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Reproductive Crimes

Hayden Golemon

REPRODUCTIVE CRIMES

Hayden Golemon*

For centuries, American criminal law has operated with little to no reference to reproductive rights—a person's right to decide if, when, how, and with whom to reproduce. Criminal law today only recognizes the violation of this right in one circumstance: during the sexual assault of a woman that results in a pregnancy. This lack of sensitivity to reproductive rights yields unjust results between cases of sexual assault as well as in situations where only reproductive (but not sexual) rights are violated, such as withholding birth control after consensual sex. By implementing statutes that justly account for the respective burdens of forced reproduction, states can provide more justice to victims of reproductive coercion and sexual assault. Part I of this Comment provides background on the types, ubiquity, and effects of reproductive autonomy and reproductive coercion in America. Part II examines to what extent the scope of sexual assault laws covers reproductive rights and to what extent reproductive freedoms are absent in criminal law. Part III draws on America's legal history to explain how the scant reproductive rights present in criminal law came to be as well as their absence elsewhere. Part IV proposes the existence of standalone reproductive crimes and examines their potential application to forms of reproductive coercion, sexual assault, and questions of sexual/reproductive consent that states have struggled to answer.

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INTRODUCTION

This is a paper about violence against vulnerable populations. It is no exaggeration to say that women, transgender individuals, and people of color have always been and continue to be the disproportionate victims of gender-based sexual and reproductive violence.[1] Solving this epidemic of violence should be the topic of every state legislature in America.[2] In this Comment, I argue that states should protect reproductive rights by criminalizing reproductive violence and reproductive coercion. Reproductive rights are the rights of a person to have complete autonomy over if, when, how, and with whom to reproduce.[3] To protect this right, states should abandon the sparse patchwork of reproductive autonomy protections currently found in sexual assault laws in favor of comprehensively criminalizing acts that compromise an individual's reproductive autonomy. By protecting reproductive autonomy, states can (1) provide prosecutors another tool to address sexual violence committed by men against women, (2) account for the disparate reproductive harms involved in different types of sexual assaults, and (3) account for the wide range of reproductive violence outside of sexual assaults.

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[1] *Victims of Sexual Violence: Statistics*, RAPE, ABUSE & INCEST NAT'L NETWORK, https://www.rainn.org/statistics/victims-sexual-violence [https://perma.cc/A6PL-TAMQ]; Karen Trister Grace & Jocelyn C. Anderson, *Reproductive Coercion: A Systematic Review*, 19 TRAUMA, VIOLENCE & ABUSE 371 (2018); OFF. FOR VICTIMS OF CRIME, *Sexual Assault in the Transgender Community*, OFF. OF JUST. PROGRAMS (June 2014), https://ovc.ojp.gov/sites/g/files/xyckuh226/files/pubs/forge/sexual_numbers.html [https://perma.cc/AFZ3-2SEZ].

[2] Membership in state legislatures is about one-third female. CTR. FOR AM. WOMEN & POL., Number and Percentage of Women in State Legislatures, 1980-2022 (graph), *in Women in State Legislatures 2022*, RUTGERS, https://cawp.rutgers.edu/facts/levels-office/state-legislature/women-state-legislatures-2022 [https://perma.cc/NE2M-LRSL].

[3] *See What is Reproductive Justice?*, IF/WHEN/HOW, https://www.ifwhenhow.org/about/what-is-rj/ [https://perma.cc/4SFZ-TJQH].

American criminal law currently places little to no value on protecting the reproductive rights of Americans. Consequently, the social classes that suffer most from the different forms of reproductive coercion—women, people of color, and transgender individuals[4]—do not receive equal justice for crimes that violate their right to reproductive autonomy. For example, sexual violence is often perpetrated in a manner that violates reproductive autonomy, i.e., by men against female victims.[5] Of course, some instances of sexual violence do not carry risks of pregnancy or fatherhood, i.e., a male-on-male assault, and thus no violation of reproductive autonomy occurs. It follows that these instances of sexual violence should not be punished as severely as sexual violence that also violates the victim's right to reproductive autonomy. One way of differentiating between sexual assaults that do or do not violate reproductive rights would be to implement gradations of sexual assault crimes, with sexual assaults that violate reproductive rights being subjected to elevated criminal legal responses. However, grading sexual assaults based on reproductive capacity would not be a complete solution, for this would still not encompass actions that violate reproductive rights, but not sexual rights.

For example, imagine a girlfriend breaks up with her boyfriend, and in the multi-day process of moving out, the ex-boyfriend tampers with his ex-girlfriend's contraceptive pills, rendering them ineffective. The ex-girlfriend proceeds to engage in consensual—unknowingly unprotected—sexual intercourse with another man. Although the intercourse with the third-party man was consensual, the ex-girlfriend has been denied her right to reproductive autonomy. In other words, she has been denied her right to choose if, when, how, and with whom to reproduce. However, the absence of reproductive rights in criminal law means this victim has no recourse for this violation of her reproductive autonomy.

This example underscores the need to separate reproductive crimes from sexual crimes. The scope of sexual assault laws should be limited to the extent to which the nature of a crime is sexual (a natural interpretation of the language). Reproductive rights deserve similar treatment: a suite of laws suited to provide justice to the victims of reproductive coercion and violence, a broad category that varies highly in gravity and type. Part I of this Comment provides background on the types, ubiquity, and effects of reproductive autonomy and reproductive coercion in America. Part II examines to what extent the current scope of sexual assault laws covers reproductive rights and to what extent reproductive freedoms are absent in criminal law. Part III

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[4] *See* sources cited *supra* note 1.

[5] *Victims of Sexual Violence: Statistics*, *supra* note 1.

draws on America's legal history to explain how the scant reproductive rights present in criminal law came to be as well as their absence elsewhere. Part IV proposes the introduction of standalone reproductive crimes and examines their potential application to forms of reproductive coercion, sexual assault, and questions of sexual/reproductive consent that states have struggled to answer.

I. REPRODUCTIVE AUTONOMY & REPRODUCTIVE COERCION

When one considers the origins of laws governing sexual offenses, it is clear that some degree of progress has been made. Women are no longer considered property of their husbands or fathers.[6] Spousal immunity to rape has been eliminated in some states.[7] Defendants, rather than a victim's sexual history, are cross-examined.[8] However, women and men are still subject to forms of reproductive coercion.[9] Discussion of the means, ubiquity, and burdens of reproductive coercion is needed to underscore the necessity for legal reform as well as to distinguish how different forms of reproductive coercion should be categorized and punished.

Reproductive coercion can include many behaviors, such as sabotage of contraceptive methods (flushing contraceptive pills, poking holes in condoms, removing a condom during sex), pregnancy pressure (partner pressure to become pregnant), and pregnancy coercion (coercing a partner to remain pregnant or terminate a pregnancy).[10] The effects of reproductive coercion can be grave; indeed, homicide is a leading cause of pregnancy-associated mortality in the United States,[11] and the majority of these

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[6] *See* Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L.J. 1465, 1478–80 (2003) [hereinafter Anderson, *Marital Immunity*].

[7] *See id.* at 1485.

[8] *Id.* at 1524.

[9] Kathleen C. Basile, Sharon G. Smith, Yang Liu, Elizabeth Miller & Marcie-jo Kresnow, *Prevalence of Intimate Partner Reproductive Coercion in the United States: Racial and Ethnic Differences*, 36 J. INTERPERSONAL VIOLENCE 21–22, at 5 (2021), NEXIS UNI, (finding an estimated 21.2 million U.S. adults had been subjected to reproductive coercion in their lives).

[10] COMM. ON HEALTH CARE FOR UNDERSERVED WOMEN, *Committee Opinion Number 554: Reproductive and Sexual Coercion*, 121 OBSTETRICS & GYNECOLOGY 411, 411–12 (2013). It should be noted some states have explicitly criminalized coerced abortions, e.g., Michigan. MICH. COMP. LAWS § 750.213a(1) "A person having . . . knowledge that a female individual is pregnant shall not do any of the following with the intent to coerce her to have an abortion against her will."

[11] Jeani Chang, Cynthia J. Berg, Linda E. Saltzman & Joy Herndon, *Homicide: A Leading Cause of Injury Deaths Among Pregnant and Postpartum Women in the United States, 1991–1999*, 95 AM. J. PUB. HEALTH 471, 472 (2005).

homicides are committed by an intimate partner.[12] Reproductive coercion is also not uncommon—a survey of 641 women between the ages of eighteen and forty-four found that 16% reported that they had suffered from reproductive coercion.[13] Reproductive coercion also can overlap with intimate partner violence.[14]

Aside from the physical and emotional suffering found in reproductive coercion, pregnancy, as well as miscarriage and abortion, can have significant physical and psychological effects on women.[15] Pre-term labor, group B strep, ectopic pregnancies, gestational diabetes, morning sickness, swollen feet, and weight gain are all complications of pregnancy that can cause severe discomfort.[16] Further, when left untreated, some complications can cause death.[17] The act of labor itself can also be extremely painful, stretching the cervix, vagina, and perineum.[18] Furthermore, approximately

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[12] Diana Cheng & Isabelle L. Horon, *Intimate-Partner Homicide Among Pregnant and Postpartum Women*, 115 OBSTETRICS & GYNECOLOGY 1181, 1181 (2010).

[13] Lindsay E. Clark, Rebecca H. Allen, Vinita Goyal, Christina Raker & Amy S. Gottlieb, *Reproductive Coercion and Co-Occurring Intimate Partner Violence in Obstetrics and Gynecology Patients*, 210 AM. J. OBSTETRICS & GYNECOLOGY 1, 1 (2013).

[14] *Id.* (32% of women that reported reproductive coercion also reported intimate partner violence in the same relationship.); Elizabeth Miller, Michele R. Decker, Elizabeth Reed, Anita Raj, Jeanne E. Hathaway & Jay G. Silverman, *Male Partner Pregnancy-Promoting Behaviors and Adolescent Partner Violence: Findings from a Qualitative Study with Adolescent Females*, 7 J. AMBULATORY PEDIATRICS 360, 360 (2007) (26% of women with abusive partners reported reproductive coercion including "manipulated condom use, sabotaged birth control use, and . . . explicit statements about wanting her to become pregnant.). *See also Fact Sheet: Intimate Partner Violence and Reproductive Coercion*, PLANNED PARENTHOOD FED'N OF AM. 4 (Aug, 2012), https://www.plannedparenthood.org/uploads/filer_public/fb/70/fb70f966-e4a2-46e8-900c-9137fed3e636/ipv_and_reproductive_coercion_fact_sheet_2012_final.pdf [https://perma.cc/P3GF-2MW9] ("Intimate partner violence and reproductive health are closely connected issues and one cannot be properly addressed without addressing the other.").

[15] Anca Răchită, Gabriela Elena Strete, Laura Mihaela Suciu, Dana Valentina Ghiga, Andreea Sălcudean & Claudiu Mărginean, *Psychological Stress Perceived by Pregnant Women in the Last Trimester of Pregnancy*, 19 INT'L J. ENV'T RSCH. & PUB. HEALTH 1, 1 (2022); Jessica Farren, Nicola Mitchell-Jones, Jan Y. Verbakel, Dirk Timmerman, Maria Jalmbrant & Tom Bourne, *The Psychological Impact of Early Pregnancy Loss*, 24 HUM. REPROD. UPDATE 731, 732 (2018).

[16] *The Most Common Pregnancy Complications*, AM. PREGNANCY ASS'N, https://americanpregnancy.org/healthy-pregnancy/pregnancy-complications/common-pregnancy-complications [https://perma.cc/L8GW-ZFKZ].

[17] *Id.*

[18] *Perineal Tears During Childbirth*, THE ROYAL COLL. OF OBSTETRICIANS & GYNECOLOGISTS, https://www.rcog.org.uk/for-the-public/perineal-tears-and-episiotomies-in-childbirth/perineal-tears-during-childbirth [https://perma.cc/7W4L-XDME] (finding up to nine out of ten women tear their perineum to some extent and sometimes all the way to the anus during delivery).

660 U.S. women died in childbirth in 2018.[19] Around 20% of women suffer from post-partum depression, with symptoms including sleep loss, depression, fatigue, loss of appetite, and severe anxiety.[20]

Women may also elect to abort a baby conceived of reproductive coercion for a variety of reasons, including the conditions and complications aforementioned. Abortion, however, can bring its own complications, like heavy bleeding, fever, and infection, with risks increasing as the pregnancy progresses.[21] Furthermore, miscarriages may induce psychological harms and pain.[22]

Beyond the deep physical and emotional suffering, victims of sexual and reproductive violence can face considerable financial and economic hardship. For example, the immediate medical costs for victims of sexual assault that seek care average $2,084,[23] and the economic impact of a sexual assault on society in the form of criminal responses, healthcare, lost work, etc., is roughly $122,000 per instance.[24] Multiply this figure by twenty-five million (the number of reported victims of rape in the United States), and the resulting calculation is that sexual assaults cost society a staggering $3.1 trillion.[25] The government will pay around one-third of these costs, nearly $1 trillion, in the form of criminal legal responses, including some healthcare, etc.[26]

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[19] Eugene Declercq & Laurie Zephyrin, *Maternal Mortality in the United States: A Primer*, THE COMMONWEALTH FUND (Dec. 16, 2020), https://www.commonwealthfund.org/publications/issue-brief-report/2020/dec/maternal-mortality-united-states-primer [https://perma.cc/94WD-4DKQ].

[20] *Postpartum Depression in Illinois*, ILL. DEP'T OF PUB. HEALTH, https://dph.illinois.gov/content/dam/soi/en/web/idph/files/publications/publicationsowhfspostpartum-depression-factsheet-1.pdf [https://perma.cc/7S54-HQV9].

[21] *See Medical Abortion*, MAYO CLINIC, https://www.mayoclinic.org/tests-procedures/medical-abortion/about/pac-20394687 [https://perma.cc/3R2W-ZYLH].

[22] Elizabeth Leis-Newman, *Miscarriage and Loss: Losing a Pregnancy Can Affect a Woman—and her Family—for Years, Research Finds*, 43 MONITOR ON PSYCH. 56 (2012), https://www.apa.org/monitor/2012/06/miscarriage [https://perma.cc/9563-WZDV].

[23] *Economic Costs of Sexual Violence*, MD. COAL. AGAINST SEXUAL ASSAULT, https://mcasa.org/assets/files/Economic-Costs-of-Sexual-Violence-with-Long-Term-Costs-Updated.pdf [https://perma.cc/4F43-JD7S].

[24] Cora Peterson, Sarah DeGue, Curtis Florence & Colby N. Lokey, *Lifetime Economic Burden of Rape Among U.S. Adults*, 52 AM. J. PREVENTIVE MED. 691, 691 (2017).

[25] *Id.*

[26] *Id.* at 693 tbl.1, 697.

Abortions, often sought after rape-induced pregnancies,[27] can cost anywhere from $450–$700 in the first trimester to $600–$2,800 in the second trimester.[28] In the event that a victim keeps the pregnancy for one of the many viable and acceptable reasons (e.g., religious beliefs, moral objections), the estimated cost of raising a child from birth to age eighteen was $233,610 as of 2015.[29] Furthermore, it is difficult to estimate the cost of reproductive coercion (absent sexual assault) to society as this behavior is not currently regulated and has not been subjected to high-quality scholarship estimating its cost. However, as reproductive healthcare can be extremely expensive and can force victims to take time from work, it is likely these behaviors also result in high costs to both victims and society, further limiting income and work quality.

Clearly, the impacts of sexual and reproductive violence on victims are not solely limited to grave physical and emotional harm but can also include deep financial injury. Furthermore, victims of sexual and reproductive violence are disproportionately from groups that are already financially disadvantaged in society.[30] This means that inaction on matters of sexual and reproductive violence will allow a pattern of systemic injustices toward these groups to continue, and conversely, action taken to mitigate sexual and reproductive violence will help remedy the economic disadvantages that women and people of color currently face. As a result, it is clear that state legislatures should include reproductive crimes to not only aid victims in desperate need of help but to also provide justice and remedy inequality in society as a whole.

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[27] Melisa M. Holmes, Heidi S. Resnick, Dean G. Kilpatrick & Connie L. Best, *Rape-Related Pregnancy: Estimates and Descriptive Characteristics from a National Sample of Women*, 175 AM. J. OBSTETRICS & GYNECOLOGY 320, 320 (1996) (finding a "total 32.4% of these victims did not discover they were pregnant until they had already entered the second trimester; 32.2% opted to keep the infant whereas 50% underwent abortion and 5.9% placed the infant for adoption; an additional 11.8% had spontaneous abortion.").

[28] *Abortion Costs in IL*, MY FUTURE APPROVED, https://www.myfutureapproved.com/abortion-costs/ [https://perma.cc/53GX-B6CF].

[29] Mark Lino, *The Cost of Raising a Child*, U.S. DEP'T OF AGRIC. (Feb. 18, 2020), https://www.usda.gov/media/blog/2017/01/13/cost-raising-child [https://perma.cc/6AVD-3CNY].

[30] *Victims of Sexual Violence: Statistics*, *supra* note 1 (showing Native American women are the most common victims of sexual assault); Katherine Richard, *The Wealth Gap for Women of Color*, CTR. FOR GLOB. POL'Y SOLS. 1 (October 2014), https://www.globalpolicysolutions.org/wp-content/uploads/2014/10/Wealth-Gap-for-Women-of-Color.pdf [https://perma.cc/8K57-YL67] (detailing how women of color have fewer financial resources); Grace & Anderson, *supra* note 1 at 371.

II. HOW THE LAW CURRENTLY TREATS REPRODUCTIVE COERCION

Despite the gravity of the harm to American women and society, the criminal laws currently do not account for the right to reproductive autonomy and thus produce unjust results. Furthermore, there is almost no legal literature on the topic.[31] In this section, I analyze the manner and extent to which reproductive rights are protected under sexual assault laws and the much greater extent to which reproductive rights are completely unaccounted for in criminal law.

A. REPRODUCTIVE AUTONOMY AS COVERED BY SEXUAL ASSAULT LAWS

As discussed in Part III, reproductive rights in American criminal law have only ever been addressed in the context of sexual assault laws. Without explicit intent to specifically address reproductive rights, some states have partially accounted for a violation of a woman's right to reproductive autonomy after a sexual assault resulting in pregnancy in three ways.[32] These include either escalating a sexual assault charge to aggravated sexual assault, treating pregnancy as an aggravating factor on a case-by-case basis, or by treating pregnancy as severe bodily harm.[33] However, these laws still fail to cover many instances of reproductive coercion by not accounting for reproductive coercion of a man or reproductive coercion after consensual sex and failing to punish violations of reproductive autonomy that do not result in reproduction.

Sexual assault laws vary from state to state and, as such, also vary in the extent to which these laws account for reproductive rights. However, states uniformly account only for the reproductive rights of women, and only in limited circumstances of sexual assault—those that result in pregnancy. States that do address pregnancy in rape law in sentencing do so in four ways.[34] First, enacting statutes that aggravate sentences of sexual assaults that result in pregnancy, such as in Michigan, Nebraska, and Wisconsin.[35] Second, precluding pregnancy–related evidence.[36] Third, always including pregnancy as a "substantial bodily injury" (an aggravating factor in sexual

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[31] Shane M. Trawick, *Birth Control Sabotage as Domestic Violence: A Legal Response*, 100 CAL. L. REV. 721, 721 (2012).

[32] *See* Lauren Hoyson, *Rape is Tough Enough Without Having Someone Kick You from the Inside: The Case for Including Pregnancy as Substantial Bodily Injury*, 44 VALPARAISO U.L. REV. 565, 586-87 (2010).

[33] *Id*.

[34] *Id.* at 586.

[35] *Id.*

[36] *Id.* at 588 n.159 (Washington, for example).

assault sentencing).[37] And fourth, addressing pregnancy as substantial bodily injury sustained from sexual assault on a case-by-case basis.[38]

Three of these methods attempt to vindicate in part a woman's reproductive rights after an assault-induced pregnancy by allowing for a sentence extension. However, among the many states that do not account for pregnancy in sexual assault laws, the greater burden women suffer goes unacknowledged.

B. THE ABSENCE OF REPRODUCTIVE RIGHTS IN AMERICAN CRIMINAL LAW

American criminal law only punishes the violation of reproductive rights in one circumstance: the sexual assault of a woman that results in a pregnancy. This leaves the wide range of behaviors that do violate reproductive autonomy, but do not fall into this narrow category unpunished. In this section I enumerate how the absence of reproductive rights in criminal law leads to unjust outcomes both in cases of sexual assaults and in cases where only a victim's reproductive, but not sexual, rights are violated.

1. Sexual Assaults

The absence of reproductive rights in criminal law leads to unjust outcomes most visibly in sexual assault cases. Sexual assaults can be easily divided into two categories: those with the potential for reproduction and those without. Sexual assaults with the potential for reproduction can be further easily divided by the role the victim and perpetrator each played in reproduction. The reproductive rights at issue here can be understood as the right to not impregnate another (for victims with testes) and the right not to become impregnated (for victims with uteruses). That the criminal legal system does not uniformly punish the violation of reproductive autonomy is already abhorrent. However, the burden of the failure to provide reproductive rights falls most heavily on victims that can be impregnated. As detailed in Section I, the financial, emotional, and physical effects of a pregnancy are severe and may even lead to death—burdens that are limited to victims that can become pregnant.

The absence of reproductive rights in the criminal law also leads to unjust treatment between identical instances of sexual assault. For example, in a case of sexual violence with the possibility of impregnating the victim, the perpetrator has no control over whether the victim is impregnated. Thus, in states where pregnancy is an aggravating factor in sentencing, male rapists

[37] *Id.* at 589 (Only Tennessee follows this route.).

[38] *Id.* at 590–91 (California, for example).

who incidentally do not impregnate their victims may receive a lesser sentence despite having committed the same act against the woman as a rapist who did impregnate their victim.[39] In the alternative, consider a woman who rapes both a man and a woman, but is impregnated by the man. Both victims have had their sexual autonomy violated, but the male victim has also had his reproductive autonomy violated. Furthermore, courts have overwhelmingly held that male victims of sexual assault must pay child support for a pregnancy that results from their victimization—even in cases of statutory rape where the male victim was underage and the abuser was an adult.[40]

Thus, the absence of reproductive rights in the consideration of sexual assault leads to unjust outcomes by failing to account for the differences between non-procreative rapes and potentially procreative rapes. Furthermore, the burden of reproduction is overwhelmingly on the woman. Although some states realize and somewhat vindicate the violation of a woman's reproductive right, not all do, and no consideration is given at all to a man's right not to become a father.

2. Violations Not Predicated on Sex

The near absence of reproductive rights in criminal law also leads to unjust outcomes in situations where sex was not present or where sex was not consensual. As reproductive rights are currently only available to women in limited circumstances of sexual assault,[41] all cases of reproductive coercion that cannot be shoehorned to fit another crime end up unpunished. While it may seem counterintuitive, reproductive coercion can exist even in the absence of a sex crime.

For example, consider again the hypothetical in which a girlfriend's jealous former partner has clandestinely interfered with her birth control. The ex-girlfriend goes on to have consensual (unknowingly unprotected) sex. The ex-boyfriend has violated the ex-girlfriend's reproductive rights by denying her right to choose if, when, with whom, and how to reproduce. This is a very clear-cut example because the sex was consensual and not contingent on reproductive concerns.

A more complex example would involve a sexual encounter, with consent contingent on reproductive concerns, in which one party engages in activity designed to violate reproductive autonomy. For example, imagine a

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[39] *See id.* at 586–87.

[40] *E.g.*, Alia Beard Rau, *Arizona Statutory Rape Victim Forced to Pay Child Support*, AZCENTRAL.COM (Sep. 2, 2014, 10:30 AM MT), https://www.azcentral.com/story/news/arizona/politics/2014/09/02/arizona-statutory-rape-victim-forced-pay-child-support/14951737/ [https://perma.cc/L66F-UUN6] (describing the case of Nick Olivas).

[41] Hoyson, *supra* note 32, at 576.

fertile couple that has consensual sex, where the impregnable partner is on birth control. Afterwards, it is either revealed that either the impregnable partner has been lying about being on birth control, or the impregnating party has been tampering with the birth control. Regardless of the guilty party, suppose the impregnable party is impregnated. An important question is whether there was valid consent to the sexual encounter as part of a sexual assault analysis.[42] However, the answer is ancillary to this paper. What is clear in these circumstances is that in both cases, one party violated the other's reproductive rights.

This analysis can also be analogized and extended to the abusive practice of "stealthing," or the non-consensual removal of a condom during sex without consent.[43] If a woman consents to sex explicitly if, and only if, a condom is used and a man removes it halfway through, this vitiates the consent to sex because the woman consented to sex with a condom. Currently, California is the only state that outlaws stealthing.[44] However, it is clear that stealthing violates a woman's reproductive autonomy. These examples can be reimagined in numerous ways (e.g., a man promises not to ejaculate inside his female partner but does so or falsely tells his partner he is sterile), but a common theme is that a reproductive right was violated, even if it is less clear that consent to sex was vitiated.

In both examples above, the party violating reproductive autonomy has been a sexual partner of the victim at some point. However, reproductive rights can be violated even in the complete and total absence of sex. For example, consider the case of Dr. Cecil B. Jacobson, a California infertility specialist who inseminated dozens of patients with his own semen, rather than the sperm the woman had chosen from the donor or husband.[45] Upon finding it was not illegal for a doctor to inseminate his patients, California prosecutors were forced to rely on mail fraud and perjury statutes to indict Dr. Jacobson.[46] Together, these examples demonstrate the need for

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[42] *See generally* Mikaela Shapiro, *Yes, "Stealthing" Is Sexual Assault . . . And We Need to Address It*, 37 TOURO L. REV. 1643 (2021) (advocating for legislation).

[43] Isabella Grullón Paz, *California Makes "Stealthing," or Removing Condom Without Consent, Illegal*, N.Y. TIMES, (Nov. 10, 2021), https://www.nytimes.com/2021/10/08/us/stealthing-illegal-california.html [https://perma.cc/FS97-DNDK].

[44] *Id.*

[45] Robert F. Howe, *Jacobson Guilty on All 52 Counts of Fraud, Perjury*, WASH. POST (Mar. 5, 1992), https://www.washingtonpost.co m/archive/politics/1992/03/05/jacobson-guilty-on-all-52-counts-of-fraud-perjury/672bb1d9-2e4a-4a28-9748-3a02c0cc0c18/ [https://perma.cc/9F7B-NZMH] ("Bellows was forced to rely on commonplace mail and wire fraud statutes to prosecute the bulk of his case.").

[46] *Id.*

reproductive rights in the law—their absence harms men and women, but disproportionately women.

III. THE PROGRESS OF REPRODUCTIVE RIGHTS

The absence of reproductive rights in criminal law clearly causes great harm to women today. Examining how these laws came to be is an important part of understanding the abhorrent amount of discrimination women continue to face with regard to their reproductive rights. In this section I detail the progress of reproductive rights from the English common law system to the present day with the aim of illustrating the positions, attitudes, and animus motivating the laws governing reproductive rights. This analysis proceeds through the lens of sexual assault laws, which have *de facto* governed women's reproductive rights for centuries in the absence of laws specifically protecting reproductive rights.

A. THE INFLUENCE OF ENGLISH COMMON LAW ON THE MODEL PENAL CODE

The American Law Institute received funding to create the Model Penal Code in 1951 and worked to consolidate, standardize, and supplement where necessary what had been a motley and patchwork collection of criminal codes nationwide.[47] The completion of its official draft in 1962 marked a watershed moment for state criminal law codes, sparking a conflagration of thirty-four state code reforms based on the Model Penal Code over the next two decades.[48] Additionally, the Model Penal Code has heavily influenced American criminal jurisprudence and has been cited thousands of times as a persuasive authority.[49] However, the English common law greatly informed the Model Penal Code by providing a historical basis for many of the Model Penal Codes more abhorrent sections, such as its force requirements.[50] This

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[47] *See* Paul H. Robinson & Markus D. Dubber, *The American Model Penal Code: A Brief Overview*, 10 NEW CRIM. L. REV. 319, 323-24 (2007).

[48] *Id.* at 326.

[49] *Id.* at 327.

[50] 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 121 (Lonang Inst. ed., J.W. Jones trans., 2005) (1769), https://lonang.com/wp-content/download/Blackstone-CommentariesBk4.pdf [https://perma.cc/8GM3-FLBJ] ("The second offense, more immediately affecting the personal security of individuals, relates to the female part of his majesty's subjects; being that of their forcible abduction and marriage [i.e., rape]. . . . It must appear that she was taken away against her will."). The same force requirement was found in the adoption of the Model Penal Code. *See* Deborah Tuerkheimer, *We Preach 'No Means No' for Sex, But That's Not What the Law Says*, GUARDIAN (Jan. 12, 2014), https://www.theguardian.com/commentisfree/2014/jan/12/rape-definition-use-of-force

section will begin with English common law and end with the introduction of the Model Penal Code in 1962.

Many precepts of the English common law system were brought to America with the establishment of the English colonies in 1607.[51] Ecclesiastical and civil courts were separated in England around 1072, after the Norman conquest of England.[52] However, that civil and ecclesiastical courts were once unified in England helps to explain the influence of Catholic and Anglican morals on laws governing sexual and reproductive rights then and today. The establishment of the United States in 1776 bifurcated the English and American common law systems, incorporating into American jurisprudence the English common law's treatment of sexual and reproductive rights,[53] where it would remain until abrogated, expanded, or altered by the legislature.[54]

The English common law in 1776 gave women no reproductive rights to enforce on their own behalf, and included spousal protections from rape charges for husbands.[55] The inability to prosecute rape by a spouse was justified at the time under three arguments.[56] First, a woman was the property of the husband or father, meaning the offense was not committed against the woman, but rather the father or husband.[57] Second, a wife's legal identity was subsumed into her husband's legal identity upon marriage, making at least marital rape impossible.[58] Finally, and most influentially, as argued by the

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[https://perma.cc/CC97-GSKU] ("Over half the states have a 'use of force' requirement in order to prove rape. U.S. law must be updated to better protect victims.").

[51] *American colonies*, ENCYC. BRITANNICA ONLINE (Aug. 22, 2022), https://www.britannica.com/topic/American-colonies [https://perma.cc/HL75-P5FP]; Ford W. Hall, *The Common Law: An Account of its Reception in the United States*, 4 VAND. L. REV. 791, 797 (1951) ("The basic conclusion is that law administration in America, as it existed around the middle of the 18th century, may aptly be classified as a development of the English common-law system.").

[52] Noel Cox, *The Influence of the Common Law and the Decline of the Ecclesiastical Courts of the Church of England*, 3 RUTGERS J.L. & RELIGION *1, *6–7 (2003) HEINONLINE, ("Spiritual courts, separate from the secular, existed in England from shortly after the Norman Conquest. This process of separation seems to have occurred around 1072–76.").

[53] *See* Richard C. Dale, *The Adoption of the Common Law by the American Colonies*, 30 AM. L. REG. 553, 554–55 (1882).

[54] Powell v. Brandon, 24 Miss. 343, 363 (1852) ("Whenever a principle of the common law has been once clearly and unquestionably recognized and established, the courts of the country must enforce it, until it be repealed by the legislature.").

[55] *See* Anderson, *Marital Immunity*, *supra* note 6, at 1479–80.

[56] *Id.* at 1477–78.

[57] *Id.* at 1478.

[58] *Id.* at 1478–80; *See also* United States v. Yazell, 382 U.S. 341, 361 (1966) ("This rule has worked out in reality to mean that though the husband and wife are one, the one is the husband.") (Black, J., dissenting).

English legal scholar Sir Matthew Hale in the late 1600s, marital rape was an impossibility because the wife had by "mutual matrimonial consent and contract" given to her husband "which she cannot retract."[59] It is important to note that despite these marital limitations, the idea of legal rights over a woman's sexual and reproductive capacities did exist at the time. However, these rights were owned by the father or husband, rather than the woman.

This understanding of a father or husband having legal rights over a woman's sexual and reproductive capacities is illustrated by decrees of restitution of conjugal rights, which "ordered the deserter (wife) to return and render conjugal rights," under punishment of up to six months imprisonment.[60] This idea of conjugal rights also represents the first of many subsumptions of reproductive rights into sexual rights, because granting a husband or father rights over a woman's sexual rights was, in the absence of contraceptives and abortions, a *de facto* grant of a woman's reproductive rights as well. This grant of conjugal rights rested on biblical assertions[61] that had been baked into the English common law,[62] aided by the historically

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[59] Regina v. R. [1992] 1 A.C. 599 (HL) 604 (appeal taken from Eng.) (quoting 1 MATTHEW HALE, HISTORY OF THE PLEAS OF THE CROWN 629 (1736)). This common law tradition of exculpating rapists married to their victims was removed in *Regina v. R.* [1992]. *Id.* at 610.

[60] L. COMM'N NO. 23, PROPOSAL FOR THE ABOLITION OF THE MATRIMONIAL REMEDY OF RESTITUTION OF CONJUGAL RIGHTS 1 (1969), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/228673/0369.pdf [https://perma.cc/RHH7-DLJF]. In the mid-twentieth century, this law was changed to allow women to recall husbands to the home. *Id.* This law remained in effect until 1970. *See id.* at 2; Matrimonial Proceedings and Property Act of 1970, Ch. 45, Pt. 1, § 20 ("No person shall after the commencement of this Act be entitled to petition the High Court or any county court for restitution of conjugal rights."), https://www.legislation.gov.uk/ukpga/1970/45/pdfs/ukpga_19700045_en.pdf [https://perma.cc/76QY-FJZG].

[61] For example, *Deuteronomy* 22:28–29 (King James) describes the rape of a woman as a crime against the property of the father, the remedy for which was money: "If a man find a damsel that is a virgin, which is not betrothed, and lay hold on her, and lie with her, and they be found; Then the man that lay with her shall give unto the damsel's father fifty shekels of silver, and she shall be his wife; because he hath humbled her." *See* John Marshall Gest, *The Influence of Biblical Texts on English Law* 20–21 (1910) ("'What therefore God hath joined together, let not man put asunder.' These commands . . . are the foundation of our law of marriage.") (quoting *Matthew* 19:6–9 and citing *Mark* 10:9).

[62] EDWIN A. ABBOTT, FRANCIS BACON: AN ACCOUNT OF HIS LIFE AND WORKS 255 (1885) ("The Law of England is not taken out of Amadis de Gaul, nor the book of Palmerin, but out of the Scripture, out of the laws of the Romans and Grecians.") (quoting Sir Francis Bacon); Taylor's Case (1726) 86 Eng. Rep. 189 (C) (Sir Hale), https://swarb.co.uk/taylors-case-1676 ("Christianity is parcel of the laws of England; . . . to reproach the Christian religion is to speak in subversion of the law."); Gest, *supra* note 61, at 20–21 ("That husband and wife are in law one person was an axiom of the common law, . . . 'This is now bone of my bones and flesh of my flesh;' . . . 'And they shall be one flesh,' Gen. 2:23. Such texts . . . and the inferior

symbiotic nature of England's civil and ecclesiastical courts. Thus, when the United States incorporated the English common law of 1776 into the American common law system, the resultant laws governing marriage and sexual and reproductive rights largely mirrored scripture, upon which the laws had been based.

The English common law that America incorporated in 1776 was most recently stated by William Blackstone in his 1769 *Commentaries on the Laws of England* as requiring a use of force by the perpetrator that was against the will of the woman.[63] However, over the years, a number of exceptions were added to the English common law. These exceptions generally conformed to a set of morals, expectations, and assumptions about men and women consistent with the religious and moral underpinnings of early English law. English common law diminished female autonomy by disallowing rape charges from women who offered insufficient resistance and women who kept silent about being raped after the attack.[64] On the other hand, the English common law emphasized male immunity through the use of rape-specific corroborative evidence requirements, resistance requirements, strict reporting requirements, and spousal rape exceptions.[65] These elements, burdens, exceptions, and, frankly, injustices, did not undergo any significant changes for two hundred years, and were eventually incorporated into the American Law Institute's 1962 and 1985 updates of the common law in creating the Model Penal Code.

For example, the Model Penal Code includes a statute of limitations that applies to all sexual assault prosecutions, requiring that a victim report a sexual assault within only three months of the event,[66] as well as a

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position of the wife in the Old Testament had a powerful effect upon the law of married women. . . . For many centuries the laws governing married women . . . were all grounded upon this theory.").

[63] BLACKSTONE, *supra* note 50, at 122 ("The second offense, more immediately affecting the personal security of individuals, relates to the female part of his majesty's subjects; being that of their forcible abduction and marriage [i.e., rape] . . . . It must appear that she was taken away against her will.").

[64] State v. Hill, 578 A.2d 370, 374–76 (N.J. 1990) (discussing the negative treatment of victims' silence); Moss v. State, 45 So. 2d 125, 126 (Miss. 1950) ("[A] mere tactical surrender in the face of an assumed superior physical force is not enough.").

[65] Michelle Anderson, *Diminishing the Legal Impact of Negative Social Attitudes Toward Acquaintance Rape Victims*, 13 NEW CRIM. L. REV. 644, 658 (discussing the court's treatment of chastity) [hereinafter Anderson, *Diminishing*]; *Moss*, 45 So. 2d at 126; *Hill*, 578 A.2d at 374 ("When . . . a virgin has been so deflowered . . . while the act is fresh she ought repair with hue and cry . . . and there display to honest men the injury done to her, the blood and her dress stained with blood, and the tearing of her dress."); *See Marital Immunity*, *supra* note 6, at 1479–80.

[66] MODEL PENAL CODE § 213.6(4).

corroboration requirement.[67] Notably, neither of these requirements apply to any other crime in the Model Penal Code. The statute of limitations can be tied to reporting requirements in early English Common Law. As explained by 13th century English legal scholar Henry de Bracton, "When . . . a virgin has been so deflowered . . . while the act is so fresh she ought repair with hue and cry . . . and there display to honest men the injury done to her, the blood and her dress stained with blood, and the tearing of her dress."[68] This "hue and cry" requirement was also required for the prosecution of several other crimes,[69] but due to its inefficacy compared to other methods (e.g., monetary rewards) of collecting information on and apprehending criminals, the hue and cry fell out of practice for all crimes but rape.[70] However, in place of its origins in helping to apprehend criminals, the "hue and cry" requirement instead became a way to substantiate that a sexual assault had occurred,[71] despite its disuse elsewhere in criminal law.

The hue and cry requirement would eventually be replaced by the "fresh complaint rule," which allowed the introduction of evidence that a victim *had made* a complaint to a trusted confidante, even if the *details* of the complaint could not be introduced as evidence establishing whether the crime had been committed.[72] While a fresh complaint was not a requirement, juries were permitted, and often instructed, to take the lack of a fresh complaint as an inference against the accuser.[73]

The corroboration requirement, requiring that a rape victim provide corroborating evidence not required for other crimes,[74] (burglary can be proven on the credible uncorroborated testimony of one person, for example)[75] reflects the attitude of deep skepticism towards accusers in early England. As Sir Matthew Hale stated in the 17th century, rape "is an

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[67] MODEL PENAL CODE § 213.6(5).

[68] *Hill*, 578 A.2d at 374 (quoting 6 J. WIGMORE, EVIDENCE § 1760, at 240 (Chadbourn rev. 1976) (quoting H.DE BRACTON, DELEGIBUS ANGLIAE, f. 147 (ca. 1250))).

[69] *Id.* (quoting 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAWS 578–79 (2d ed. 1923)) ("When a felony is committed, the hue and cry (hutesium et clamor) should be raised.").

[70] *Id.* (citing 1 L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW 27 (1956)).

[71] *Id.*

[72] *Id.* at 375.

[73] Kathryn M. Stanchi, *The Paradox of the Fresh Complaint Rule*, 37 B.C.L. REV. 441, 446. ("If the prosecution offered no fresh complaint evidence, the defense could request the court to instruct the jurors to draw an inference against the complainant.").

[74] *See* MODEL PENAL CODE § 213.6(5).

[75] Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U.L. REV. 945, 948 (2004) [hereinafter Anderson, *Legacy*].

accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent."[76] This attitude would also lead to the cautionary instructions in rape law,[77] which were still permitted in thirteen states as of 2004.[78] The Model Penal Code requires courts to instruct the jury to "evaluate the testimony of a victim . . . with special care in view of the emotional involvement of the witness."[79] Again, no similar cautionary jury instruction exists for any other crime in the Model Penal Code and, tellingly, the cautionary warning only applies to the victim's testimony and not the alleged perpetrator.[80]

Although American common law did not include a formal resistance requirement requiring the victim to resist the rape, the evidence used to prove the "against the will" element was often a *de facto* resistance requirement.[81] Henry de Bracton explicitly mentions the need for a woman to "display to honest men the injury done to her, the blood and her dress stained with blood, and the tearing of her dress."[82] The amount of resistance required was also alarmingly high.[83] For example, in *Brown v. State*, the Supreme Court of Wisconsin overturned a rape conviction on the basis that the victim had not sufficiently resisted, despite her testimony that:

> I tried as hard as I could to get away. I was trying all the time to get away just as hard as I could. I was trying to get up; I pulled at the grass; I screamed as hard as I could, and he told me to shut up, and I didn't, and then he held his hand on my mouth until I was almost strangled.[84]

According to the court, "[a] woman's means of protection are not limited to that, but she is equipped to interpose most effective obstacles by means of hands and limbs and pelvic muscles," which are "practically insuperable."[85] This resistance requirement gradually diminished from

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[76] Rhoades v. State, 468 A.2d 650, 651 (Md. Ct. Spec. App. 1983) (quoting Sir Hale).

[77] *See* Anderson, *Diminishing*, *supra* note 65, at 649.

[78] Anderson, *Legacy*, *supra* note 75, at 26-27.

[79] MODEL PENAL CODE § 213.6(5).

[80] *Id.*

[81] Brown v. State, 106 N.W. 536, 538 (Wis. 1906) ("[T]here was not evidence . . . of such resistance as the law makes sine qua non to the crime of rape."); Moss v. State, 45 So. 2d 125, 126 (Miss. 1950) ("[A] mere tactical surrender in the face of an assumed superior physical force is not enough."); Anderson, *Diminishing*, *supra* note 65, at 653; Richard Klein, *An Analysis of Thirty-Five Years of Rape Reform: A Frustrating Search for Fundamental Fairness*, 41 AKRON L. REV. 981, 987 (2009).

[82] State v. Hill, 578 A.2d 370, 374 (N.J. 1990) (quoting de Bracton).

[83] *Moss*, 45 So. 2d at 126 ("Where the penalty for the defendant may be supreme, so must resistance be unto the uttermost.").

[84] *Brown*, 106 N.W at 537.

[85] *Id.* at 538.

requiring a woman to resist to her utmost[86] to requiring a woman to resist in a manner reasonably proportional to her strength and opportunities.[87] About half of the states still require resistance to prove rape charges today.[88]

To summarize, although English common law described rape as a two-element crime requiring (1) carnal knowledge by force, and (2) resistance by the victim, it also included a chastity requirement, marital rape exception, acquaintance rape exception, incurring wounds as a form of evidence, and prompt reporting requirements to prove a case. These sub-elements are remnants of early English social, moral, and religious expectations for men and women. This battery of extra requirements was adopted into American common law after the Revolutionary War and then (in some form or another) into the Model Penal Code established by the American Law Institute in 1962.

B. THE DECADES SINCE THE INTRODUCTION OF THE MODEL PENAL CODE

A feminist wave of sex-crime law reform began in the 1970s,[89] as almost every state adopted rape shield laws, shielding rape accusers from cross-examination about past sexual history and eliminating the chastity requirement after nearly seven centuries in the common law.[90] Unfortunately, contrary to public belief, marital exceptions to rape have not been eradicated from America's laws.[91] Although all fifty states allow claims of forcible rape against spouses, about half grant marital immunity from claims of sexual

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[86] *See, e.g.*, *id.*

[87] State v. Risen, 235 P.2d 764, 766 (Or. 1951) ("The reason why evidence of resistance is important is to show carnal knowledge of the woman by force and non-consent on her part."); State v. Harris, 174 A.2d 645, 648 (N.J. Super. Ct. App. Div. 1961) (rendering obsolete the utmost resistance standard in New Jersey).

[88] *See* Tuerkheimer, *supra* note 50.

[89] CAROL E. TRACY, TERRY L. FROMSON, JENNIFER GENTILE LONG & CHARLENE WHITMAN, RAPE AND SEXUAL ASSAULT IN THE LEGAL SYSTEM 5–6 (2012), https://www.womenslawproject.org/wp-content/uploads/2016/04/Rape-and-Sexual-Assault-in-the-Legal-System-FINAL.pdf [https://perma.cc/AX25-DUDJ].

[90] Anderson, *Diminishing*, *supra* note 65, at 659; Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 86–94, (2002). It is important to note, however, that exceptions still exist and harm women. For example, U.S. Federal Rule of Evidence 412 permits evidence of a victim's previous sexual history where it relates to both the victim and the accused (which accounts for 26% of all rapes), and where not doing so would violate the accused's constitutional right (an exception often expanded beyond a defendant's constitutional rights). FED. R. EVID. 412(b); Anderson, *Diminishing*, *supra* note 65, at 660.

[91] Anderson, *Diminishing*, *supra* note 65, at 662–63.

assault in some other form[92], e.g., presuming immunity in the absence of a prompt complaint,[93] or force.[94] However, at least two states still require evidentiary corroboration to support claims of sexual assault,[95] and less than ten states require juries to hear cautionary instructions.[96]

The force requirement in sexual assault laws has lasted at least 400 years, and was incorporated into the Model Penal Code's provisions covering sexual offenses.[97] For example, to be guilty of deviate sexual intercourse by force under the Model Penal Code, a person must have compelled the victim "by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping."[98] To be guilty of "deviate sexual intercourse by force or imposition," a person must have used "any threat that would prevent resistance by a person of ordinary resolution."[99] Across jurisdictions today, statutory definitions of force vary widely, and a majority of states today require a showing of resistance to force to prove rape, creating a de facto force requirement.[100]

The main purpose of a statute of limitations is to protect defendants from being accused of crimes in which the evidence has become obscured by time.[101] However, rape is a uniquely underreported crime due to a variety of factors.[102] According to the National Sexual Violence Resource Center, only

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[92] *Id*. at 662.

[93] *E.g.*, S.C. CODE ANN. § 16-3-615 (requiring claims of spousal sexual battery within thirty days of the offence).

[94] *E.g.*, S.C. CODE ANN. §§ 16-3-652, 16-3-653 (requiring proof of force, forcible confinement, or incapacitation).

[95] N.Y. PENAL LAW § 130.16 (McKinney 2022) (requiring corroboration for complainants unable to consent due to mental defect or incapacity); OHIO REV. CODE ANN. § 2907.05(C)(2)(a) (West 2019); TEX. CODE CRIM. PROC. ANN. art. 38.07(a) (West 2021) (requiring corroboration of gross sexual imposition for mandatory prison sentence).

[96] Anderson, *Legacy*, *supra* note 75, at 974–77.

[97] BLACKSTONE, *supra* note 50, at 122 ("The second offense, more immediately affecting the personal security of individuals, relates to the female part of his majesty's subjects; being that of their forcible abduction and marriage [i.e., rape] . . . . It must appear that she was taken away against her will.").

[98] MODEL PENAL CODE §§ 213.1(1)(a), 213.2.

[99] MODEL PENAL CODE § 213.2(1)(a).

[100] Deborah Tuerkheimer, *Rape On and Off Campus*, 65 Emory L.J. 1, 15 (2015).

[101] *Time Limits for Charges: State Criminal Statutes of Limitations*, FINDLAW (Apr.16, 2020), https://www.findlaw.com/criminal/criminal-law-basics/time-limits-for-charges-state-criminal-statutes-of-limitations.html [https://perma.cc/ZV9F-X48K].

[102] Jeffrey S. Jones, Carmen Alexander, Barbara N. Wynn, Linda Rossman & Chris Dunnuck, *Why Women Don't Report Sexual Assault to the Police: The Influence of Psychosocial Variables and Traumatic Injury*, 36 J. EMERGENCY MED. 417, 420 (2007).

37% of completed rapes are reported to the police.[103] Rape victims may experience a vast number of physical, psychological, and emotional symptoms in the days, months, and years following a rape.[104] "These symptoms may include fear, anxiety, anger, self-blame, dissociation, guilt, loss of trust, flashbacks, PTSD, depression, phobias, panic disorder, and obsessive compulsive disorder."[105] Thus, given the unique circumstances surrounding rape, some states have begun to reevaluate statutes of limitations for rape laws.[106] However, most states still have a statute of limitations on felony sex crimes (most sex crimes are felonies). Forty-three states have statutes of limitations for felony sex crimes, but twenty-eight of these states have an exception when DNA evidence identifies a perpetrator.[107]

In summary, the initial promulgation of the Model Penal Code in 1962 led to a wave of similar state laws that included the Code's resistance requirements, jury-cautioning requirements, force requirement, statutes of limitations, evidentiary corroboration requirements, marital rape exceptions, and chastity requirements. However, in the decades since its initial promulgation, many states have enacted reforms mitigating exceptions to rape. These include eliminating the force, chastity evidentiary corroboration, and resistance and jury cautioning requirements, as well as expanding statutes of limitations.

Women have always been—and continue to be—the disproportionate victims of gender-based sexual and reproductive violence.[108] Although states

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[103] Statistics About Sexual Violence, NAT'L SEXUAL VIOLENCE RES. CTR. 2 (2015), https://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf [https://perma.cc/YQ3V-345Q] (citing CALLIE MARIE RENNISON, RAPE AND SEXUAL ASSAULT: REPORTING TO POLICE AND MEDICAL ATTENTION, 1992-2000, U.S. DEP'T OF JUST. 2 (2002) https://bjs.ojp.gov/content/pub/pdf/rsarp00.pdf [https://perma.cc/884N-Q67X] (finding that 63% of completed rapes are not reported)).

[104] *See* Tracy et al., *supra* note 89, at 8.

[105] *Id.*

[106] *See, e.g.*, Douglas Wigdor, *Statute of Limitations on Sexual Assault Eliminated for One Year in New York Following Passage of the Adult Survivors Act*, FORBES (May 25, 2022), https://www.forbes.com/sites/douglaswigdor/2022/05/25/statute-of-limitations-on-sexual-assault-eliminated-for-one-year-in-new-york-following-passage-of-the-adult-survivors-act/?sh=73d8da4646fd [https://perma.cc/GJH7-44TL].

[107] *State by State Guide on Statutes of Limitations*, RAPE, ABUSE & INCEST NAT'L NETWORK, https://www.rainn.org/state-state-guide-statutes-limitations [https://perma.cc/Q2GD-RQJ3] (reporting seven states with no statute of limitations for any felony sex crime: Kentucky, Maryland, North Carolina, South Carolina, Virginia, West Virginia, and Wyoming).

[108] *Victims of Sexual Violence: Statistics*, *supra* note 1 (showing 1 in 6 women are or will be the victims of an attempted or completed rape in their lives, and only 1 in 10 rape victims are male).

have improved laws governing sexual assaults, women still lack and are uniquely harmed by the absence of adequate protections for their reproductive rights. Furthermore, the absence of reproductive rights in criminal law leads to reduced sensitivity to the variety of ways that sexual assault affects victims and fails to account for reproductive coercion that does not take place in a sexual context. In light of the historical discrimination against women and their reproductive capacities, and the failure of criminal law to differentiate between gravities of harm, it is imperative that states take action to protect their inhabitants' reproductive rights.

IV. SOLUTION

It is by now apparent that the current laws governing sexual violence are inadequately prepared to deal with the myriad sexual, reproductive, and bodily autonomy rights that are necessarily implicated across cases of sexual and reproductive coercion. What has occurred is a natural extension of the ways in which laws governing sexual violence developed. As discussed in Part III, men owned the rights to their wives' sexual autonomy, without reference to a woman's reproductive autonomy, leading to the general subsumption of a woman's reproductive rights into her sexual rights. This subsumption has never been separated since. The absence of reproductive rights in criminal law has far-reaching consequences, such as the inability to differentiate between rapes that involve reproductive rights from those that do not and a complete lack of laws relating to infringements of reproductive rights unrelated to sexual encounters, like medical malpractice and reproductive coercion.

In response to this problem, I propose states should enact suites of laws intended to protect a person's right to reproductive autonomy. In writing these laws, state legislatures should focus only on the harm caused by the violation of reproductive autonomy, and not the way in which the reproductive right was violated. The scope of reproductive crimes should only cover violations of reproductive rights. A sexual assault that violates a reproductive right, for example, should be treated as two separate crimes: a sexual assault and a reproductive assault (to choose a random potential nomenclature). Medical malpractice that results in a forced pregnancy should be prosecuted as a reproductive assault as well as under any laws that would govern the physician's behavior in inducing the pregnancy.

In focusing on the reproductive harms to a person, states must consider how grave each violation of reproductive autonomy is. Specifically, violations of a person's reproductive rights that results in them becoming pregnant is more severe. While men can obviously have their reproductive rights violated, the violation is limited to the mere state of being—or not

being—a parent. Beyond this simple right to decide whether to be a parent, however, there are obvious other ramifications of reproduction, namely, pregnancy. Thus, if a woman is sexually assaulted and becomes pregnant, not only has her right to choose to be a parent been violated, but she has also suffered the great bodily burden of pregnancy. However, a man who is sexually assaulted by a woman who then becomes pregnant has (in terms of his reproductive rights) only been denied his simple right to choose whether to be a parent. The man has not, however, been impregnated. Thus, the difference in gravity becomes clear: a violation of a woman's reproductive autonomy causes a greater harm, and thus deserves a greater punishment.

Additionally, states need to decide where criminal liability for violations of reproductive rights attaches as well as how to treat attempt liability. I argue that a person's reproductive autonomy is violated the moment their control over if, when, how, or with whom to reproduce is compromised. To illustrate this, I return to the example of the vindictive ex-boyfriend who tampers with his ex-girlfriend's birth control. The moment the ex-boyfriend renders his ex-girlfriend's birth control ineffective, he has taken her control over her reproductive autonomy away and should be held fully liable for his actions whether or not she becomes pregnant. Attempt liability, then, would attach when someone attempts but fails to remove a person's control over their reproductive autonomy.

Starting from this position, states can simply order reproductive crimes by the gravity of their potential harm. The greatest potential harm of reproductive coercion is a victim's forced pregnancy. Furthermore, the only options available to the victim of a forced pregnancy are carrying the pregnancy to term, abortion, or miscarriage, all of which have potentially severe physical, psychological, and financial ramifications. Thus, reproductive violations of the class of victim who can become pregnant should be punished most. Because a victim of reproductive coercion who cannot become pregnant does not suffer as grave a harm, violations of this class of victims should be punished less.

In addressing reproductive coercion, states must also consider whether to punish more or less based on the method of coercion. For example, it may be the case that forced pregnancies as a result of an infertility specialist's medical malpractice should be treated differently than a partner's coercion to maintain an unwanted pregnancy, or that perhaps both should be treated differently than a pregnancy induced by sexual assault. Because the gravity of the *reproductive* harms (i.e., an unwanted pregnancy) are all identical, they should be punished equally, regardless of the way the pregnancy was induced. This makes sense because the blameworthiness of the action inducing the pregnancy is separate from the violation of a person's

reproductive rights. If a doctor commits medical malpractice and forcibly induces a pregnancy, the doctor should be held liable for his individual actions: the medical malpractice and the violation of reproductive rights via a forced pregnancy. Similarly, a male who sexually assaults a victim who can become pregnant should be held separately liable for his violations of both the victim's sexual and reproductive autonomy. A partner who coerces their partner to remain pregnant should be held only liable for their violation of their partner's reproductive autonomy, not sexual autonomy.

States would also need to decide whether and how to include considerations for the intent of the perpetrator. I argue that strict liability should attach for reproductive crimes. Otherwise, too many perpetrators of sexual assault would argue that they had no criminally reproductive intent, just criminally sexual intent. A failure to apply strict liability might also allow rapists who used a method of contraception to escape liability in the instance the victim still becomes pregnant. Because condom failure is not unknown,[109] a rapist who uses a condom still effectively takes reproductive autonomy out of a victim's hands, and thus I would treat condom usage (or other types of contraceptives) and intent as irrelevant and apply strict liability to any intentional act the actor knew would deprive the victim of their reproductive autonomy.

States should also take into consideration the age of the victim because children and the elderly deserve heightened protection as more vulnerable members of our society. Furthermore, the dangers of pregnancy are heightened as one ages out of ideal child-bearing years (late 20s and early 30s).[110] Thus, there is a viable argument that reproductive violations of both older and younger victims who can become pregnant should be punished more than violations of victims for whom pregnancy is less dangerous.

CONCLUSION

In summary, states must enact statutes that protect the reproductive rights of their inhabitants. These statutes should be completely separate from existing laws on sexual assault. In separating sexual and reproductive laws, states can increase the sensitivity of their criminal codes to account for the

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[109] *How effective are condoms?*, PLANNED PARENTHOOD, https://www.planned parenthood.org/learn/birth-control/condom/how-effective-are-condoms [https://perma.cc/V3Z2-VP24] ("But people aren't perfect, so in real life condoms are about 87% effective – that means about 13 out of 100 people who use condoms as their only birth control method will get pregnant each year.").

[110] Stephanie Watson & Holly Ernst, *When Can You Get Pregnant and What's the Best Age to Have a Baby?*, HEALTHLINE (June 6, 2018), https://www.healthline.com/health/ womens-health/childbearing-age [https://perma.cc/2Q59-L45T].

disparate reproductive rights sometimes involved in different forms of sexual violence, as well as violations of reproductive autonomy that do not occur in a sexual context. This in turn will help marginalized communities who are most often the victims of reproductive and sexual abuses and who stand to suffer most from violations of their reproductive rights.