry severe punishments.[78] Raped and ruined white women featured heavily in the racialized tough-on-crime and victims'-rights narratives that blueprinted American mass incarceration. But because rape had long been a worst-of-worst crime, feminists faced an uphill battle convincing lawmakers and society that sexual assault by acquaintances, then considered dates gone wrong, were "real rapes."[79] They did so by arguing that just as violent stranger rapes devastated women, nonviolent acquaintance rapes also ruined reputations and caused potentially life-long shame and trauma. This is not to deny that sex ranging from too casual to violently compelled can take a real, and sometimes life-altering, emotional toll. But the powerful and long-lasting cultural association of sex and female ruination complicates the mainstream account of trauma and indicates that the trauma frame itself contributes to the shame that produces emotional suffering from date rape.[80]

Feminist rape law reform was unidirectional, pushing to criminalize more sex-related conduct as rape, including fraud, extortion, and miscommunication. Sometimes courts and legislatures effected these changes by broadening "force" to include "moral, psychological, or intellectual force."[81] Still, cases surfaced where courts narrowly interpreted force to exclude some pretty egregious situations involving extortion, implied threats,

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[75] Kathleen Barry, Female Sexual Slavery 247 (1979).

[76] Wayne A. Logan, Challenging the Punitiveness of "New-Generation" SORN Laws, 21 New Crim. L. Rev. 426, 454-57 (2018).

[77] Susan Estrich, Rape, 95 Yale L.J. 1087, 1162 (1986).

[78] Markus Dirk Dubber, Victims in the War on Crime: The Use and Abuse of Victims' Rights 192-202 (2002).

[79] See generally Susan Estrich, Real Rape: How the Legal System Victimizes Women Who Say No (1987).

[80] Joanna Bourke, Sexual Violence, Bodily Pain, and Trauma: A History, 29 Theory Cult. Soc'y 25 (2012).

[81] Commonwealth v. Rhodes, 510 A.2d 1217, 1226 (Pa. 1986).

bodily restraint, sudden penetration, and highly coercive circumstances.[82] Feminist reformers accordingly came to see the force standard as irredeemable and insisted that sexual-assault liability required the defendants to do no more than engage in sexual activity. Force became the apogee of the "archaic" patriarchal rape system and consent represented enlightened progress.[83] Force was then transformed into various conditions that undermine choice. Of course, not every expansionist effort was successful, and courts and legislatures frequently declined to interpret consent to require negotiation, verbal communication, freedom from deception, and sobriety. But importantly, that mid-century liberal resistance toward heavy-handed government intervention into sexual behaviors all but disappeared.

As autonomy became the lever of producing more expansive criminal laws, its substantive content adapted accordingly. Valid consent could require the performance of specific communicative practices before sex.[84] It could require sobriety.[85] It could require the absence of power imbalances.[86] In the "campus rape crisis" of the 2010s, date rape once again came to the forefront of scholarly, legal, and public consciousness. Antirape activists and college administrators construed women's autonomy as so precarious that it simply could not coexist alongside repeated asking, drunkenness, information deficits, uncertainty, or even lack of enthusiasm.[87] Adopting the traditional concept of women as "gatekeepers," administrators counseled students to presume that women are—or ought to be—in a perpetual state of sex-aversion, such that desired sex is the rare condition to be verified by specific communicative rituals. In this effort to expand campus-rape discipline, proponents did not paint an altogether rosy picture of the women to be protected. Administrators sold the feminist program to young men by way of glossy posters depicting sloppy-drunk and passed out girls and in-control boys, with the message, "Just Because She's Drunk, Doesn't Mean She's Down To F-ck."[88] A 2013 Peabody-award winning viral video portrayed a young sober male college student pointing to a sprawled-out passed-out female college student and stating, "Hey bros . . . [g]uess what I'm going to do to her?" The video ends with the sober boy covering the girl with a blanket, leaving a glass of water by her side, and proclaiming, "Real men treat women with respect."[89]

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[82] See, e.g., Commonwealth v. Mlinarich, 498 A.2d 395, 396 (Pa. Super. Ct. 1985), aff'd, 542 A.2d 1335 (Pa. 1988); State v. Thompson, 792 P.2d 1103 (Mont. 1990) (no force where principal threatened that 17-year-old could not graduate unless she had sex with him); Commonwealth v. Berkowitz, 609 A.2d 1338, 1347 (Pa. Super. Ct. 1992) (per curiam), aff'd in part, 641 A.2d 1161 (Pa. 1994).

[83] Deborah Tuerkheimer, Rape On and Off Campus, 65 Emory L.J. 1, 1 (2015); Estrich, supra note 79, at 34-36.

[84] See, e.g., State ex rel. M.T.S., 609 A.2d 1266 (N.J. 1992) (requiring affirmative expression of consent).

[85] N.Y. S.B. 6679, 2019-2020 Leg., Reg. Sess. (N.Y. 2019) (making "voluntary intoxication" incapacity).

[86] Mont. Code Ann. § 45-5-501(1)(b)(ix)(B) (prohibiting sex between a psychotherapy patient and anyone who works or volunteers at the healthcare facility).

[87] Jacob Gersen & Jeannie Suk, The Sex Bureaucracy, 104 Cal. L. Rev. 881, 925-28 (2016).

[88] The Truth About Nursing (Aug. 29, 2012) (https://perma.cc/GC7M-N28A).

[89] Samantha Stendal, A Needed Response, YouTube (Mar. 22, 2013) (https://perma.cc/EU72-6K6C).

V. Collective Interests

In Professor Kennedy's account and mine, marriage provided formal grounds and informal motivation for legal decisions about sex until the late twentieth century. At that time, an autonomy regime took over and defined sexual harm as choice-impairment. Kennedy hints that faith in legal liberalism may have underwritten this turn, but I tell a slightly more intentional story where the modern turn to consent and criminalization were driven in part by a feminism-moralist value system yet tethered to older chastity values.[90] Nevertheless, we both agree that "[w]hen individual choice is the main, or even sole, interest underpinning the law . . . 'other' considerations can appear subservient or else disappear from view altogether."[91] And I endorse Kennedy's effort "to find other substantive collective interests that can anchor this area of law, but which fit contemporary sensibilities better than the now-outdated notion of marriage that formerly prevailed."[92] My question is whether the notion of sex as female ruin, now in its new feminist bottle, is a "contemporary sensibility" rather than an "outdated" relic.

I have argued that there is a dominant cultural view, shared by those with conflicting political ideologies, that for women, sex is a big deal, brings serious physical and emotional consequences, and can impact identity in an instant. Given the primacy and longevity of this narrative, I am not sure that our instincts about how women must feel about certain sexual events track how women do feel. Should the analyst just presume the grand narrative of women's negative relationship to sex to be true, as MacKinnon did? Perhaps women are in fact more into the male style than we think.[93] Or, even if they are not, perhaps on average, they regard some of the targeted sexual behaviors as wrong but not criminal and would prefer alternate means of addressing them.[94] But those engaged in sex lawmaking tend to reject a fact that "empirical sex researchers repeatedly encounter": "for many people sex is not very important at all."[95]

Yet I have little doubt that many women do consider sexual encounters important and seek a certain level of intimacy with sexual partners. The same cannot be said of many

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[90] Kennedy, supra note 3, at 188-89.

[91] Id. at 202.

[92] Id. at 204.

[93] Some studies indicate that in recent years, male and female emerging adults have begun to converge in their attitudes toward and practices of casual sex. See, e.g., Rita Luz et al., Multiple Casual Sex Scripts: Shared Beliefs about Behavior among Portuguese Emerging Adults, 35 Int'l J. Sexual Health 105 (2023); R.M. Martino et al., The Role of Feminism and Gender in Endorsement of Hookup Culture among Emerging Adults, 53 Arch. Sex. Behav. 1621 (2024). Nevertheless, gender predicts the emotional outcomes of hook-ups, with women feeling ashamed and worried they might be judged and men feeling happy and buoyed by the experience. B.E. McKeen et al., Was It Good for You? Gender Differences in Motives and Emotional Outcomes Following Casual Sex, 23 Arch. Sex. Behav. 1417 (2022).

[94] Koss, Mary P., The RESTORE Program of Restorative Justice for Sex Crimes: Vision, Process, and Outcomes, 29 J. Interpers. Violence 1623 (2014); Hadar Dancig-Rosenberg et al., Post or Prosecute? Facebook, the Criminal Justice System, and Sexual Assault Victims' Needs, 2023 U. Ill. L. Rev. 1225.

[95] Juliet Richters, Bodies, Pleasure and Displeasure, 11 Culture, Health & Sexuality 225 (2009).

men. Thus, the question becomes: Who gets to "generally speak" for everyone? And here, there are only two choices because I have distinguished sexual views only by gender and not by other categories like race, class, age, and religious affiliation. In the contested area of sexuality, it may be that settling on *any* general value is too much "order" to our "sexually pluralistic society."[96] In any case, I am sympathetic to the stance that law for too long has been made in man's image and should begin to reflect the woman's standpoint.[97] However, the challenge for every theorist connecting "oughts" to "is's" lies in determining exactly how agnostic to be about *why* people have the views they do. If, as I argue, women's sex-preoccupied stance is a "partial and perverse understanding" conditioned by chastity ideals, to use Sarah Harding's concept, elevating it would hardly help dismantle the law's patriarchy.[98]

Nor do we fare better with adopting the mainstream heterosexual male stance that sex is a nearly unqualified good to be pursued as a badge of masculinity. Just as sexist chastity mores continue to shape women's relationship to sex, sexism and homophobia continue to shape men's. The type of sex that really upsets men is sex that calls into question their masculinity and gender identity.[99] So for example, if the average straight man got drunk and hooked up with a man, he would wake up feeling much worse than if he had slept with a woman.[100] Perhaps the same could not be said for women. Given that women are more supportive of LGBT issues than men and thirty-one percent of Gen Z women identify as LGBT (as opposed to 12 percent of Gen Z men), there is reason to believe that anxiety of heterosexual identity may be distinctly gendered.[101]

Inducing Intimacy recounts recent prosecutions in the UK that involved trans men who deceived cis women into romantic and eventually sexual relationships. The female victims were, in fact, emotionally broken by the gender deception.[102] The curious fact that the gender deception cases all involved female victims makes sense given that men are

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[96] But see Kennedy, supra note 3, at 213-14 (arguing that shared values can further pluralism).

[97] See, e.g., Ann C. Scales, The Emergence of Feminist Jurisprudence, 95 Yale L.J. 1373 (1986); see generally Lorraine Code, What Can She Know? Feminist Theory and the Construction of Knowledge (1991).

[98] Sandra Harding, The Science Question in Feminism 25-26 (1986).

[99] Supra note 51 & accompanying text.

[100] Alison Parkes, Vicki Strange, Daniel Wight, Chris Bonell, Andrew Copas, Marion Henderson, Katie Buston, Judith Stephenson, Anne Johnson, Elizabeth Allen & Graham Hart, Comparison of Teenagers' Early Same-Sex and Heterosexual Behavior: UK Data From the SHARE and RIPPLE Studies, 48 J. Adolescent Health 27 (2011) ("Boys were more likely to report . . . regret . . . in relation to first same-sex genital contact than first heterosexual intercourse"); see generally Richard R. Troiden, The Formation of Homosexual Identities (1988).

[101] Jeffrey M. Jones, LGBTQ+ Identification in U.S. Rises to 9.3%, Gallup (Feb. 20, 2025) (https://perma.cc/6GHC-LWCR).

[102] Kennedy, supra note 3, at 152, 177-79 (analyzing R v. McNally, 2013 Q.B. 593 (Eng. & Wales C.A.) & R (Monica) v. Director of Public Prosecutions, 2019 Q.B. 1019 (Eng. & Wales Div. Ct.)).

unlikely to report sexual victimization or even understand themselves as victims.[103] Still, those gender-identity cases involved complex layers of facts beyond just two adults having a sexual encounter without one disclosing gender assigned at birth. Time does not permit me to get into those facts, but I will say they do not necessarily indicate a gender-neutral consensus that any straight person would be horrified that they had unintentional or impulsive sex that was in some manner "gay."[104] And I would guess that, if presented with a scenario in which an LGBT person unwittingly or impulsively had sex with a straight or cis person, people would hardly see the person as a victim. Some might even celebrate that they were returning to "natural" practices.

All that said, I agree with Professor Kennedy's inclination to take society's pulse on which sex-adjacent behaviors are unacceptable, how bad they are, and whether they call for state intervention, even as we understand that social views may be shaped by various biases. I support her quest to seek gender-neutral consensus values.[105] But at the current time, attitudes toward and values surrounding sex are deeply gendered, as well as influenced by a number of other factors. As a result, it takes a lot of work to push away the layers of situated meaning to find the kernel of a general value. Nevertheless, looking at an issue from multiple perspectives and engaging in gender switching can help zero in on what values are at issue and whether men's and women's ideas overlap in some areas.[106]

Take, for example, nonconsensual condom removal. The thin autonomy analysis is that surreptitious and deceptive removal violates a presumptive condition of the sexual agreement such that ensuing sex is nonconsensual. For reasons so eloquently laid out in *Inducing Intimacy*, this still leaves the question, "But why is that worse than any other sexual deception?"[107] Professor Kennedy argues that contraceptive deceptions appear particularly immoral because, among other things, they deny people control over becoming a parent.[108] That certainly favors legal intervention in situations where the defendant tries to make the unwilling victim a parent—for example, a wife who lies and gets pregnant hoping her

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[103] See cases cited in note 102 supra; see also Helen Pidd, Woman Who Posed as Man to Dupe Friend into Sex Is Jailed After Retrial, The Guardian (July 20, 2017) (https://perma.cc/J3EJ-4G5D); Helen Pidd, Woman Who Posed as Boy to Sexually Assault Up to 50 Girls Is Jailed, The Guardian (Jan. 10, 2020) (https://perma.cc/9R6F-CAQP); Mark Brown & Helen Pidd, Woman Accused of Posing as Male Found Guilty of Sexual Assault by Kissing, The Guardian (June 14, 2023) (https://perma.cc/4VRD-24ZE); Alex Sharpe, European Human Rights Law and the Legality of Sex Offence Prosecutions Based on Deception as to Gender History, 44 Legal Stud. 631 (2024).

[104] Cf. Kennedy, supra note 3, at 216 ("Deception as to gender can also be viewed as an example of identity nonrecognition because of the way that the gender of one's sexual partner is related to one's sexual identity (and possibly gender identity).").

[105] See id.

[106] See Scales, supra note 97, at 1378-79; Katharine T. Bartlett, Feminist Legal Methods, 103 Harv. L. Rev. 829, 854-55 (1990); see also Janet Halley, Split Decisions: How and Why to Take a Break from Feminism (2006).

[107] Kennedy, supra note 3, at 189-91.

[108] Id. at 216-17.

husband will come around or a fake abortion provider who misleads a pregnant woman into foregoing abortion. It is not as clear that identity nonrecognition occurs from deceptions that are not intended to achieve impregnation but which *might* increase its risk—a stealthing victim after all could be on birth control.[109] Moreover, if contraceptive deception is identity nonrecognition because it ups the risk of unwanted parenthood, it stands to reason that using lies to procure sex in the first place is also identity nonrecognition because it ups the parenthood risk from a non-sex zero.

In any case, the stealthing laws would have looked quite different had they been based on the importance of determining one's parental status. Female birth control sabotage, more than stealthing, deprives the victim of control over parenthood. If a man engages in stealthing and the woman becomes pregnant, she still has the means—emergency contraception, medical and surgical abortion—to control prospective parenthood, even in our world of increasing state regulation of the female body.[110] If a woman deceives a man about birth control and becomes pregnant, he thereafter has no legal or practical ability to control whether he becomes a parent. But few advocates push to punish women for forgetting their birth control or even surreptitiously trying to get pregnant.[111] At least in the legal sphere, the fight has been between feminist antirape advocates and the gleeful online trolls reveling in getting the best of women and insisting it is men's prerogative to spread their seed.

Public health literature has long discussed condom-used failures, including nonconsensual condom removal, and how to address them. However, the issue rose to public prominence in the late-2010s as American millennial feminists began to spotlight the harms of many forms of bad male sexual behavior that, in their view, was not taken seriously enough by legal and disciplinary authorities. These impassioned feminists developed their activist program during the "campus rape crisis," which some commentators characterized as heralding a new sex war. Young feminists revived themes of sex as male domination that required strict external control, while sex-radicals and queer theorists, mostly the older ones, pushed back.[112] In 2017, campus activist Alexandra Brodsky, whom the press has referred

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[109] Lisa M. Diamond, Sexual Fluidity: Understanding Women's Love and Desire (2008); Arielle Kuperberg & Alicia M. Walker, Heterosexual College Students Who Hookup with Same-Sex Partners, 47 Arch. Sex. Behav. 1387 (2018).

[110] Studies also link the availability of emergency contraception to better mental health outcomes. S.M. Harvey, Women's Experience and Satisfaction with Emergency Contraception, 31 Fam. Plan. Persp. 237 (1999).

[111] Alexandra Brodsky, Rape Adjacent: Imagining Legal Responses to Nonconsensual Condom Removal, 32 Colum. J. Gender & L. 183, 193 (2017) (calling this an "undesirable outcome"). See also Bethany Wakeman & Rachel Worthington, Evaluating Perceptions of Sexual Coercion: The Role of Personality, Gender, and Motive in Birth Control Sabotage, 28 J. Sexual Aggression 296 (2022) (participants were "significantly more likely to perceive [birth control sabotage] as a [criminal offense] when the perpetrator was male compared to female").

[112] Emily Bazelon, The Return of the Sex Wars, N.Y. Times (Sept. 13, 2015) (https://archive.ph/mOdfw).

to as "the gifted and thoughtful heir to Catharine MacKinnon,"[113] penned an influential 2017 article conceiving of stealthing as a sexual assault in the absence of affirmative consent to condom removal.[114] Despite the fact that this logic conceives of stealthing as rape, a worst-of-the-worst crime, the article calls for the creation of a civil, not criminal, cause of action—Brodsky is a critic of the American penal state.[115]

In theory, even without a new cause of action, the women who became pregnant or developed a disease had remedies in tort and family law. Still, a civil law to prohibit nonconsensual condom removal—defined in California as removal without "verbal consent"—would apply regardless of pregnancy or disease and could result in significant damages.[116] As such, these laws portended to serve deterrence and punitive functions, which, as Professor Kennedy traces, tort laws on sexual harm traditionally have served. For example, one might think that Washington's new anti-stealthing law, which specifies a damage floor of $5000,[117] might operate like MacKinnon's short-lived anti-pornography ordinance, which she hoped would shut down the industry. The ordinance widely granted any woman the right to sue people involved in producing sexual images that were "demeaning" to women.[118]

However, Brodsky's proposal and the current anti-stealthing laws modeled after it require a first-party plaintiff with proof that the condom removal was not accidental, so its general deterrent potential is not obvious. The populations most vulnerable to stealthing and other forms of sexual wrongdoing, like sex workers, marginalized women, and LGBT people of color, practically cannot sue.[119] Who would take their case? A college student, professional, or other "good" plaintiff stealthed by a wealthy man—or a victim with independent means—*might* find a lawyer. It is thus unsurprising that, in the five years since California passed its law, nobody has brought suit; nor has anyone under the other laws.[120] Perhaps realizing this, the trend in other "Western" countries has been to criminalize

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[113] Irin Carmon, How Do We Investigate Sexual Offenses Fairly?, The Cut (Oct. 14, 2021) (https://perma.cc/BA43-ZJCK).

[114] Brodsky, supra note 111, at 193.

[115] Id. at 126.

[116] Cal. Assemb. Bill No. 453 (2021) (enacting Cal. Civ. Code § 1708.5)

[117] Wash. H.B. 1958 (2024) (enacting Wash. Rev. Code ch. 7.113).

[118] Minneapolis, Minn., Code of Ordinances tit. 7, ch. 139 (1982); see also Paul Brest & Ann Vandenberg, Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis, 39 Stan. L. Rev. 607 (1987) (quoting MacKinnon).

[119] Kelly Cue Davis et al., A Scoping Review of Nonconsensual Condom Removal ("Stealthing"): Research, Policy, and Practice Implications, 25 Trauma, Violence & Abuse 215 (2024) ("Potential risk factors for NCCR victimization included: identifying as a racial or sexual minority; a history of prior sexual victimization; having sex in uncommitted relationships and having more sexual partners; and more frequent substance use.").

[120] This is what I can tell from running searches in Westlaw, Lexis, and on ChatGPT-5. I found one case where a college student disciplined for nonconsensual condom removal sued his university and lost. Doe v. Clark University, 624 F. Supp. 3d 1 (D. Mass. 2022).

stealthing as sexual assault itself.[121] Such laws portend to produce idiosyncratic convictions (i.e., where the victim is able and willing to go to the police and the man texted an apology) and enforcement within typically policed, marginalized populations.[122] Meanwhile, it is easy for officials to ignore more costly prevention, treatment, and material aid programs that many people reject as "welfare" in any case, because criminal law has sent its message and solved the problem. Of course, this is an issue with criminalization in general, but sex exceptionalism makes it particularly present in sex regulation.

But, putting aside larger issues about criminalization, one might fairly claim that as long as we have criminal law, stealthing should be in it. Stealthers engage in intentional deception, frequently *for the purpose of* subordinating and harming victims. They deliberately, or at least recklessly, impose risks on the individual and society, although whether sex risks are worse than other risks is another question. Brodsky, however, did not focus on pushing back on manosphere ideology or intervening with at-risk populations, and in fact, she downplayed the role of risk in assessing stealthing's wrongfulness.[123] Like their second wave antirape forbears, anti-stealthing activists focused on the sex itself. The problem was "skin to skin" contact. Sex without a condom, in this view, is a higher step on the gravity pyramid than sex with one, requiring its own preconditions like negotiation and intimacy to avoid being deeply violating.[124] To be sure, it was a smart move from a legal perspective, as it transformed what might be considered a fraud in the inducement (lying about a condition to produce agreement) into a fraud in factum (doing something else altogether).

Research reports that men and women now widely—and surprisingly, equally—acknowledge stealthing as criminal sexual assault, which very well may have been due to the consciousness-raising efforts of millennial feminists.[125] The fact that they brought attention to the problem may have, standing alone, reduced stealthing and reduced women's self-

[121] E.g., R. v. Kirkpatrick, 2022 SCC 33 (Can.) (sexual assault); Assange v. Swedish Prosecution Auth., [2011] EWHC 2849 (Admin) (UK) (rape under Sexual Offences Act 2003 § 74); Crimes (Stealthing) Amendment Act 2021 (Austl. Cap. Terr.) (rape under Crimes Act 1900 (ACT) s. 67); Criminal Law (Coercive Control and Affirmative Consent) and Other Legislation Amendment Act 2024 (Qld.) (amending Criminal Code 1899 (Qld.) ch. 32 to criminalize stealthing as rape); Amtsgericht Berlin-Tiergarten, Judgment of July 2018 ("Stealthing Fall") (sexual assault under Strafgesetzbuch § 177) (Ger.); Tribunal Supremo, Sentencia STS No. 344/2023 (Spain) (sexual assault/rape under Código Penal arts. 178-179).

[122] Diane Taylor, London Man Jailed for "Stealthing" After Removing Condom Without Consent, Guardian (June 13, 2024) (https://perma.cc/6A7Q-VARN). See also Federal Bureau of Investigation, Crime in the United States, 2019, tbl. 43 (2019) (https://perma.cc/P8ZL-AA48) (Black men disproportionately arrested for sexual assault compared to population); Amelia Roskin-Frazee, The Effect of Race and Sex on Contact Sex Crime Arrest Odds, 18 Socio. Compass e70015 (2024). (Black men disproportionately arrested and prosecuted for sexual contact compared to population and self-reported incidents).

[123] Davis et al., supra note 119, at 226 (suggesting "targeted risk reduction" and "alcohol and drug use-focused interventions").

[124] Brodsky, supra note 111, at 195-96.

[125] Wakeman & Worthington, supra note 111, at 296-97.

blame over the birth control failure. These are very good outcomes.[126] But feminists did not just raise awareness; they also *constructed* the harm of stealthing in a manner that was not so empowering to women or apt to produce non-punitive interventions. The point was to conceptualize skin-contact sex as so different from barriered sex that it requires specific affirmative consent.[127] It is thus worth asking whether, all other things aside, people do consider skin-contact sex as fundamentally different from condom-barriered sex. Again, birth control failures occur regardless of stealthing. Condoms break and fall off; women forget to take pills; and people get caught up in the heat of the moment. Studies show that these failures do produce emotional stress from fear of pregnancy/disease and *shame* for not being careful about sex.[128] For sure, a large contingent of government officials probably applaud that people fear and feel shame about "unprotected" sex and are thus deterred from it. Still, as public health researchers well know, instilling fear and shame is a costly and potentially less effective way to reduce risk than changing structural conditions.[129]

But the feminist effort to criminalize stealthing was not primarily to promote safe sex, but to recognize the gravity of unauthorized skin contact, regardless of outcome. So we are left to wonder exactly what makes skin-contact sex wholly different in kind from barriered sex. So we are left to wonder exactly what makes skin-contact sex different. Perhaps the logic is that because skin-contact sex is physically closer (and potentially more pleasurable) than sex with a condom, it is an inherently bigger deal: more transcendent under the right conditions, and more devastating under the wrong ones. Maybe the claim boils down to "everyone knows" that skin-contact is different. This takes as a given the gendered chastity-based and moral epidemiological directive that women should save skin-contact sex for serious relationships.[130] Activists rarely mention men feeling violated by women tricking or pressuring them into condomless sex, even though it risks disease and unwanted parenthood.[131] The presumption, perhaps a correct one, is that prioritizing the physical sensation of skin-to-skin contact is the "male style," whereas women value, not

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[126] This exemption from blame may not distribute evenly across race. See Jennifer Katz & Miranda McKinney, White Female Undergraduates' Perceptions of Black Pregnant Adolescents: Does Control over Pregnancy Matter?, 3 Stigma & Health 69 (2018) (White female college student respondents viewing Black pregnant stealthing victim, LaToya, as more responsible for pregnancy than victim of unspecified race, Lauren).

[127] Brodsky, supra note 111, at 192-95. The research reveals that people perceive the main harm of stealthing the disrespect and breach of trust more so than risk. Davis et al., supra note 119.

[128] Brodsky, supra note 111, at 192-95; Davis et al., supra note 119.

[129] Id. (attributing birth control failures to structural and economic barriers and inconvenience).

[130] Roger Davidson, Reservoirs of Infection: Gender, Morality and the Social Epidemiology of VD in Twentieth-Century Scotland, in Sex, State and Society: Comparative Perspectives on the History of Sexuality 25 (2000); see also Amy Fairchield, James Colgrove & Ronald Bayer, The Myth of Exceptionalism: The History of Venereal Disease Reporting in the Twentieth Century, 31 J. L., Medicine & Ethics 624 (2003); Paula A. Treichler, AIDS, Homophobia, and Biomedical Discourse: An Epidemic of Signification, in AIDS: Cultural Analysis/Cultural Activism 31 (1987).

[131] That is despite the fact that women do engage in deliberate birth control sabotage and pressure not to wear condoms, although rare. Davis et al., supra note 119.

just risk reduction, but having a barrier itself. One could, in fact, imagine a scenario where a woman said, "I can't believe he broke up with me after we had sex *without a condom*." It is difficult to imagine the lack of condom making a difference to the jilted man. In a recent discussion with some of my female students on the subject, one remarked, "sex without a condom is just gross, but I'm not sure why."

It is possible, if not probable, that before the stealthing discussion, people already understood skin-contact sex as, to use the American baseball analogy, a new "base" past home plate to be desired by men and resisted by women. Still, the public stealthing discussion may have instilled in women a heightened sense that one should rarely ever allow themselves to go to that base. There is evidence that public discourse often portrays stealthing as graver than it is perceived to be by those who have actually experienced it.[132] Other highly publicized sex discussions, like those regarding AIDS and the MeToo movement, changed attitudes toward sex and even preceded sex recessions.[133] Of course, many feminists might see the current skepticism toward risky and ruinous condomless sex a victory.[134] As U.S. conservative groups continue to rack up wins in the quest to eliminate reproductive freedom, it is all too tempting for feminists to push for more state control over wrongful sex that risks putting pregnant women at the mercy of the moralistic state. This is, however, a dangerous move. A driving motivation of the anti-abortion, anti-contraception movements is to bring back a culture where sex is saved for marriage, and fear of and shame over nonmarital, nonmonogamous sex once again rule women's lives.

One would think that progressive feminists and autonomy-loving liberals would concentrate their efforts on fighting state regulation of female reproduction, rather than trying to reduce women's exposure to pregnancy one jailed stealther at a time. But the second-wave preoccupation with male-dominant sex has always had an anti-reproductive-freedom bent. MacKinnon remarked:

> So long as women do not control access to their sexuality, [abortion] facilitates women's heterosexual availability. . . . [S]exual liberation in this sense does not so much free women sexually as it frees male sexual aggression. The availability of abortion removes the one real consequence men could not easily ignore, the one remaining legitimated reason that women have had for refusing sex besides the headache.[135]

Thirty-five years later, in 2023, journalist and "Reactionary Feminist" blogger Mary Harrington adopted a strikingly similar stance. Birth control, she said, "is all to the purpose

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[132] Rosie Latimer et al., Non-Consensual Condom Removal, Reported by Patients at a Sexual Health Clinic in Melbourne, Australia, 14 PLOS ONE e0209779 (2018) (people who had experienced stealthing less likely to describe it as an assault, compared with people who had not experienced stealthing).

[133] Treichler, supra note 130 (explaining that AIDS discourse established normative ideals of safe sex); Peter Ueda et al., Trends in Frequency of Sexual Activity and Number of Sexual Partners Among Adults Aged 18 to 44 Years in the United States, 2000-2018, 3 JAMA Network Open e203833 (2020).

[134] Angela Franks, #MeToo Shows the Dangers of "End-Less" Sex: "Humanae Vitae" Shows the Way Forward, America Mag. (Apr. 17, 2018) (https://perma.cc/26WX-LCJ7) ("without an orientation to procreation, sex coasts into use").

[135] MacKinnon, supra note 70, at 190.

of rending a woman receptive to what is for the most part loveless and extremely degrading sexual access." She added, "A good place to start would be a feminist movement against the pill and for rewilding sex, returning the danger to sex, returning the intimacy, and really the consequentiality to sex."[136] And thus in a head-spinning twist, the feminist anti-stealthing logic that sex is naturally subordinating and dangerous overlaps with an abstinence logic that is, in the end, against contraception.

There is no denying that stealthing is bad behavior that harms women, and we are right to wrestle with how to address it. I agree with Professor Kennedy that serious and harmful sexual fraud should not be automatically outside of the law. If the manosphere produces, publicizes, and grossly boasts about a particular fraud script for conning women into sex, many will be inclined to propose a criminal law to address it. To be sure, law could play a role in stopping that con from proliferating. But the default does not have to be, and really should not be, criminal rape law. The problem as I see it, is that old and new mores have invested sex with so much gravity that recognizing sexual harm means declaring the person who imposes it a worst-of-the-worst rapist. In turn, legal actors and courts focus on drawing a strict all-or-nothing line between the sex-adjacent behaviors like certain deceptions that are bad enough to be called rape and those that are not. The latter then become legal nothings. Sex-exceptionalism leaves little room not just for scalar consent but for *anything* to be scalar. I hope that facing it head on will open new "horizons of meaning" for sex crime law and theory.[137]

VI. Conclusion

Inducing Intimacy is a necessary intervention in the discussion about sexual deception. Professor Kennedy's observation that the culturally embedded marital values that once ordered the law of deceptive sex gave way to a thin concept of autonomy, far removed from values, is a critical historical insight that often goes overlooked in discussions about wrongful sex. My contribution has been to wind around that story the persistent gendered conceptions of women's relationship to sex that continue to influence culture and law. Chastity ideals predated marriage, persisted after marriage's decline in legal influence, contributed to the late-twentieth-century theorists' and lawmakers' embrace of choice, and still pose a threat to women's otherwise increasing ability to cast off the shame of both sexual assault and nonnormative sex. Recognizing the social phenomenon of sex exceptionalism adds another layer to Professor Kennedy's already rich analysis of how the law has treated and treats deceptive sex—and how it should.

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[136] Heritage Foundation (@Heritage), "It seems to me that a good place to start would be a feminist movement against the pill, & for... returning the consequentiality to sex," Twitter (May 27, 2023) (https://perma.cc/7S3D-VUPF).

[137] Kennedy, supra note 3, at 214.