

## SEXUAL EXCEPTIONALISM

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The idea that sexual injuries register on a different level than other types of injuries runs throughout the law. Sometimes, sexual injuries do not register at all. Consider the lack of attention to sexual violence when its victims are male<sup>2</sup> or married.<sup>3</sup> In other instances, sexual injuries are the source of heightened attention, even moral panic.<sup>4</sup> Consider the unique array of penalties for sex offenses as opposed to other types of criminal offenses.<sup>5</sup> Many legal doctrines penalize certain types of harmful conduct, while carving out sexual variants of that conduct for special treatment, in deviation from the legal norm. This Article terms that impulse “sexual exceptionalism.”<sup>6</sup> Although feminists and other legal theorists have long debated whether sexuality is a site of oppression or liberation,<sup>7</sup> no legal scholarship has taken sexual exceptionalism in the law as an explicit topic of inquiry.<sup>8</sup>

This Article posits that sexual exceptionalism is a broad ranging phenomenon deserving of theoretical scrutiny. It investigates the operation of sexual exceptionalism in various contexts, including: (1)

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<sup>2</sup> See Bennett Capers, *Real Rape Too*, 99 CAL. L. REV. 1259 (2011).

<sup>3</sup> See Jill E. Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373 (2000).

<sup>4</sup> See, e.g., PHILIP JENKINS, MORAL PANIC: CHANGING CONCEPTS OF THE CHILD MOLESTER IN MODERN AMERICA 118 (1998).

<sup>5</sup> See Corey Rayburn Yung, *The Emerging Criminal War on Sex Offenders*, 45 HARV. C.R.-C.L. L. REV. 435 (2010); Michael Vitiello, *Punishing Sex Offenders: When Good Intentions Go Bad*, 40 ARIZ. ST. L.J. 651, 651–90 (2008).

<sup>6</sup> I do not mean exceptionalism just in the sense of special treatment on account of superior or privileged status (as in “American exceptionalism”). I mean exception from norms generally, whether based on superiority or inferiority. The term “sexual exceptionalism” has also appeared in the work of Jasbir K. Puar, who uses the idea in a more narrow sense than I do here. Puar writes on the confluence of American exceptionalism and myths about the uniqueness of Muslim vulnerability to sexual violence in the context of the War on Terror. JASBIR K. PUAR, TERRORIST ASSEMBLAGES: HOMONATIONALISM IN QUEER TIMES 2 (2007). Adrienne Davis has used a similar term, “sexuality exceptionalism,” by which she means “a deeply essentialist, almost Freudian, notion of sex as sacred, repressed, distinct from other bodily pleasures, . . . in need of liberation, exempt from regulation and distributive justice inquiries.” Adrienne D. Davis, *Bad Girls of Art and Law: Abjection, Power, and Sexuality Exceptionalism in (Kara Walker’s) Art and (Janet Halley’s) Law*, 23 YALE J.L. & FEMINISM 1, 52 (2011) (emphasis added). I use the term “sexual exceptionalism” in a broader sense. While Davis is concerned about theories that privilege sexuality, I mean to interrogate legal rules that both privilege and punish sex.

<sup>7</sup> See, e.g., Rosalind Dixon, *Feminist Disagreement (Comparatively) Recast*, 31 HARV. J.L. & GENDER 277, 282 (2008); Katherine M. Franke, *Theorizing Yes: An Essay on Feminism, Law, and Desire*, 101 COLUM. L. REV. 181 (2001).

<sup>8</sup> Although he does not examine the broader question of sexual exceptionalism, Professor Jed Rubenfeld has recently reinvigorated debate over what differentiates rape from battery. Compare Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372, 1387, 1430 (2013) (asking what principle, other than “a morality of feminine virtue,” distinguishes rape from batteries, such as force feeding, and proffering a concept of rape as a violation of the right to “self-possession”) with, e.g., Gowri Ramachandran, *Delineating the Heinous: Rape, Sex, and Self-Possession*, 123 YALE L.J. ONLINE 371, 385 (2013) (arguing that “sex is special” due to potential consequences such as pregnancy, disease, and “reduced capacity to have pleasurable sex in the future” and how it “often signifies something important about one’s social identity”). This Article contributes to this debate by examining how the sexual might amplify, mute, or distort legal understandings of injury in contexts other than rape.

treating sexualized forms of workplace and school harassment differently than non-sexual ones,<sup>9</sup> (2) treating sex trafficking differently than other forms of human trafficking,<sup>10</sup> (3) treating child sex abuse differently than other types of mistreatment,<sup>11</sup> and (4) treating pornographic communications differently than other types of unsolicited advertising.<sup>12</sup> In these contexts, injuries are thought both more or less severe when sexual. Side-by-side comparison reveals general insights about the motivations for and potential drawbacks of sexual exceptionalism. This Article will conclude that sexual exceptionalism is a troubling impulse when unmoored from considerations of systemic inequalities and stereotypes, particularly those based on gender.

Because sexual injuries often afflict members of relatively vulnerable social groups (women, children, prisoners), feminists and other progressives have sought to bring these forms of injury to light.<sup>13</sup> Progressives argue that because sexual violation entails unique forms of stigma and trauma, it requires special disapprobation.<sup>14</sup> It is less likely to be reported, and therefore more vigilance is required in efforts at prevention and deterrence to reveal and combat the problem at all.<sup>15</sup> These arguments tend to resonate with social conservatives who view sexual expression outside of marriage as inherently immoral.<sup>16</sup>

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<sup>9</sup> Vicki Schultz has argued that Title VII sexual harassment cases focus on sexual (in the sense of erotically charged) conduct to the detriment of non-sexual but still discriminatory forms of harassment. See Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1755 (1998). This paper will focus on state sexual harassment laws that single out sexual conduct. See, e.g., CONN. GEN. STAT. § 46A-60(8); 775 ILL. COMP. STAT. 5/2-101(E); MASS. GEN. LAWS. CH. 151B § 1(18); MICH. COMP. LAWS § 37.2103(i); MINN. STAT. § 363A.03(43); N.D. CENT. CODE § 14-02.4-02(6); N.H. REV. STAT. § 354-A:7(V); R.I. GEN. LAWS § 28-51-1(B); VT. STAT. ANN. TIT. 21 § 495D(13); WISC. STAT. §111.32(13). See also 29 P.R. LAWS ANN. §155B; 10 V.I. CODE ANN. § 64a(b)(4). It will also examine Title IX's prohibitions on sexual conduct in schools. See, e.g., Dear Colleague Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ. at 1 (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

<sup>10</sup> Compare, e.g., Janie A. Chuang, *Rescuing Trafficking from Ideological Capture: Prostitution Reform and Anti-Trafficking Law and Policy*, 158 U. PA. L. REV. 1655, 1694-99 (2010), Melissa Ditmore, *Trafficking in Lives: How Ideology Shapes Policy*, in *TRAFFICKING AND PROSTITUTION RECONSIDERED* 107-23 (Kamala Kempadoo ed., 2005), with SHEILA JEFFREYS, *THE INDUSTRIAL VAGINA* 160 (2009); Catharine A. MacKinnon, *Trafficking, Prostitution, and Inequality*, 46 HARV. C.R.-C.L. L. REV. 271, 271-309 (2009).

<sup>11</sup> Compare, e.g., Robin Fretwell Wilson, *Children at Risk: The Sexual Exploitation of Female Children After Divorce*, 86 CORNELL L. REV. 251, 251-325 (2001) with Elizabeth A. Wilson, *Suing for Lost Childhood: Child Sexual Abuse, the Delayed Discovery Rule, and the Problem of Finding Justice for Adult-Survivors of Child Abuse*, 12 UCLA WOMEN'S L.J. 145, 147-249 (2003), with Amy Adler, *The Perverse Law of Child Pornography*, 101 COLUM. L. REV. 209, 214-34 (2001).

<sup>12</sup> See Controlling the Assault of Non-Solicited Pornography and Marketing (CAN-SPAM) Act of 2003, 15 U.S.C. §§ 7701-7713 (2012).

<sup>13</sup> See, e.g., Linda Gordon, *The Politics of Child Sexual Abuse*, 28 FEMINIST REV. 56, 56-63 (1988).

<sup>14</sup> See JOHN N. BRIERE, *CHILD ABUSE TRAUMA: THEORY AND TREATMENT OF THE LASTING EFFECTS* 19 (1992). But see P.E. Mullen, J.L. Martin, J.C. Anderson, S.E. Romans & G.P. Herbison, *The Long-Term Impact of the Physical, Emotional, and Sexual Abuse of Children: A Community Study*, 20 CHILD ABUSE & NEGLECT 7, 7-21 (1996) (arguing that therapists should be wary of privileging child sexual abuse over other forms of abuse).

<sup>15</sup> See, e.g., Lynne Henderson, *Without Narrative: Child Sexual Abuse*, 4 VA. J. SOC. POL'Y & L. 479, 479-544 (1997).

<sup>16</sup> See, e.g., Elizabeth Bernstein, *Militarized Humanitarianism Meets Carceral Feminism: The Politics of Sex, Rights, and Freedom in Contemporary Antitrafficking Campaigns*, 36 SIGNS 45, 45-71 (2010).

Yet there are also reasons to be concerned about sexual exceptionalism. There is disagreement on what constitutes a sexual transgression and why it is injurious.<sup>17</sup> Critical theorists have asked whether by recognizing the stigma of sexual violence, feminism might reaffirm and reinforce that stigma, by, for example, instructing victims that their injury is too severe for any recovery to be possible, or signaling to aggressors that sex is the best way to cause injury.<sup>18</sup> Another concern is that sex may become the only frame for understanding social problems, obfuscating other types of harm to vulnerable populations.<sup>19</sup> At the same time that sexual injuries are more likely to be kept in the dark, when brought to light, they are more likely to become focal points of intense interest.<sup>20</sup> For example, sex work becomes the primary problem for an anti-trafficking movement, rather than other forms of coerced labor.<sup>21</sup> On the one hand, due to its sensational nature, sex can garner attention for a cause.<sup>22</sup> On the other, it risks monopolizing the agenda, while also splintering a movement due to fundamental normative disagreements about the nature of sexual injury. Finally, the focus on sexual injury may result in scapegoating members of vulnerable populations as perpetrators, while shielding those who lead more conventional lives.<sup>23</sup>

This paper will proceed in three parts. Part I will offer a typology of theories of sexual injury. It will explain what types of sex cause injury and why, from the perspectives of four intellectual schools: social conservatism, feminism, psychology, and political liberalism. Part II will analyze how these theories are deployed to support sexual exceptionalism in various legal contexts, and the attendant advantages and disadvantages of that move in each context. Part III will argue that sexual exceptionalism may sideline the project of dismantling sexism and other systemic forms of inequality, and will ask what it would mean to treat sexual injuries on par, or commensurate with their harms.

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<sup>17</sup> See Camille Gear Rich, *Innocence Interrupted: Reconstructing Fatherhood in the Shadow of Child Molestation Law*, 101 CAL. L. REV. 609, 613-14 (2013).

<sup>18</sup> JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 345-46 (2006). Halley offers the controversial analogy of the child who falls on the playground, and does not start crying until adults make a fuss. See Robin West, *Desperately Seeking a Moralist*, 29 HARV. J. L. & GENDER 1 (2006) (objecting to this analogy).

<sup>19</sup> See, e.g., Elizabeth F. Emens, *Inside Out*, 2 CALIF. L. REV. CIRCUIT 95, 100-02 (2011) (discussing focus on sexual violence in prisons).

<sup>20</sup> See, e.g., Elizabeth A. Wilson, *supra* note 10.

<sup>21</sup> See, e.g., Chuang, *supra* note 9.

<sup>22</sup> See, e.g., Grant Gross, *New Legislation Would Allow Spammers to Be Sued*, INFOWORLD (June 13, 2003), <http://www.infoworld.com/d/developer-world/new-legislation-would-allow-spammers-be-sued-374> (discussing how concerns over the harms to children from internet pornography helped democrat Charles Schumer form an alliance with the Christian Coalition of America to pass an anti-SPAM bill).

<sup>23</sup> See, e.g., Jennifer M. Collins, *Lady Madonna, Children at Your Feet: The Criminal Justice System's Romanticization of the Parent-Child Relationship*, 93 IOWA L. REV. 131, 143-45 (2007).