"Ruined"

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Judges play a critical role in one of the most important stages of a criminal case's adjudication—sentencing. While there have been substantial limitations placed on the discretion judges can exercise in devising punishments, there are little to none on what judges say at such hearings when articulating their rationales for the sentences they impose on convicted defendants. This Article examines the language judges use when sentencing defendants convicted of rape, sexual assault, and sexual abuse that describes victims of those crimes and the harms they have sustained, especially language that describes victims as "ruined," "broken," or "destroyed." The use of such language, while apparently meant to be empathetic, only serves to uphold misogynistic understandings of rape and sexual assault and actively harms victims. Judges trying to justify harsh sentences for defendants convicted of sex crimes also engage in shaming and exploitation of victims when saying that defendants have left victims "ruined" at sentencing.

In this Article, I use traditional scholarly methods of reviewing and analyzing cases and legal doctrine to show why the use of such language is harmful to victims and flouts the purposes of criminal punishment. However, I also engage in autoethnographic methods, relying on my own experiences of rape and sexual assault, as well as prosecuting such cases. This Article considers how other fields such as medicine and public health have approached destigmatizing other historically stigmatized conditions such as substance use and mental illness, arguing that judges should take similar steps to destigmatize being a victim of rape and sexual assault by more carefully considering their language use at sentencing. I conclude by reflecting on the use of personal narrative in legal scholarship and in the classroom and argue that it can be a powerful tool that scholars should more openly embrace.

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This Article is dedicated to Brian, who made me happy enough to finally be able to write it.

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INTRODUCTION

My first real position in legal academia was as a visiting assistant professor at the J. Reuben Clark Law School at Brigham Young University in Provo, Utah. I was a small-town practitioner for nearly a decade beforehand and was making the transition to a new career as an academic that I never anticipated would ever happen. I was excited to be starting a new venture. The law school at the time seemed excited, as well. My face was on the law school splash page, announcing my recent hire, albeit a temporary one. The school's public relations coordinator at the time even decided to do an interview with me to introduce me to the law school community. I was grateful for the support, and the interview went well. The questions were, for the most part, straightforward—questions about my research and what I anticipated teaching would be like—and I was excited to answer them.

There was one question, however, that threw me off and that I somehow was not prepared for. It was the question of what led me to the law in the first place. I gave the answer that I have given so many times since then, to friends, potential employers, and to students: that growing up in inner-city Long Beach, California, during the 1992 Los Angeles riots[1] put me on the path of studying the law, questioning why the criminal legal system functioned the way it did, and wondering what specifically I could do to benefit my community; that somehow going to law school and becoming a prosecutor would situate me to be the most effective I could be at reforming the criminal legal system and making it less brutal and discriminatory.

That was a lie.

While the reasons that I articulated that day were important to me, I had been telling people that I wanted to be a prosecutor since the time I was about seven years old—perhaps even a little earlier. And the real reason I had for wanting to

1. On April 29, 1992, a jury issued not guilty verdicts on almost all charges that were brought against four Los Angeles policemen. The charges arose from their sadistic beating of Rodney King, a Black man, during a traffic stop in the San Fernando Valley. The police officers were white. After tasing King, the officers beat him savagely with batons, kicked him, stomped on him, and eventually handcuffed and hogtied him. *See* Cydney Adams, *March 3, 1991: Rodney King Beating Caught on Video*, CBS NEWS (Mar. 3, 2016, 6:00 AM), https://www.cbsnews.com/news/march-3rd-1991-rodney-king-lapd-beating-caught-on-video/ [https://perma.cc/P7K3-AKUC]; *Timeline: Rodney King and the LA Riots*, 89.3 KPCC, https://projects.scpr.org/timelines/la-riots-25-years-later/ [https://perma.cc/RS9L-7MWF] (last visited Oct. 4, 2022).

Video of the beating was played many times over on both local and national news. The trial of the policemen was also covered extensively by news media, and the coverage was widely, from my own childhood recollection, consumed. It was consumed widely enough that when the policemen were acquitted, a multiday riot—or uprising, depending on whom one asks—began, starting on April 29, 1992, and lasting for six days. *See Timeline: Rodney King and the LA Riots*, *supra*; *Angelenos Mark 30th Anniversary of LA Riots*, CBS L.A. (Apr. 29, 2022, 11:57 AM), https://www.cbsnews.com/losangeles/news/angelenos-mark-30th-anniversary-of-la-riots/ [https://perma.cc/VCY6-H8PK].

be not just a lawyer but a prosecutor so early was much more personal to me. When I was a little girl, perhaps somewhere starting around three years old and up until I was about six or seven, my biological father repeatedly sexually abused me. He tricked me into fondling and kissing him and performing oral sex under the guise that that was how fathers showed their love for their daughters and how daughters showed love for their fathers.

When those explanations failed to placate me when he wanted to move on to even more serious sexual behavior, he threatened to hurt the rest of my family and said that if I ever told anyone what he did, I would be taken away and never see my family again. On finding that that was the threat that would guarantee my silence, he began to take me on "camping" trips to meet like-minded friends of his out in the desert parks outside of Los Angeles.

I feel like there is no good way for me to estimate the number of times I was abused by my biological father and his friends while on those trips; there is no way, I think, to arrive at an accurate number even though the horror feels burned into my memory and buried deep in my soul. I was warned many times over not to talk to teachers, police officers, judges, priests, nuns, or anyone else holding any kind of authority, period, and never to tell a soul of what happened. And I was warned that if I did, a lawyer—a prosecutor—could send him to jail forever.

And so, I decided to become the thing that my biological father seemed to fear the most—a criminal prosecutor. I am not sure that I would ever have discovered what a prosecutor was as a small child if not for my biological father expressing his fear of them, and I am also not sure that there was anything else that could ever have made another career path more alluring at the time. Attaining the role for myself became a singular goal and the framework through which I judged much of what I did. Would taking a certain class in high school make it more likely that I would be admitted into a good college, which would then lead to an excellent law school, which would then help me obtain a job as a criminal prosecutor? If I went to a party where other kids were drinking and we all got caught, would that lead to a contact with the juvenile justice system, rendering me less likely to be accepted into the good college necessary to go to law school to become a criminal prosecutor? My focus on accomplishing this goal at times was unwavering. Obsessive.

Looking back decades later, I am better able to understand what I longed to achieve with becoming a prosecutor. I wanted to become that of which my biological father was afraid. While I wanted to "do justice" by becoming a progressive prosecutor as my criminal law professor exhorted us to do if we really wanted to effect criminal legal system reform, deep down my drive to become a prosecutor found its genesis in wanting to be feared. I wanted not only to be feared by my biological father but also to be feared by anyone else who would mean to do me similar harm in the future or to do such harm to others. Part of me

clung to a naive vision of "prosecutor as hero,"[2] imbued with the power and authority to bring those who committed sexual crimes to justice and those who suffered such crimes the peace that they were seeking. I desperately wanted to control my own narrative—"victim becomes powerful voice for others"—and help others reclaim theirs while meting out the punishments I believed sexual offenders deserved.

I met my first husband in law school. He was in my same small section my first year of law school and we got married the summer right before our third year of law school started. Although it would, within just a few years, become a painfully unhappy and, for me, abusive marriage, we were then at least happy enough to decide to move back to where he was from—a county in northern Utah with a small city at its center and several exurban and rural towns throughout the rest. I secured a job as a county prosecutor and was excited for the opportunity to do what I believed would be meaningful work in a small office moving the cause of criminal legal system reform forward; perhaps I would have the chance to prosecute cases involving sexual offenses and, at least in some sense in my own mind, represent the interests of those who had been victimized as I had, even though I knew that prosecutors, unlike other attorneys, had no one, easily discernible client and did not represent victims.[3]

I spent the first three years of my legal career after law school as the most junior attorney in that county-level prosecutor's office. Since then, I have been asked in several different settings how bad, or serious, or challenging being a prosecutor could have been in a small, rural setting. To be blunt, the way most prosecutors do the job, it is not challenging at all. Prosecutors enjoy greater resources than their analogues in the opposition, public defenders, do.[4] They enjoy assistance from and close relationships with police. They are often treated better and given greater deference by judges.[5] Being a prosecutor, depending on how you

2. In the old 1950s television show *Mr. District Attorney*, the district attorney was the "champion of the people, defender of truth, guardian of our fundamental rights to life, liberty, and the pursuit of happiness," never mind that prosecutors represent the government and are not charged directly with helping anyone in particular know or avail themselves of their constitutional rights. *See, e.g.*, Timeless Television, *Mr. District Attorney~50s Classic Crime Show*, YOUTUBE, at 0:10 (Aug. 20, 2019), https://www.youtube.com/watch?v=475FW_5aQtw&ab_channel=TimelessTelevision; *see also infra* note 3 (describing role of prosecutors).

3. "The prosecutor generally serves the public and not any particular government agency, law enforcement officer or unit, witness or victim. When investigating or prosecuting a criminal matter, the prosecutor does not represent law enforcement personnel who have worked on the matter and such law enforcement personnel are not the prosecutor's clients. The public's interests and views should be determined by the chief prosecutor and designated assistants in the jurisdiction." CRIM. JUST. STANDARDS: PROSECUTION FUNCTION § 3-1.3 (AM. BAR ASS'N 2017).

4. Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219, 222 (2004).

5. *See* Darryl Brown, *The Judicial Role in Criminal Charging and Plea Bargaining*, 46 HOFSTRA L. REV. 63, 75 (2017) (noting the great deference paid by American judges to prosecutors); Laurie L. Levenson, *The Politics of Ethics*, 69 MERCER L. REV. 753, 760 (2018) (noting that judges interpret rules in favor of prosecutors "out of deference to the exigencies of their work").

approach it, is actually pretty easy. But the things that worried prosecutors in my office—conviction rates, relationships with investigating officers, potential future judgeships and political appointments—were not the things that ever seemed to trouble me. I often worried about many of the ethical conundrums that would arise in my job, which has been the starting point of much of my other writing. But there were other aspects of the job that were much more personal to me that made the job uniquely challenging.

At a sentencing hearing sometime in early 2007, I sat at the prosecutor's table, listening to the judge pronounce the sentence in a sexual assault case that I had prosecuted from beginning to end: it had pled out, averting a trial and sparing the victim from having to take the stand. Although the victim elected not to read or provide a victim impact statement, the judge decided to weigh in on what he suspected would be the impact on the victim's life from the bench, anyway. "You've ruined this young woman's life; it's changed forever, and you've changed her, forever."[6] I thought I understood at the time the point the judge was attempting to make, that he was trying to shame the defendant and to show that he had done something shameful. I shuddered, however, at the implication and the shame that seemed to run in both directions—this terrible thing was not only committed by the defendant, but also, according to the judge, something that weighed on the victim, who would live with a related sort of shame, forever.

I thought of this sentencing hearing when reading a story years later about Elizabeth Smart relating what had happened after her kidnapping, including repeated sexual assault, as well as the reasons why it was difficult to speak out about it after returning home.[7] She had heard messages growing up, including from schoolteachers, that meant to shame those who engage in premarital sex:

> [The teacher] said, "Imagine you're a stick of gum and when you engage in sex, that's like, that's like getting chewed, and then if you do that lots of times you're going to become an old piece of gum, and who's going to want you after that?" Well, that's terrible, but nobody should ever say that, but for me, I thought, "Oh my gosh, I'm that chewed up piece of gum!" Nobody rechews a piece of gum. You throw it away. And that's how easily [sic] it is to feel like you no longer have worth, you no longer have value. Why would it even be worth screaming out? Why would it even make a difference if you are rescued? Your life still has no value.[8]

I quit my job at the prosecutor's office after three years, for a variety of reasons. I felt that my supervisors, including the elected head prosecutor, were

6. This is the quotation that I recall to the best of my memory.

7. *See* Christina Capatides, *A Cup Full of Spit, a Chewed Up Piece of Gum. These Are the Metaphors Used to Teach Kids About Sex*, CBS NEWS (Apr. 29, 2019, 8:00 AM), https://www.cbsnews.com/news/a-cup-full-of-spit-a-chewed-up-piece-of-gum-these-are-the-metaphors-used-to-teach-kids-about-sex/ [https://perma.cc/N9SK-CXUL].

8. David Rosowski, *Elizabeth Smart Visits Johns Hopkins*, YOUTUBE, at 10:07 (May 30, 2014), https://www.youtube.com/watch?v=kzBVzBf-Dn4; *see* Capatides, *supra* note 7.

increasingly expecting me to engage in unethical behavior in order to secure convictions; I had never given in, and it was impacting my work environment. I was also realizing that, given the politics of the office in which I worked, attempting to make positive change by being a reform-minded prosecutor would be next to impossible, if not impossible. I also, however, could no longer bear to sit through sentencing hearings, hearing the victims of sexual assault, be they children, teenagers, or adults, and almost always women and girls, be told over and over that they had been ruined, destroyed, or broken by what had happened to them and the people who perpetrated such injustices upon them. I just could no longer listen, over and over again, to why I should be and feel broken, forever. It made me feel like I was being a bad victim somehow, that I should not have been able to go on with life as I did, and that there was something wrong with me if I tried and succeeded to do so.

This Article is the first to consider the language that judges employ during sentencings involving sex crimes and focuses specifically on the language that judges use to describe the nature of the harm inflicted by such offenses, as well as the words used to describe victims themselves, such as "ruined" or "broken." Although much has been made of the choice of language of prosecutors, defense counsel, police officers, and others during both the trial and, if a conviction is secured, sentencing in rape and other sexual assault cases, truly little scholarship, if any, has been devoted to the language that judges use during these proceedings. Part I provides examples of the type of language on which I am focusing, as well as explains the methodology that the Article employs. It posits that the use of such language describing victims in such cases, who are primarily women and girls,[9] has its roots in misogyny, both past and present, legal and not. Part II contemplates how the use of the language in question operates in the courtroom, specifically what judges may be trying to accomplish with its use and how this usage runs afoul of traditional justifications for criminal punishment, particularly in person-on-person crimes. Part III examines analogues to the use of such language when referring to other traditionally stigmatized and judged populations, particularly those affected by substance use disorders and mental illness. Part IV briefly reflects on the question of how much we, as professors, should let events from our own lives influence how we teach and how we write, suggesting that law professors should be more open to the possibility of bringing parts of themselves to the classroom that they may not have considered before.

9. *See* BUREAU OF JUST. STAT., OFF. OF JUST. PROGRAMS, FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994-2010, at 3 (2013), https://bjs.ojp.gov/content/pub/pdf/fvsv9410.pdf [https://perma.cc/V5UR-PGDZ]; HOLLY KEARL, STOP STREET HARASSMENT, THE FACTS BEHIND THE #METOO MOVEMENT: A NATIONAL STUDY ON SEXUAL HARASSMENT AND ASSAULT 7 (2018), https://www.nsvrc.org/sites/default/files/2021-04/full-report-2018-national-study-on-sexual-harassment-and-assault.pdf [https://perma.cc/2KRW-SH9E]. This is not to say that men and boys are not sexually victimized at all, but multiple estimates conclude that women and girls are more commonly the victims of sexual offenses.

I. "BROKEN" LANGUAGE

Of the many events that occur in the adjudication of a criminal case, sentencing may be one of the most important and anxiously awaited because it is at this stage that both defendants who have been convicted and victims, depending on the crime, finally learn the outcome of an often-arduous process. There are many actors and factors that contribute to the outcome of sentencing. Defendants and victims may even have the chance to speak at a sentencing hearing; in federal and nearly all state sentencing hearings, victims have the right to speak at sentencing, with this right usually sounding in statute or, in some instances, even state constitutions.[10] Prosecutors "decid[e] what charges to bring against [a] defendant," "engag[e] in plea bargaining," and "mak[e] sentencing recommendations."[11] Defense counsel usually do what they can to offer facts in mitigation, in an effort to alleviate whatever burdens may be placed on their clients.[12] A representative from a probation office usually collects information about the defendant after conviction for purposes of a pre-sentence investigation, with a report delivered to both parties and the judge ahead of a sentencing hearing.[13]

This Article focuses specifically on language that judges use to describe the harm inflicted on victims by acts of sexual assault and the harmful effects of using this language to describe not just the harms in question but victims and their lives themselves. At this point, however, it is important for me to clarify that this Article theorizes on and scrutinizes only the language that judges use at the sentencing hearings in question. I do not purport to police the language that victims of sexual assault and abuse choose to use to describe their own experiences. Many, understandably, may wish to describe themselves in an effort to explain the seriousness of the harm done to them as being "broken," "ruined," or something else indicating a profound change.

A. "RUINED" HISTORY

Because, as described above, rape and sexual assault have long been unjustly understood as crimes committed by men exclusively against women and girls, the language used to describe and address rape has long been gendered as well. It is my contention that the language that judges use in describing victims of rape, sexual abuse, and other sexual violence as "ruined," "broken," "destroyed," and the like arises from a history of women being treated as property and objects the likes of which men could own, exploit, and render worthless. This next Section of this Article seeks to examine the history of both terms and doctrines that objectify women before considering the ways such terms are deployed from the bench during sentencing. This Section then seeks to contextualize this language in the larger legal and historical tradition of treating women as property and objects,

10. Paul G. Cassell, *In Defense of Victim Impact Statements*, 6 OHIO ST. J. CRIM. L. 611, 611 (2009).

11. *Sentencing, Parole, and Probation*, 71 GEO. L.J. 673, 673–74 (1982).

12. *See generally* Carissa Byrne Hessick & Douglas A. Berman, *Towards a Theory of Mitigation*, 96 B.U. L. REV. 161, 167–77 (2016) (describing the history of mitigation).

13. *Sentencing, Parole, and Probation, supra* note 11, at 674, 676–78.

starting with the doctrine of coverture inherited from the English common law, and then moving to marital rape and marriage in lieu of prosecution of rape. After establishing that the use of words like "ruined" when describing the purported state of a victim of sexual assault has its origins in a misogynistic legal history in the United States that renders women objects and intertwines concepts like chastity, virtue, and subjugation, I move to questioning why some judges continue to use such language.

1. Coverture

The treatment of women as property under the law has a long and tragic history in both the United States and England, from which American common law is derived. This is particularly evident in the history of the law of marriage, which is indelibly intertwined with the law of rape and sexual assault and abuse.[14]

Under the doctrine of coverture, "a married man and woman were treated by the State as a single, male-dominated legal entity."[15] A woman did not have a separate legal existence apart from her husband's upon marrying under the system of coverture. She no longer owned her own property.[16] She was also obligated "to serve and obey her husband" while a husband had "to protect and support his wife."[17] A woman's work and everything that came of it belonged to her husband.[18] Given these limitations, marriage under coverture amounted to a "quasi-carceral institution" with husband as jailer,[19] especially because married women "could not . . . testify for or against their husbands."[20] With time, however, it became clear that there were distinct disadvantages to maintaining the doctrine of coverture. Without it, "a wife's property could keep a family solvent if a husband's creditors claimed his assets, and employed married women could support their children if their husbands were profligate."[21]

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14. As described by William Blackstone regarding the system of coverture:

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing; and is therefore called in our law-french a feme-covert . . . and her condition during her marriage is called her coverture.

1 WILLIAM BLACKSTONE, COMMENTARIES *430 (footnote omitted).

15. Obergefell v. Hodges, 576 U.S. 644, 660 (2015).

16. Margaret Valentine Turano, *Jane Austen, Charlotte Brontë, and the Marital Property Law*, 21 HARV. WOMEN'S L.J. 179, 180 (1998).

17. Albertina Antognini, *Nonmarital Coverture*, 99 B.U. L. REV. 2139, 2151 (2019) (quoting NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 12 (2000)).

18. *Id.* at 2154.

19. Nan D. Hunter, *Reconstructing Liberty, Equality, and Marriage: The Missing Nineteenth Amendment Argument*, 108 GEO. L.J. 73, 75 (2020).

20. Kerry Abrams, *Citizen Spouse*, 101 CALIF. L. REV. 407, 415–16 (2013).

21. Allison Anna Tait, *The Return of Coverture*, 114 MICH. L. REV. FIRST IMPRESSIONS 99, 101 (2016) (quoting Brief of Historians of Marriage and the American Historical Association as *Amici Curiae* in Support of Petitioners at 17, Obergefell v. Hodges, 576 U.S. 644 (2015) (Nos. 14-556, 14-562, 14-571, 14-574)).

Pushback against the system of coverture began in the mid-1800s with the passage of Married Women's Property Acts throughout the United States. While the term "Women's" in the titles of these acts was always unmodified, it is critical to understand that these acts are more accurately understood as white women's property acts, and that the coverture system applied in large part to white women only.[22] While Mississippi was the first to enact a Married Women's Property Act, allowing for ownership and control of property by a married woman and eroding the influence of coverture, what these white wives in Mississippi gained was the ability to own and control enslaved people.[23]

In 1848, the New York state legislature enacted its own Married Women's Property Act.[24] It and the 1860 New York Married Women's Property Act would prove influential by serving as a template and example for other states taking similar measures afterward.[25] Under the Act, women could control the separate property they brought into marriage themselves and proceeds of that property, as well as any gifts given or specifically devised to them.[26] It would, however, take the New York state legislature another twelve years to protect this separate property from seizure to satisfy a husband's debts.[27]

The passage of Married Women's Property Acts, however, did not magically exorcise the country of the influence of coverture. Even into the 1970s, married women had difficulties obtaining credit, opening bank accounts, and obtaining credit cards, with banks able to point to marital property regimes in some states as the reason such bars were necessary.[28] Nineteenth-century supporters of

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22. *See* Diane Klein, *Their Slavery Was Her Freedom: Racism and the Beginning of the End of Coverture*, 59 DUQ. L. REV. 106, 106–07 (2021).

23. As explained by Professor Diane Klein:

> The value of enslaved labor and the offspring of enslaved people frequently made them the most attractive assets in the marital estate of an otherwise impecunious debtor—and the most fiercely defended by his propertied slave-owning wife. The nineteenth century scenario was more 'Gone with the Wind' than 'The Adventures of Ozzie and Harriet.'

Id. at 109 (footnote omitted).

24. Benet Kearney, Note, *Challenges to Marital Unity: Spousal Testimony and Married Women's Property Acts in Nineteenth-Century New York*, 10 GEO. J. GENDER & L. 957, 967 (2009).

25. *See id.* at 967–68, 967 n.72.

26. *Id.* at 959.

27. *Id.*

28. Courtney G. Joslin, *Discrimination in and Out of Marriage*, 98 B.U. L. REV. 1, 8–9 (2018). In the article *Credit-Ability for Women*, Helen S. Lewis described her surprise in 1973 as she discovered that none of the credit cards she used were hers:

> I am the one in our family who does the buying and the paying of bills. All of these years I have carried credit cards I thought were mine [b]ecause I applied for them. My husband . . . never even knows what bills I incur or what I pay. It was only when I got interested in this credit business that I took them out and looked at them. Lo and behold: they're not mine at all. They're *his*! I'll tell you what I mean and what I think women mean when they say they want credit in their own names. I am going to write to the stores . . . to say we want to cancel these accounts. Then we'll re-open the account in my name. We will then extend courtesy cards to my husband.

Martha L. Garrison, *Credit-Ability for Women*, 25 FAM. COORDINATOR 241, 241–42 (1976) (omissions in original).

coverture argued that coverture was necessary because a woman's proper role was that of wife and mother, with the sort of weak nature such that women could not be trusted to act in their own best interest or to make good decisions on their own.[29] The lingering effects of coverture have continued to haunt American law and render women as objects and somehow less than men even today.[30]

The remnants of coverture can also be found in the history of jury service in the United States. As recently as 1975, the Supreme Court in *Taylor v. Louisiana* addressed the systemic exclusion of women from jury service on a statewide level, holding that providing "a fair cross section of the community is fundamental to the American system of justice" and to a defendant's Sixth Amendment right to a jury trial.[31]

The coverture-system notion that women were incapable of making decisions in their own best interest has even more recently been used in support of antiabortion legislation.[32] While the notion that coverture has been abolished and is no

29. Jill Elaine Hasday, *Protecting Them from Themselves: The Persistence of Mutual Benefits Arguments for Sex and Race Inequality*, 84 N.Y.U. L. REV. 1464, 1498–99 (2009).

30. Other scholars have done critically important work in highlighting the ways that coverture continues to haunt the contemporary legal landscape. Coverture underlies current "disputes about parental relocation after divorce . . . . [R]estrictive approaches to relocation by custodial parents (but typically not by noncustodial parents) reveal assumptions about fathers as breadwinners and mothers as caregiving wives bound to their husbands' domiciles—even after dissolution." Susan Frelich Appleton, *Leaving Home? Domicile, Family, and Gender*, 47 U.C. DAVIS L. REV. 1453, 1476–77 (2014). Housework, still primarily done and provided by women, is still "not given the same material recognition at law" as other "value-producing labor," but is considered "part of the gift of marriage, akin to affection, and not an object to be negotiated." Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 35–36 (1996).

31. 419 U.S. 522, 529–530 (1975). At the time of the *Taylor* decision, both the Louisiana Constitution and the Louisiana Code of Criminal Procedure prohibited women from being called for jury duty service without affirmatively opting-in, with a woman having to file a written declaration stating her wish to be subject to jury service. *Id.* at 523 & nn.1–2.

In its brief, the State of Louisiana argued, unsuccessfully, that this ban did not violate the Sixth and Fourteenth Amendments because both the Code of Criminal Procedure and Louisiana Constitution "rather accord[ed] [women] the privilege to serve without imposing the duty to do so." *See* Original Brief on the Merits on Behalf of the State of Louisiana, Appellee at 2, *Taylor*, 419 U.S. 522 (1973) (No. 73-5744), 1974 WL 186110, at *2. The State of Louisiana also argued that the ban—which it characterized as an "exemption"—was "granted to women of a state by that state on the basis of the state interest in the general welfare of its citizens and women as the center of home and family life." *Id.* at 6.

32. *See* Hasday, *supra* note 29, at 1478, 1499. In arguing that abortion restrictions are constitutional if they satisfy rational-basis review, the petitioner in *Dobbs v. Jackson Women's Health Organization* argued that states should be able to assert an interest "in protecting the health of women," characterizing abortion as a risky procedure that could require "a hysterectomy, other reparative surgery, or blood transfusion." Brief for Petitioners at 8, Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (No. 19-1392), 2021 WL 3145936, at *8. Such arguments also found their way into varying briefs filed by amici in support of the petitioner. The group Concerned Women for America argued that abortion restrictions protect women from supposed "physical, psychological, and emotional harms." Brief of *Amicus Curiae* for Concerned Women for America in Support of Petitioners at 3, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392), 2021 WL 3422348, at *3. A brief submitted by Priests for Life argued that the state has an interest in preventing physical harm that may occur during abortion as well as mental illness that may occur afterward. Brief of *Amicus Curiae* Priests for Life Supporting Petitioners at 11, *Dobbs*, 142 S. Ct. 2228 (No. 19-1392), 2021 WL 3403941, at *11. These arguments rely on a certain rhetoric rooted in

more was a welcome development even to the Supreme Court[33] and the optimism behind such sentiment is attractive, coverture's effects remain and influence how women are viewed both in and outside the law.

2. Marital Rape

Rape was not originally, at common law, really theorized as a crime that could have male victims;[34] it was a crime that could be committed by physical action against women only, and that historical understanding still undergirds much of how rape and sexual assault laws have been drafted and operate today. Rape was also not originally understood as a crime against women so much as something done to women.[35] Because women were property of men, the crime itself was more of an affront to the man married to the woman who had been raped; a man owned his wife and therefore could do with her whatever he wished, even without her consent.[36] Over time, however, this justification changed—or perhaps mutated—into a justification commonly cited by the judiciary: the theory of continuing consent.[37] As Professor Michelle J. Anderson explained: "By giving her body sexually to her husband, a woman thereby gave her ongoing contractual consent to conjugal relations with him in the future."[38]

There seemed to be a great deal of progress made in eliminating the marital rape exemption starting in the 1970s.[39] Rather than amounting to the total elimination of marital rape exemptions from prosecution throughout the country, in some states exemptions still exist but in partial form. Even according to recent estimates, only four states do not have some type of marital exemption, complete or partial, to prosecution for rape.[40] Exemptions take a few different forms,

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coverture—that women cannot make decisions regarding their own healthcare and that the state knows better than they. *See* Hasday, *supra*, note 29, at 1478, 1499.

33. "Nowhere in the common-law world—indeed in any modern society—is a woman regarded as chattel or demeaned by denial of a separate legal identity and the dignity associated with recognition as a whole human being." Trammel v. United States, 445 U.S. 40, 52 (1980).

34. Rape was defined at common law as unlawful "carnal knowledge of a woman forcibly and against her will." *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *210. "Under the still-dominant common law definition of rape, proof that a man engaged in vaginal intercourse with a woman without her consent is legally necessary but not sufficient for conviction." Dan M. Kahan, *Culture, Cognition, and Consent: Who Perceives What, and Why, in Acquaintance-Rape Cases*, 158 U. PA. L. REV. 729, 745 (2010).

35. *See supra* note 34. Such a treatment only served to emphasize how subsumed a woman became upon marriage into her husband's identity, as described in Section I.A.1 examining coverture, *supra*.

36. Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 HASTINGS L.J. 1465, 1477–78 (2003) (describing different theories of the origin of the marital rape exemption).

37. *Id*. at 1479–80.

38. *Id*. at 1480 (internal quotation marks omitted) (citing State v. Smith, 426 A.2d 38, 41 (N.J. 1981)); *see also* MARY LYNDON SHANLEY, FEMINISM, MARRIAGE, AND THE LAW IN VICTORIAN ENGLAND 157 (1989) ("In the eyes of the law, neither a married woman's money nor her body were her own—both were the 'property' of her husband.").

39. Victoria Nourse, *The "Normal" Successes and Failures of Feminism and the Criminal Law*, 75 CHI.-KENT L. REV. 951, 961 (2000).

40. TERESA M. GARVEY, HOLLY M. FUHRMAN & JENNIFER LONG, AEQUITAS, CHARGING CONSIDERATIONS IN THE PROSECUTION OF MARITAL RAPE 2 (2019), https://aequitasresource.org/wp-content/uploads/2019/09/Charging-Considerations-in-the-Prosecution-of-Marital-Rape-2.pdf [https://perma.cc/3T53-PZ37].

including marital exemptions to statutory rape prohibitions; exemptions based on a victim's inability to consent, such as during sleep or when intoxicated to the point of not being able to form consent; exemptions "to laws that otherwise prohibit sexual conduct between individuals who are in certain custodial, therapeutic, academic, and/or supervisory relationships"; and exemptions for rapes and sexual assaults committed against adults competent and capable of consenting.[41]

In some states, the existence of a marriage or cohabitation may make a difference in how a sexual crime is graded; for example, spousal rape may be a misdemeanor rather than a felony.[42] These exemptions, partial though they may be, contradict the reality that many rape and sexual assault victims are familiar with those who have victimized them.[43] In this sense, a woman might be safer in a room full of strangers rather than with someone with whom she is acquainted. These exemptions also rely upon the theory that has been discussed earlier in this Article—that women become the property of their husbands, that a woman's identity is subsumed by her husband's, and that a wife gives continuing consent to sex, even if it is truly unwelcome, in marriage.[44]

3. Marriage in Lieu of Prosecution of Rape

I recall being shocked as a teenager at an aunt of mine suggesting that a woman who had been raped, whose story was reported in the local paper, might find justice by being able to marry the alleged perpetrator. To make sense of why she would think this would suffice as "justice" when it struck me as being as far as possible from a just resolution, I researched rape law in Costa Rica. At the time, the country still had a "marry-your-rapist" law in effect, under which prosecution could be avoided even if the person who was victimized rejected the proposal.[45]

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41. *Id.*

42. *See* Nourse, *supra* note 39, at 963.

43. In more than 70% of rape and sexual assault cases involving female victims in 2005, the offender was the victim's intimate, relative, friend, and/or acquaintance. *See* SHANNAN M. CATALANO, BUREAU OF JUST. STATS., OFF. OF JUST. PROGRAMS, CRIMINAL VICTIMIZATION, 2005, at 9 tbl.9, (2011), https://bjs.ojp.gov/content/pub/pdf/cv05.pdf [https://perma.cc/G55E-39QV]. Citing data published by the Centers for Disease Control and Prevention in 2011, another study from 2019 estimated that acquaintances account for 41% of sexual assaults involving female victims and explained that "sexual assaults are one of the most under-reported crimes." Claire R. Gravelin, Monica Biernat & Caroline E. Bucher, *Blaming the Victim of Acquaintance Rape: Individual, Situational, and Sociocultural Factors*, FRONTIERS PSYCH., Jan. 21, 2019, at 1, 1 (citing MICHELE C. BLACK, KATHLEEN C. BASILE, MATTHEW J. BREIDING, SHARON G. SMITH, MIKEL L. WALTERS, MELISSA T. MERRICK, JIERU CHEN & MARK R. STEVENS, CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 21, 91 (2011), https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf [https://perma.cc/5NDQ-C32N]).

44. *See* Anderson, *supra* note 36, at 1477–80. Even outside the United States, thirty-five out of fifty-four Commonwealth countries had some degree of exemption for marital rape and sexual assault as of 2020. U.N. POPULATION FUND, MY BODY IS MY OWN: CLAIMING THE RIGHT TO AUTONOMY AND SELF-DETERMINATION 48 (2021), https://www.unfpa.org/sites/default/files/pub-pdf/SoWP2021_Report_-_EN_web.3.21_0.pdf [https://perma.cc/54XM-EG5X].

45. While I do not recall the articles I read at the time in the California State University, Long Beach library in Long Beach, California, I do recall not too long after my conversation with my aunt reading

My aunt was not making up some circumstance in her head, of her own accord, to think of a resolution that would satisfy her. She lived in and grew up in Costa Rica under a legal system where rape could be cured with not only marriage, but a mere proposal of marriage as well.

In a disturbing inversion of sorts of laws that provide for an exemption, either full or partial, from prosecution of marital rape, there are some countries that still allow someone who has been alleged to have committed rape to avoid prosecution by marrying the woman or girl they have been accused of harming.[46] In Algeria, Angola, Bahrain, Bolivia, Cameroon, the Dominican Republic, Equatorial Guinea, Eritrea, Gaza, Iraq, Kuwait, Libya, the Philippines, Russia, Serbia, Syria, Tajikistan, Thailand, Tonga, and Venezuela, alleged perpetrators can still avoid penalties, including prosecution, through such laws, widely known in a colloquial sense as "marry-your-rapist" laws.[47] Until relatively recently "marry-your-rapist" laws were common in Latin America, with Argentina, Brazil, Chile, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Nicaragua, Panama, Paraguay, and Peru having offered this exemption from prosecution as of the 1990s.[48]

The United States has its own analogues to "marry-your-rapist" laws. Child marriage was permitted in the early United States and has existed in some form in a legally sanctioned fashion ever since.[49] While all states have prohibitions on statutory rape,[50] such prohibitions are oftentimes limited by child marriage.[51] Because marriage—and, therefore, child marriage—is regulated on the state level in the United States, there are a variety of approaches regarding minimum ages, if any, parental permission, and judicial approval.[52] In effect, such states have loopholes in their statutory rape laws "that allow[] minors to marry with parental or guardian consent or at a county judge's discretion if the child is pregnant."[53] Until 2019, Arkansas, for example, allowed the marriage of a pregnant girl with

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this story in the *New York Times*, which explained that at the time, apart from Peru, "[f]ourteen other Latin American countries exonerate[d] a rapist if he offer[ed] to marry the victim and she accept[ed] . . . . The law in Costa Rica, one of the 14, exonerate[d] a rapist if he expresse[d] an intention to marry the victim, even if she [did] not accept." Calvin Sims, *Justice in Peru: Victim Gets Rapist for a Husband*, N.Y. TIMES, Mar. 12, 1997, at A1. At that time, I still had not disclosed to my family what had happened to me.

46. *See* U.N. POPULATION FUND, *supra* note 44.

47. *Id.* at 48–49.

48. Sims, *supra* note 45.

49. *See* Erin K. Jackson, *Addressing the Inconsistency Between Statutory Rape Laws and Underage Marriage: Abolishing Early Marriage and Removing the Spousal Exemption to Statutory Rape*, 85 UMKC L. REV. 343, 347–51 (2017).

50. Leslie Y. Garfield Tenzer, *#MeToo, Statutory Rape Laws, and the Persistence of Gender Stereotypes*, 2019 UTAH L. REV. 117, 119. While marriage has, in some cases, served to evade prosecution for statutory rape, those same laws have been used to criminalize minors engaging in sexual contact with each other, rendering them both victim and offender and contributing to juvenile overcriminalization. Cynthia Godsoe, *Recasting Vagueness: The Case of Teen Sex Statutes*, 74 WASH. & LEE L. REV. 173, 186–97 (2017).

51. *See* Jackson, *supra* note 49, at 351 & n.47, 353.

52. *See id.*

53. *See* Jan Pudlow, *Family Law Section: All in on Closing the Child Marriage Loophole*, FLA. BAR NEWS, Nov. 15, 2017, at 1.

no minimum age at all; "[i]n the case of pregnancy, courts could consent to marriage with no minimum threshold, no minimum at all," explained the state representative who finally sponsored a bill to end such a possibility.[54]

While the legal mechanism to allow such marriages to proceed likely originated from "'moral' or 'welfare' reasons, which [are] typically invoked when the teenage girl is pregnant,"[55] the lives of child brides are marked more often by struggles and setbacks, especially because teenage marriage, which often results in the teenage bride having children at a young age, so negatively impacts educational attainment and the potential for greater autonomy later in life.[56]

4. Being Labelled "Ruined" and "Broken"

This Article focuses specifically on the language used by trial judges at sentencing to describe the harm suffered by victims of rape, sexual assault, and sexual abuse. Even outside that context, however, many instances of the judiciary describing victims of sexual crimes as being "ruined" may be found in state appellate court opinions. In *Callaghan v. State*, a case involving statutory rape, the Arizona Supreme Court intricately linked rape with shame and ruin:

> Any act of sexual intercourse with such a female is without her consent, because she is deemed in law incapable of such consent, and the sexual act with her must necessarily involve the element of assault and violence, even though she yielded voluntarily to her shame. An injury to her person more violent than the rape of a young girl—her defloration and ruin—is impossible. She is protected, not only from the passion of men but from her own frailty—not only from an accomplished act of seduction, but from all the defiling acts of the seducer that may lead to her destruction. It is the voice of society, echoed in the statute law of this state, that the bloom of her virtue and innocence outweigh all other considerations and must be preserved even though a temporary weakness, or want of understanding on her part invite to ruin.[57]

This "ruin" as invoked by the Arizona Supreme Court in *Callaghan* focuses on the physical effect of the victim's rape in that case, prioritizing "defloration" in a way that renders the victim as an object and somehow worth less to someone other than the victim herself (such as a potential husband) than before the rape.[58]

In *Cooksey v. State*, the Texas Court of Criminal Appeals used the word "ruined" to refer to what happened to the victim in what appears to be an effort to avoid using the word "rape," relating: "Appellant objected to the action of the

54. Shelby Rose, *Governor Signs Law Banning Child Marriage in Arkansas*, KATV (Apr. 17, 2019), https://katv.com/news/local/governor-signs-law-banning-child-marriage-in-arkansas [https://perma.cc/4EGG-3XSS].

55. *See* Jackson, *supra* note 49, at 354.

56. *Id.* at 357.

57. 155 P. 308, 309–10 (Ariz. 1916). The court's language here is frustratingly inconsistent in that it states in the same sentence that the victim was somehow able to "yield[] voluntarily" when she was legally incapable of consent. *See id.* at 309.

58. *Id.* at 309.

court excluding certain testimony offered by him from the witness Gertie Cooksey as to the reason assigned to her by Nellie Capps for leaving home, to wit, that she left home because her father had ruined her, etc."[59] In *Whetstone v. State*, Nebraska Supreme Court Justice Samuel H. Sedgwick wrote a dissenting opinion that illustrates the meaning and significance of rape as a ruining of a woman or girl's "chastity," objectifying not only the victim of the rape in question in *Whetstone*, but also other victims as well:

> The crime of rape is one of the most detested of crimes. It is a crime against the virtue of womanhood.
>
> "The object of the statute is to protect the virtuous maidens of the commonwealth, to protect those girls who are undefiled virgins; and a female under 18 years of age and over 15 years of age who has been guilty of unlawful sexual intercourse with a male is not within the act."
>
> If this young girl was previously chaste and was ruined by this defendant, he richly deserves the punishment for rape which the statute provides may be 20 years in the penitentiary. If she was not a pure girl, the crime which this defendant has committed, if he has done the act charged, is principally in degrading himself and indirectly injuring his wife and children. That crime is not rape; it is adultery, and the punishment is a short term in the county jail. When the crime of rape is committed against a girl under the age of consent, the substance of the crime is the violation of her chastity, and must be proved beyond a reasonable doubt.[60]

Similarly, the Missouri Supreme Court Justice Thomas Adiel Sherwood in *State v. Hamey* drew connections between ruin, rape, virtue, and chastity: "[n]ow, if defendant had really ravished her, it would have been the most natural thing in the world for her to have indignantly gone to him, and charged that he had forcibly despoiled her of her virtue, pillaged her of her chastity, and accomplished her ruin."[61]

While it may be, in some ways, easier to attribute a simple, empathetic motive to a trial judge at sentencing describing a victim as being "ruined" or "broken" or using other similar language, use of the word "ruin" to describe the state of a victim of rape or of sexual assault or abuse has historically been much more denigrating than that. As this Section demonstrates, the word "ruin" alone has a demonstrated history of use in a way that equates the value of women with virginity and chastity lost forever, no matter that consent was never given or was impossible to form in the case of victims younger than the age of consent. If it is not yet time to entirely abandon such language (which it highly likely is in most contexts

59. 58 S.W. 103, 104 (Tex. Crim. App. 1900), *overruled by* Barnett v. State, 73 S.W. 399 (Tex. Crim. App. 1903).

60. 156 N.W. 1049, 1050 (Neb. 1916) (Sedgwick, J., dissenting) (citation omitted).

61. 67 S.W. 620, 639 (Mo. 1902) (en banc) (Sherwood, J., dissenting).

at the sentencing hearings in question in this Article), courts should at least be mindful of the history of its use before deploying it from the bench in the present day.

B. SENTENCING EXAMPLES

I am not an empiricist, and—although I have sat in on scores of sexual assault and molestation case sentencings where a judge has stated that a victim's[62] life has been "ruined" or "broken" or "destroyed"—at the very beginning of this likely long-ranging project, I do not yet have the resilience or thick skin to seek out examples of judges using such language across the country to compile data to code in a multitude of ways. Being able to highlight a few examples of such language in use, I believe, brings enough focus to the problem itself—the possibility of judges using language that objectifies and dehumanizes sexual assault victims in a misguided effort to empathize with and comfort victims, while justifying hard sentences.

One can find a multitude of examples of judges telling defendants convicted of rape, sexual assault, or child molestation that they have "ruined" victims' lives with even a cursory search on the Internet. In a high-profile example, singer R. Kelly was recently sentenced to thirty years in prison after conviction on racketeering and sex trafficking charges.[63] During the trial, victims, many of them children at the time the crimes were committed, gave harrowing testimony regarding the abuse, sexual assault, and coercive control they suffered while effectively imprisoned by Kelly.[64] United States District Court Judge Ann Donnelly highlighted some of this sad and shocking testimony during her remarks at sentencing, in particular highlighting an instance in which Kelly "snapped his fingers twice," which led to a "young lady" crawling "out from under a boxing ring to perform sex acts" on him and a young man he was also sexually abusing.[65] In justifying the thirty-year prison sentence, Judge Donnelly explained: "You [R. Kelly] left in your wake *a trail of broken lives*."[66]

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62. I make free use of the word "victim" in this Article to refer to those who have experienced rape, sexual assault, or child sexual abuse. Because this Article's inquiry is limited to the language the judges use during sentencing, a defendant who has been convicted of one of the types of crimes in question may be presumed. Anna Roberts has addressed the concern of using the term "victim" in pre-adjudication settings in which there has been no conviction, and she argues that using such language can lead to a host of dangers, such as the presumption that an accusation constitutes a crime without further proof necessary. Anna Roberts, *Victims, Right?*, 42 CARDOZO L. REV. 1449, 1482–87 (2021).

63. Sonia Moghe & Dakin Andone, *R. Kelly Sentenced to 30 Years in Prison for Federal Racketeering and Sex Trafficking Charges*, CNN (June 30, 2022, 1:13 PM), https://www.cnn.com/2022/06/29/us/r-kelly-sentencing-racketeering-sex-trafficking/index.html [https://perma.cc/523U-D7HK].

64. Troy Closson, *R. Kelly, R&B Star Who Long Evaded Justice, Is Sentenced to 30 Years*, N.Y. TIMES (June 29, 2022), https://www.nytimes.com/2022/06/29/nyregion/r-kelly-racketeering-sex-abuse.html.

65. *Id.*

66. Moghe & Andone, *supra* note 63 (emphasis added).

In August of 2020, Eray Alfonso Diaz, of Niles, Michigan, was convicted of molesting a girl for three years and sentenced to ten to forty years in prison.[67] Cass County Circuit Judge Mark Herman stated during the hearing that, because of Diaz's actions, Diaz had "ruined [the victim's] life and ruined [Diaz's] life as well."[68]

On July 13, 2011, the *Honolulu Star-Advertiser* quoted Circuit Judge Randal O. Lee sentencing Christopher Cantrell for the abduction and rape of a ten-year-old girl: "You preyed on someone who was partially blind, namely the victim's father, and a 10-year-old girl who was defenseless. You ruined her life."[69] Judge John C. Tylwalk employed similar language on January 17, 2001, when sentencing a man convicted of raping a thirteen-year-old girl in North Lebanon Township, Pennsylvania: "You probably ruined her life."[70]

In an unpublished opinion addressing an ineffective assistance of counsel claim, the Fourth District Appellate Court of Illinois quoted a trial judge's remarks at sentencing where the defendant had been convicted of sexual assault: "The defendant not only ruined a victim's life, but his other children's [lives] . . . ."[71] In an unpublished memorandum opinion, the Texas Court of Appeals in Amarillo discussed a defendant's remarks made at the sentencing after the defendant had been convicted of aggravated sexual assault of a child: "Appellant testified and asked the court for community supervision and a chance to change his life. He acknowledged he ruined his victim's life and apologized to her family."[72]

While it is helpful to provide examples of the specific type of language that I am critiquing and relying only on those examples would make my work easier by allowing me to keep a greater emotional remove, I also return to my own experiences of hearing such language used, specifically from judges and especially while they were on the bench, while I was in practice.

I owe much of my approach to this paper to Susan Estrich and her 1986 article, *Rape*. In that piece she explains in the introduction that

> [e]ven the real rape victim must bear the heavy weight of the silence that surrounds this crime. At first, it is something you simply don't talk about. Then it occurs to you that people whose houses are broken into or who are mugged in Central Park talk about it all the time. Rape is a much more serious crime. If it

67. Debra Haight, *Niles Man Sentenced to Prison on Molestation Charges*, LEADER PUBL'NS (Aug. 21, 2020, 12:20 PM), https://www.leaderpub.com/2020/08/21/niles-man-sentenced-to-prison-on-molestation-charges/ [https://perma.cc/K25U-HFG2].

68. *Id.*

69. Nelson Daranciang, *Man Gets 30 Years for Waikiki Rape and Assault*, HONOLULU STAR-ADVERTISER, July 13, 2011, at B3.

70. Les Stewart, *Tylwalk Sends Child-Rapist to State Prison*, LEBANON DAILY NEWS (Pa.), Jan. 18, 2001, at 1A.

71. People v. Snyder, No. 4-18-0134, 2020 WL 1698185, at *5 (Ill. App. Ct. Apr. 6, 2020) (alteration in original).

72. Flores v. State, Nos. 07-14-00251-CR, 07-14-00415-CR, 2015 WL 128723, at *2 (Tex. App. Jan. 7, 2015).

> isn't my fault, why am I supposed to be ashamed? If I shouldn't be ashamed, if it wasn't "personal," why look askance when I mention it?[73]

My own experiences of rape and sexual assault were never prosecuted; I never had to testify in a courtroom against my biological father or his associates. I had only found the ability in myself to tell someone what happened fifteen years later during my first year of law school. Studying rape and sexual assault, even briefly in my first-year criminal law class, felt like too much to bear, and I went to speak to a counselor at U.C. Berkeley's student health center. After I finished telling—I remember at the time thinking of it as confessing—what had happened to me, he apologized deeply and sincerely. He then said to me that it must have made me feel "so broken."

The experience then only got worse when he told me that he was required to call the Berkeley Police Department, who spoke with me for about five to ten minutes before deciding that any case moving forward would be too "he said/she said," after which they promptly dropped the subject and never contacted me again. The language the counselor used saying that I must have felt "broken" came to mind at the first sentencing hearing where I heard a judge tell a defendant that they had "ruined" a victim's life. Even worse, at these sentencing hearings, sometimes the formulation of the sentiment was reduced to, "You ruined *your* victim's life."[74] From my perspective, it sounded as if the judge wished to draw a permanent connection between the defendant and the person victimized, not even rendering them of the same status so much as ascribing a permanent ownership to the defendant over a victim.

C. AN AUTOETHNOGRAPHIC APPROACH

This Article is informed not only by the legal scholarship done before me, indebted to it as I am, nor only the examples that I cited above or will later, but also by my own experience as a victim of sexual assault and child abuse. In bringing my own experiences to this Article and examining the language used by judges during sexual assault sentencing hearings, I am engaging in autoethnography, which serves as both a process and a product. I am focusing on both important turning points and "epiphanies" in my own life that are important to my understanding of the treatment of sexual assault both in the criminal adjudicative process and, specifically, at sentencing.[75] Rather than writing about a problem that I find profoundly troubling but refusing to connect it to my own experiences, I am fully acknowledging that I am not approaching this "from a neutral,

73. Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1088–89 (1986).

74. Emphasis is my own.

75. *See* Carolyn Ellis, Tony E. Adams & Arthur P. Bochner, *Autoethnography: An Overview*, 36 HIST. SOC. RSCH. 273, 275 (2011). "As a method, autoethnography combines characteristics of autobiography and ethnography. When writing an autobiography, an author retroactively and selectively writes about past experiences. Usually, the author does not live through these experiences solely to make them part of a published document; rather, these experiences are assembled using hindsight." *Id.*

impersonal, and objective stance,"[76] but neither are most other legal scholars who might root their own scholarship in models, vocabularies, or methods that only appear to be objective.[77] While I do not necessarily feel comfortable with the term "victim" because there was never any criminal adjudication that arose from what I described at the beginning of this Article, I am unsettled on what term to use otherwise.

Autoethnography also seeks to connect personal experience to larger social and cultural contexts.[78] In this Article, I also seek to use these experiences to examine a particular practice—the use of words such as "ruin" or "broken" at sentencing hearings in reference to what happens to victims of sexual assault and abuse. Sentencing hearings, much like trials, are "shared experiences" with actors appearing in fixed roles such as prosecutors, defense counsel, defendants, judges, victims, and sometimes members of the public and the press.[79] And as much as those of us who write about criminal adjudication may wish to pretend otherwise, these shared experiences, as well as those that might be shared outside the courtroom by way of mass media and the like, are all part of a culture, and one that is important not to ignore.

It is important at this juncture of the Article for me to acknowledge that, because I am relying significantly on an autoethnographic approach in analyzing and contemplating the language used by trial courts at rape and sexual assault sentencing hearings, my perspective is fraught with limitations. While this Article examines the gender dynamics of sexual assault and its influence on a judge's choice of language at sentencing, the history of rape in American criminal law is tightly intertwined with race. "[A]s a legal matter, the experience of rape did not even exist for black women. During slavery, the rape of a black woman by any man, white or black, was simply not a crime."[80] In this sense, historically, in the eyes of American criminal law, Black women could not be considered

76. *See id.* at 274.

77. While autoethnography is beginning to gain ground in legal scholarship, its status as a research method is more firmly established in other disciplines such as sociology and anthropology, and some prominent examples can be found in those disciplines. One is H.L. Goodall Jr.'s account of growing up in a family where relationships and communications are predicated on "serious omissions, distortions, secrets, and lies." *See* H. L. Goodall Jr., *Narrative Inheritance: A Nuclear Family with Toxic Secrets*, 11 QUALITATIVE INQUIRY 492, 492 (2005). Patrick Anderson wrote a book recounting his experience of contracting MRSA, which caused him to fall into a coma, while connecting those experiences to cultural representations of sickness as well as coverage of MRSA in mass media. *See generally* PATRICK ANDERSON, AUTOBIOGRAPHY OF A DISEASE (2017). Some works that are usually considered literature or literary criticism may also be considered autoethnographies. *See generally*, *e.g.*, Carola Hilfrich, *"The Self is a People": Autoethnographic Poetics in Hélène Cixous's Fictions?*, 37 NEW LITERARY HIST. 217 (2006).

I first encountered autoethnography in legal scholarship while familiarizing myself with the literature regarding law and rurality. Professor Lisa Pruitt, in particular, has used her own experiences of growing up in rural Arkansas as a foundation in starting the field of law and rurality. *See generally* Lisa R. Pruitt, *Rural Rhetoric*, 39 CONN. L. REV. 159 (2006).

78. *See* Ellis et al., *supra* note 75, at 279–80.

79. *See id.* at 275.

80. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 599 (1990) (citing Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L.J. 103, 118 (1983)).

"ruined" in the manner that I contemplate and take issue with in this Article. Even when the rape of Black women results in criminal prosecutions, their accounts and experiences are not taken as seriously as those of white women, and men who are convicted of raping Black women are sentenced more leniently than others.[81] As explained by Professor Mikah K. Thompson:

> The justice system's reluctance to prosecute cases involving Black victims, especially in light of the robust, albeit racist, impulse to prosecute and sometimes execute Black men for allegedly raping White women, suggests that slavery-era stereotypes and myths concerning the promiscuity of Black girls and women had a major impact on law enforcement authorities.[82]

Likewise, there are victims of rape who are men and boys. As Professor Bennett Capers explains, "[a]s a society, we rarely think of male-victim rape."[83] Male-victim rape, when acknowledged at all, is often thought of only in the context of prison rape or joked about.[84] It is not difficult to find instances, especially on the Internet, of people expressing the opinion that prison rape might be something that a male who is incarcerated "deserves," especially when that man or boy has been accused of or convicted of a sexual offense themselves.[85]

I have witnessed the cavalier treatment of male-victim sexual assault by law enforcement. In attempting to prosecute a case involving both domestic violence in the relationship between two gay men, as well as the rape of one of the men by the other, I ran into several shocking hurdles. The police investigation was conducted in a shoddy and cursory fashion. The investigators seemed to regard the matter as an entertaining joke. When it was time to conduct a preliminary hearing, during which a judge determines, after the presentation of evidence by the State, whether there is enough evidence under a probable cause standard to bind a defendant over for trial, the investigating officers appeared late and unprepared. Their lack of commitment to investigating the case, and the lack of support that I received from my then-supervisor, the elected county attorney, led me to have to dismiss the case, much to my frustration but also sincere fear for the man who had experienced domestic and sexual violence.

I am a cisgender Latina who presents to the world as straight. Nearly all the rape and sexual assault cases that I have prosecuted have involved women and

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81. Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT L. REV. 359, 367–68 (1993). Professor Cynthia Godsoe explained that "[t]he victim and offender categories, often characterized as 'natural or innate,' are infact highly socially constructed. Harm is only recognized for some victims—white, middle-class, female—and culpability is only recognized for some offenders." Cynthia Godoe, *#MeToo and the Myth of the Juvenile Sex Offender*, 17 OHIO ST. J. CRIM. L. 335, 341 (2020). "[T]he criminal treatment of sex crimes reinforces the very gendered and racialized hierarchies that animate them. Girls and women of coilor continue to be undervalued and unprotected." *Id.* at 339.

82. Mikah K. Thompson, *Just Another Fast Girl: Exploring Slavery's Continued Impact on the Loss of Black Girlhood*, 44 HARV. J.L. & GENDER 57, 65 (2021) (footnote omitted).

83. Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259, 1261 (2011).

84. *Id.* at 1262.

85. *See id.*

girls with relatively similar backgrounds—cisgender and straight presenting. In this sense, my own perspective and focus centers on the most theorized form of rape, with a man as perpetrator and a woman or girl as victim, though I believe that my conclusion—that judges must be more cautious and avoid the language of ruin and brokenness for a variety of reasons—would be generalizable to other instances not encompassed by the gender dynamic I address. This Article, however, does serve in some part as my own "subjective account of [my] experience of harm flowing from [my biological father's and others'] crime[s]."[86]

II. "RUIN" AND PUNISHMENT

What are trial courts attempting to achieve, and, from the perspective of punishment theories of criminal law, what are they doing in the alternative? In this Part, I argue that the language of ruin and brokenness demonstrates that something has gone profoundly wrong during some rape and sexual assault sentencing hearings—that judges have lost sight of one of the real purposes of criminal punishment, that is, addressing a social imbalance that occurs when one person commits a criminal offense against another—while also examining the effects, such as retraumatization and stigmatization, that can occur when victims are told that they or their lives have been ruined. I demonstrate this here in Part II by showing that the use of such language does nothing to support any of the widely accepted theories of punishment by discussing some of them in turn. I then discuss what the use of such language does and continues to do to victims: it stigmatizes, essentializes, and retraumatizes them while promoting a faulty narrative of perfect victimology.

A. TRADITIONAL THEORIES OF PUNISHMENT AND THEIR (REAL-WORLD) APPLICATION

Nearly every criminal law course textbook and class throughout the United States at some point during a semester takes time to focus, even if briefly, on different theories of punishment. Students often learn that there are four main justifications for criminal punishment: retribution, deterrence, rehabilitation, and incapacitation.[87] To some extent, too, much scholarship focusing on criminal law and theories of punishment also focuses on the question of what, exactly, is the overarching, correct philosophical theory by which other academics, jurisprudes, legislators, and perhaps practicing lawyers should abide.[88] However, as Professor Corey Rayburn Yung astutely observes, "[c]riminal law sits upon an unsteady foundation of laws with varying, sometimes contradictory, motivations supporting them. A legal system predicated on democratic governance likely makes such a state inevitable because the public has divergent views on the appropriate scope of criminal law that change over time."[89]

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86. *See* Erin Sheley, *Reverberations of the Victim's "Voice": Victim Impact Statements and the Cultural Project of Punishment*, 87 IND. L.J. 1247, 1257 (2012).

87. *See* WAYNE R. LAFAVE, CRIMINAL LAW § 1.5(a) (6th ed. 2017).

88. *See, e.g.*, Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1486 (2016).

89. COREY RAYBURN YUNG, CRIMINAL LAW 6 (3d ed. 2021).

Although retribution[90] may have been the original purpose of criminal punishment, the other three purposes began to gain greater influence after reformers pushed to consider utilitarian[91] principles (deterrence, rehabilitation, and incapacitation) more seriously and even accomplished having these focuses codified in penal codes.[92] And so, the two sides, retributive versus utilitarian (or, perhaps, consequentialist), have been fighting it out since. Judges, however, do not all necessarily approach their task with the same fidelity that many criminalist legal academics possess; theirs is often more of a wandering theoretical eye. Sentencing hearings are rife with explanations from the bench invoking all four rationales for punishment to one extent or another, often in the same sentencing hearing.

Examples of this open approach to considering the appropriateness of a sentence may sometimes even be found at the federal level. A prime example can be found in *United States v. Blarek II*, in which Judge Jack B. Weinstein delivered an opinion reviewing the sentences of two codefendants, interior decorators who first provided decorating services and then laundered money for members of a Colombian drug cartel, describing and examining each of the four traditional sentencing rationales.[93]

In many ways, it is a remarkable opinion, providing an overview of Kantian just deserts[94] and Benthamite utilitarian theories.[95] It is even more remarkable in explicitly stating that it would not choose between the two camps. Given the complexities and drawbacks of both of the two categories of punishment theories, Judge Weinstein decided to choose both: "Given these problems, it may make sense to continue to equivocate, oscillating between these poles, tempering justice with mercy, just deserts with utility calculations, in varying pragmatic ways."[96] Judge Weinstein then went through each of the four traditional rationales and applied them to both codefendants in turn, holding that the sentences in question were appropriate mainly on the ground of deterrence.[97]

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90. "*Retribution* supposes that crime inherently merits punishment" and that "punishment is directed at imposing merited harm upon the criminal for his wrong, and not at the achievement of social benefits." Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313, 1315–16 (2000).

91. "[U]tilitarian purposes—deterrence, rehabilitation, and incapacitation—are not concerned with inherent moral merits, but with accomplishing social benefits through the use of punishment as a means." *Id.* at 1316.

92. Professor Cotton's article comprehensively "examines state statutes and state constitutional provisions specifying utilitarian purposes for punishment." *See id.* at 1314.

93. *See* 7 F. Supp. 2d 192, 196, 199–203 (E.D.N.Y. 1998).

94. Judge Weinstein quotes and cites Kant's *Metaphysical Elements of Justice* and explains that "[f]or Kant and his adherents, '[p]unishment that gives an offender what he or she deserves for a past crime is a valuable end in itself and needs no further justification.'" *Id.* at 201 (second alteration in original) (quoting Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 454 (1997)).

95. As Judge Weinstein explains, for Bentham, "law in general, and criminal jurisprudence in particular, was intended to produce the greatest happiness for the greatest number," and "deterring crime, as well as correction and reformation of the criminal, are primary aspirations of criminal law." *Id.* at 201–02 (internal quotation marks and citation omitted).

96. *Id.* at 203.

97. *Id.* at 209–10, 214.

B. DEVELOPMENTS IN PUNISHMENT THEORY BEYOND THE RETRIBUTIVE/UTILITARIAN BINARY

The dissatisfaction with the traditional four rationales of punishment has led to the development of newer theories that have led to similar disagreements, once more, as to which is correct and which is not. What some of these newer theories have been doing, however, that the more traditional theories have neglected, is more carefully considering victims and their individual characteristics.[98]

Restorative justice, for example, is a theory that has been gaining some traction with academics, judges, and those interested in criminal legal system reform.[99] The goals of a restorative justice framework have been described as "making amends for the offending, particularly the harm caused to the victim, rather than inflicting pain upon the offender. Accountability is demonstrated by recognizing the wrongfulness of one's conduct, expressing remorse for the resulting injury, and taking steps to repair any damage."[100] Restorative justice is profoundly victim centered compared to other theories on the purposes of punishment,[101] moving the focus of attention to how a crime breaches and potentially harms community and social relationships. In this sense, there is in restorative justice paradigms a deep shift away from the often-misunderstood dynamic between the prosecutor/state and the person who has experienced crime—interests of the prosecutor and alleged victims do not always align. Restorative justice understands crime in the context of relationships between individual people rather than a violation against the state and, because of this focus, seeks to rebuild personal relationships through "collective decision-making process[es]" that de-emphasize "punitive responses."[102]

Expressive theories of punishment have also enjoyed greater prominence in the last few decades. In an early formulation of the theory, A. C. Ewing explained that one convicted of a crime

> must realize the badness of what he has been doing, and since his previous actions make it very doubtful whether he will do so of his own accord, this badness must be "brought home to him" and the consciousness of it stamped on his mind by suffering. The infliction of pain is society's way of impressing on him that he has done wrong.[103]

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98. *See* Joshua Kleinfeld, *A Theory of Criminal Victimization*, 65 STAN. L. REV. 1087, 1090 (2013).

99. *See* Bruce A. Green & Lara Bazelon, *Restorative Justice from Prosecutors' Perspective*, 88 FORDHAM L. REV. 2287, 2288–90 (2020); Kate E. Bloch, *Changing the Topography of Sentencing*, 7 HASTINGS RACE & POVERTY L.J. 185, 189 (2010).

100. Erik Luna, *Introduction: The Utah Restorative Justice Conference*, 2003 UTAH L. REV. 1, 3.

101. *See* David Miers, *The Responsibilities and the Rights of Victims of Crime*, 55 MOD. L. REV. 482, 496 (1992).

102. Thalia González, *The Legalization of Restorative Justice: A Fifty-State Empirical Analysis*, 2019 UTAH L. REV. 1027, 1029, 1035.

103. William DeFord, *The Dilemma of Expressive Punishment*, 76 U. COLO. L. REV. 843, 845–46 (2005) (quoting A. C. EWING, THE MORALITY OF PUNISHMENT: WITH SOME SUGGESTIONS FOR A GENERAL THEORY OF ETHICS 84 (1929)).

Expressive theories hold that the law's function in punishing offenders is sending "a message of condemnation about a criminal wrongdoer's conduct."[104] In doing this, the theory of expressive punishment transcends the traditional divisions between the retributive and utilitarian punishment justifications.[105] The proportionality concept that is essential to retributionist theory also arises in expressive punishment, primarily in the emphasis on placing both defendants and victims on equal social footing.[106] Expressive punishment, however, also addresses utilitarian concerns, positing that punishment can "change social norms and behavior" to be in conformity with what a community desires and expects.[107] Even in expressivism itself there is variation in how a defendant's moral desert is weighed as opposed to the actual harm caused to a victim by a defendant's actions.[108] In this sense, the expression of the community's opprobrium is meant to be communicated not only to a convicted defendant but also to the broader community as a whole, as well as to the victim.[109]

C. MY (PERHAPS UNSUCCESSFUL) ATTEMPT AT A PERSONAL THEORY OF PUNISHMENT

These differing punishment theories were all interesting to me in law school, which was when I first started wrestling with the philosophical and ethical implications of my potential future career choices. I initially wished to become a prosecutor to become something that my biological father feared and, therefore, regarded as powerful. In many ways at the time, this felt like an effective way to somehow reclaim some of the control I lost as a child; even if I could not move forward in court testifying to what happened to me as a child, perhaps I could help others do so. I figured that by prosecuting such cases I could be instrumental in others finally securing the justice that they needed to move on with their lives. I was also committed to what some may currently call "progressive" prosecution. That the criminal legal system unfairly targets and punishes the poor, the minoritized, women, and other vulnerable populations was apparent to me in law school but became painfully clear to me on starting my first job as a prosecutor.

At the very least, however, I knew when I started practicing that "dividing up the world of punishment theory" into two camps—consequentialist/utilitarian versus retributive—was "not especially useful."[110] I became aware early in my career of something I did not realize was common at the time: I was yet another person who subscribed to multiple theories of punishment at once depending on the crime in question, though I eventually became yet another academic who

104. Erin Sheley, *Victim Impact Statements and Expressive Punishment in the Age of Social Media*, 52 WAKE FOREST L. REV. 157, 165 (2017).

105. *See id*. at 166.

106. *See id*. at 166–67.

107. *See id*. at 167.

108. *See* Jack Boeglin & Zachary Shapiro, *A Theory of Differential Punishment*, 70 VAND. L. REV. 1499, 1524 (2017).

109. *See id*. at 1525.

110. *See* Kenworthey Bilz & John M. Darley, *What's Wrong with Harmless Theories of Punishment*, 79 CHI.-KENT L. REV. 1215, 1215 (2004).

"has come to accept more-or-less hybrid theories."[111] If anything, I have found myself in the position that scholars like Kenworthey Bilz and John M. Darley have taken—that framing questions regarding justification of punishment should center more squarely on the question of whether harm exists and whether the harm in question should be recognized.[112] Such justifications have recently begun to be reframed beyond being merely expressive but rather "victim-facing."[113] Victim-facing justifications can focus on the symbolic significance of a defendant being convicted, then punished, by the state, as well as the righting of an inequality between a victim and an offender caused when a crime has been committed.[114] A victim's social standing has been diminished, and criminal punishment should, at least in part, serve to return the victim to their original position.[115] While this sounds similar to expressivist theories described earlier in this Part, the focus is more narrowly on outcomes for a victim, rather than merely expressing the opprobrium of the wider community. While I am not sure that I subscribe to expressive justifications of punishment, I find greater victim-facing focuses compelling.

There have been debates as to the nature of the harm caused when a person suffers from rape, sexual assault, or sexual abuse. There have been some scholars who have even questioned the need to criminalize rape in the first place, sometimes in shockingly callous and dismissive fashion:

> An unanswered question lies at the heart of rape law. Why is rape a crime of its own?

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111. *See id.* at 1219 (citing Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1231–32, 1246 n.697 (2001)).

112. *See id.* at 1226.

113. *See* Boeglin & Shapiro, *supra* note 108, at 1523 (distinguishing victim-facing justifications from "offender-facing justifications," which "provide no basis for differentiating criminal punishment based on whether or not a statutory harm occurs").

114. *See id.* at 1523–25.

115. *See* Kenworthey Bilz, *Testing the Expressive Theory of Punishment*, 13 J. EMPIRICAL LEGAL STUD. 358, 364 (2016). There have been some efforts by scholars to test whether some of these theories of punishment really bear out in the real world. In Kenworthey Bilz's piece *Testing the Expressive Theory of Punishment*, she runs an experiment with undergraduate students in which the students watch edited versions of the film *The Accused*, a film based on the events surrounding and the subsequent trial involving the rape of Cheryl Araujo in a bar in her hometown of New Bedford, Massachusetts.

In one version of the film shown to half of the students, the men who committed the rape were tried and convicted. The other half saw a film that was the same except that the accused men entered a plea bargain to a much less serious offense, avoiding a trial. The students were then asked questions about the characters in the film, allowing them to assign key traits to each of the roles.

While there may be some question as to whether these key traits, such as being described as "'admired,' 'valuable,' and 'respected,'" are an accurate reflection of social standing, when using these measures, the victim in the film "gained social standing and offenders lost it when the offenders were punished. When the offenders were not punished, the victim lost social standing and offenders gained." *Id.* at 365–66; Rebecca Ford, *'The Accused' Oral History: A Brutal Rape Scene, Traumatized Actors and the Producers' Fight to Make the Movie*, HOLLYWOOD REP. (Dec. 5, 2016), https://www.hollywoodreporter.com/movies/movie-news/accused-oral-history-a-brutal-rape-scene-traumatized-actors-producers-fights-make-movie-952-952228/ [https://perma.cc/EB5R-Q3TK].

> Every rape is an assault or battery. Every rapist could be punished on that ground alone. . . . Rape law makes an assault involving particular body parts a special crime of its own . . . . The crime of rape is in this respect unique. There is, for example, no special crime of assaulting someone's hands or face.[116]

In currently codifying rape, sexual assault, and sexual abuse as their own crimes, however, there is an official acknowledgement that these crimes inflict their own types of harm that should be recognized.[117] As Professor Yung notes, these inquiries as to the nature of rape as a crime, and whether it should be criminalized at all, ignore a great deal of scholarship that clarifies why rape should be treated differently as its own crime in its own right: "harm, gender, and terror."[118] Discussing these at least briefly in turn and from my own perspective will, I hope, highlight how these three characteristics render the harm caused by rape different from that of other crimes.

I have been subject to many crimes outside the sexual ones that I detailed at the beginning of this Article. I have had my identity and my purse stolen, my cars broken into multiple times, and a storage unit broken into and emptied so that I no longer have any photographic record of myself before college, among other things. None of these things have had the lasting impact on my mental health that the things my biological father and his associates did to me have had. I have been diagnosed with complex post-traumatic stress disorder (PTSD). I still flinch when I see a landscape that looks like the ones where I would be forced to spend horrific weekends. There are, all these years later, sights, smells, and sounds that still nauseate me and terrify me when I encounter them unexpectedly in my everyday life. In bearing the long-term mental health impacts of rape, I know I am not alone. Eighty-one percent of sexual assault victims had PTSD symptoms a week after the assault, while seventy-five percent did a month afterward.[119]

The experience of the terror I felt so many times over has also stayed with me. It colored the way I approached dating and relationships, and likely still does. "Robin West observes how women often try to escape the terror inflicted by rape by seeking protective men, who often end up representing the very danger that women are trying to escape."[120] I did this very thing, marrying relatively young while in law school to a man who, while not sexually abusive, was physically volatile and abusive while emotionally menacing and cruel. This is not something I would ever deign to say in any other piece of scholarship. Take my word for it; rape is different. I adopt this normative claim throughout this Article. It is one on

116. *See* Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372, 1387 (2013).

117. *See* Bilz & Darley, *supra* note 110, at 1229.

118. *See* Corey Rayburn Yung, *Rape Law Fundamentals*, 27 YALE J.L. & FEMINISM 1, 20 (2015).

119. Emily R. Dworkin, Anna E. Jaffe, Michele Bedard-Gilligan & Skye Fitzpatrick, *PTSD in the Year Following Sexual Assault: A Meta-Analysis of Prospective Studies*, TRAUMA, VIOLENCE, & ABUSE, 2021, at 1, 6.

120. Yung, *supra* note 118, at 26–27 (citing Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 104 (1987)).

which the foundations of this Article are built and one that I do not intend to debate.

D. JUDICIAL MOTIVATIONS AND THE HARMS OF BEING PRONOUNCED "RUINED"

As discussed thus far in this Part, there are several theories of punishment that prescribe how and why the criminal legal system, and the state more broadly, should punish behavior that has been deemed criminal. Judges, while not as exacting about the theoretical foundations on which they rely when sentencing defendants, often appear to rely on a number of theories, even if they do so intuitively and are not always aware of their formal names and scholarly pedigrees.[121] In many ways, what judges can accomplish at sentencing is limited. Our criminal legal system as currently configured is almost entirely dependent upon jail, prison, and other carceral measures to impose punishment.[122] A judge's ability to sentence a defendant to whatever they wish is now "limited by the statutes and sentencing structures existing in a particular state"[123] or, for federal crimes, federal sentencing law and guidelines.[124]

The American Bar Association has instituted its own criminal justice standards that have attempted to direct the judiciary in how they should approach their task at sentencing.[125] The Standards were promulgated for the purpose of providing a template for states drafting their own sentencing guidelines to achieve more consistency in sentencing outcomes.[126] Standard 18-6.2 directs the consideration of different possible sanctions after conviction of one or multiple crimes:

> (a) A sentencing court should consider all permitted types of sanctions and, subject to the guidance of the agency performing the intermediate function, should select the type of sanction or sanctions that is most appropriate for the gravity of the offense, the culpability of the offender, the offender's criminal history, and the personal characteristics of an individual offender that may be taken into account.
>
> (b) In shaping a sentence that is a composite of different types of sanctions, a sentencing court should determine the level of severity for each type of sanction so that the composite sentence is no more severe than necessary to achieve the societal purposes for which it is imposed and does not result in unwarranted and inequitable disparities in sentences.[127]

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121. *See supra* Section II.A.

122. *See* Bilz & Darley, *supra* note 110, at 1228.

123. CHARLES W. OSTROM, BRIAN J. OSTROM & MATTHEW KLEIMAN, JUDGES AND DISCRIMINATION: ASSESSING THE THEORY AND PRACTICE OF CRIMINAL SENTENCING 2 (2003), https://www.ojp.gov/pdffiles1/nij/grants/204024.pdf [https://perma.cc/7TZA-HB62].

124. Frank O. Bowman, III, *The Failure of the Federal Sentencing Guidelines: A Structural Analysis*, 105 COLUM. L. REV. 1315, 1321–23 (2005).

125. *See generally* ABA STANDARDS FOR CRIM. JUST.: SENT'G (AM. BAR ASS'N 1994).

126. *See* Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. Rev. 1, 63–64 (1998).

127. ABA STANDARDS FOR CRIM. JUST.: SENT'G § 18-6.2 (AM. BAR ASS'N 1994).

Although purporting to be a source of guidance, these standards give extraordinarily little. They do, however, exhort judges to "consider . . . the level of severity" when determining how to sentence those who have been convicted of crimes, though how this level is to be decided apart from considering personal characteristics of defendants to determine whether there might be mitigating or aggravating factors is not elaborated upon.[128] The standards do allow for victim statements at sentencing, which are limited to discussing "the physical, psychological, economic, or social effects of the offense on the victim or the victim's family."[129]

So why, when victims often have their own opportunities to address the courtroom during sentencing or to provide the court with their own statements otherwise, do judges feel compelled in some instances to pronounce the victims of rape and sexual assault "broken"? I believe that judges in the American criminal legal system believe that rape is its own crime apart from assault and battery, and that it is, rightfully, a profoundly serious one with a multitude of harms. I also believe that judges are attempting to empathize with the victims of sexual assault and rape. Judges are calling victims "broken" and "ruined" not because they are actively attempting to be patriarchal, misogynistic, or hierarchical in a harmful way, but because they are attempting to project care and concern, as well as to justify severe sentences. However, they do so in ways that are patriarchal, misogynistic, and harmful because the law and culture in which they are embedded are as well. The following subsections discuss why this approach and why pronouncing victims "ruined" or "broken" from the bench can do much more harm than good.

1. Stigmatization

Rape was punishable by death in many states until 1977, when the United States Supreme Court held that death was a "grossly disproportionate" sentence for rape.[130] The American Civil Liberties Union, in its amicus brief authored by then-Professor Ruth Bader Ginsburg, argued that "[t]he death penalty as a potential sanction for rape is part of the fabric of laws and enforcement patterns based on obsolete and demeaning notions about women which inevitably yields lack of enforcement of rape laws, rather than protection of women."[131] This fabric has proven to be resilient even in the face of efforts to reform and modernize rape law, and those who have been victimized still face stigma even long after rape or sexual assault. If someone who has been raped decides to come forward to report what occurred, they often must face "victim-blaming, smear campaigns, and harassment."[132]

128. *Id.* § 18-6.3.

129. *Id.* § 18-5.11.

130. Coker v. Georgia, 433 U.S. 584, 592–95 (1977). *Coker*'s holding was expanded to prohibit the death penalty in all cases other than those in which homicide or crimes against the state such as treason have been charged. Kennedy v. Louisiana, 554 U.S. 407, 437–38 (2008).

131. Brief *Amici Curiae* of the ACLU et al. at 8–9, *Coker*, 433 U.S. 584 (No. 75-5444), 1976 WL 181482, at *8–9.

132. Alena Allen, *Rape Messaging*, 87 FORDHAM L. REV. 1033, 1054 (2018).

In using the language of destruction and ruin, courts continue a long history of stigmatization.[133] Professor Yung has addressed the equation of rape with death or even something worse and illustrates that the former use of the death penalty in response to rape alters perceptions and "not just court interpretations, but also societal understanding about child molestation and rape."[134] With death off the table as an option in sentencing, judges are still left with the task of justifying harsh prison sentences. By calling victims "ruined," judges attempt to justify outcome severity in their sentencing by looking at the severity of the harm inflicted on the victim. In doing so, judges also flout one of the aims that is critical under some expressive and retributive[135] theories of punishment and justice—reasserting a balance between victim and defendant, especially in the context of rape and sexual assault prosecutions.

In this sense, while pronouncing the victim "broken," the judge may be acting in an expressive sense, but in a likely unintended way. The judge is engaging in the same misogyny and diminishment of victims and women that the rest of the American rape law and popular culture has done for hundreds of years. Rather than restoring a victim's social standing, a judge pronouncing a victim "ruined" does nothing to address any imbalance created by a defendant's actions. Presumably, if a judge is addressing harm done to a victim by pronouncing her "ruined" or "broken," that judge is motivated in their sentencing decisions, at least in part, by the harm as they understand it. If judges are going to address harm done to victims, they should avoid doing anything that frustrates the purposes in doing so and stay away from the historically diminishing and stigmatizing language of ruin.

Stigma, however, is different from taboo or even disgrace.[136] Rather, in thinking specifically about language and communication, stigma can be defined "as a simplified, standardized image of the disgrace of certain people that is held in common by a community at large."[137] When people have been stigmatized and understand themselves as being stigmatized, they may suffer a number of

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133. Part of this historical stigmatization in the United States consists of "[v]iewing rape as a harm principally to women's honor." *See* Martha Chamallas, *Lucky: The Sequel*, 80 IND. L.J. 441, 468 (2005). "[W]omen were thought to be dishonored by rape, because rape signaled that women had engaged in illicit sexual intercourse, were no longer innocent or chaste, and as a result, had lost their value as sexual objects, and hence as wives and daughters." *Id.* at 467.

134. Corey Rayburn, *Better Dead than R(ap)ed?: The Patriarchal Rhetoric Driving Capital Rape Statutes*, 78 ST. JOHN'S L. REV. 1119, 1152 (2004).

135.

> [R]etribution is a response to a wrong that is intended to vindicate the value of the victim denied by the wrongdoer's action through the construction of an event that not only repudiates the action's message of superiority over the victim but does so in a way that confirms them as equal by virtue of their humanity.

Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1686 (1992).

136. *See* Rachel A. Smith, *Language of the Lost: An Explication of Stigma Communication*, 17 COMMC'N THEORY 462, 463 (2007).

137. *Id.* at 464.

challenges. They could be less likely to interact with their wider communities.[138] They can suffer from poor psychological or even physical health.[139] Especially in the context of rape and sexual assault, victims may feel inclined to stay silent, for fear of being stigmatized.[140] In some circumstances, a type of stigma may be so strong and pervasive that those who associate with the stigmatized can become stigmatized themselves.[141] Judges should be aware of the stigmatizing potential of the language they use, especially when stigma itself can have such dire consequences.

2. Essentialization

Language that judges use during sentencing, such as calling rape victims "ruined," may also have the danger of further essentializing them. As Aya Gruber explains, "[e]ssentialism … is the practice of treating members of certain 'groups,' whether racial, gender, socio-economic, or ethnic, as though they all share the same beliefs, traits, goals, and desires."[142] Victims of rape are individuals and not a monolith. Rape and sexual assault victims are diverse in characteristics,[143] even if by reported numbers they are vastly women.[144] They do not all have the same interests or desires or needs or concerns.

Using such language to flatten the experience of individual victims and then using that flattened experience to justify harsh punishment may even go directly against the wishes of some victims. In many family and domestic violence situations, victims do not always want the harshest penalties possible, such as lengthy sentences in prison, but rather they may want the ability to address their experience openly and have the experience acknowledged by a defendant with an apology for their wrongdoing.[145] Given that victims themselves are not parties to criminal prosecutions (rather, the government and the defendant are), it is especially exploitative to discount victims' individual experiences and wishes by essentializing them to further justify potentially harsh criminal sentences. It should be up to victims themselves to determine whether they are ruined, broken,

138. *Id.* at 475.

139. *Id.*

140. *See id.*; Courtney E. Ahrens, *Being Silenced: The Impact of Negative Social Reactions on the Disclosure of Rape*, 38 AM. J. CMTY. PSYCH. 263, 263 (2006) ("Rape survivors who speak out about their assault experiences are often punished for doing so when they are subjected to negative reactions from support providers. These negative reactions may thereby serve a silencing function, leading some rape survivors to stop talking about their experiences to anyone at all.").

141. *See* Smith, *supra* note 136, at 476.

142. Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 774 (2007) (citing Elizabeth M. Iglesias & Francisco Valdes, *LatCrit at Five: Institutionalizing a Post-Subordination Future*, 78 DENV. U. L. REV. 1249, 1265 n.39 (2001)).

143. "Sexual assault victims, in particular, are diverse across racial, ethnic, socio-economic lines; some are members of LGBTQ groups, some are men." Lara Bazelon & Bruce A. Green, *Victims' Rights from a Restorative Perspective*, 17 OHIO ST. J. CRIM. L. 293, 295–96 (2020).

144. *See supra* note 9 and accompanying text.

145. C. Quince Hopkins, Mary P. Koss & Karen J. Bachar, *Applying Restorative Justice to Ongoing Intimate Violence: Problems and Possibilities*, 23 ST. LOUIS U. PUB. L. REV. 289, 291 (2004).

or whatever state they feel themselves to be in, and up to them whether they wish to share this with a courtroom, rather than having it foisted upon them by judges.

3. Retraumatization

In an opinion piece for *The New York Times*, Jessica Bennett explored the consequences of trauma becoming a pop cultural phenomenon.[146] Bennett both bitingly and smartly pushes back on psychological concepts being used by people on the Internet, especially social media, as a means for building "clout."[147] She jokingly terms this trend "post-traumatic hyperbole."[148] In the article, psychology Professor Nick Haslam attributes the trend to "trauma creep": "when the language of the clinical, or at least the clinical-adjacent, is used to refer to an increasingly expansive set of everyday experiences."[149] This expansive use of the word "trauma" and associated concepts to describe the annoyances of everyday life, such as rude bosses and unpleasant breakups, has led to what can be seen as instances of definitional slippage.[150]

Trauma, even for all its appropriation by pop culture, is still a real psychological phenomenon with foremost importance for studying mental health. In the context of mental health, trauma "refers to a psychological phenomenon involving a sudden, life-threatening, or horrifying experience, often followed by troubling memories and reactions," while retraumatization can occur when people undergo multiple traumas.[151] Although rape and sexual assault often cause trauma in those who have been victimized, it is critically important to remember that such crimes do not happen in a vacuum and that "[s]ociety's response to this crime can also affect women's well-being."[152]

Just as it can be difficult to define the concept of psychological trauma with any precision, it is equally difficult, if not more so, to understand retraumatization. Retraumatization and post-traumatic stress disorder can potentially appear together in comorbid fashion.[153] While PTSD can develop after a traumatic event—one where a person responds with "immediate intense fear, helplessness, or horror"—retraumatization is the result of further traumatic events happening after

146. *See generally* Jessica Bennett, Opinion, *If Everything Is 'Trauma,' Is Anything?*, N.Y. TIMES (Feb. 4, 2022), https://www.nytimes.com/2022/02/04/opinion/caleb-love-bombing-gaslighting-trauma.html.

147. *See id.* (quoting Shantel Gabrieal Buggs, Florida State University).

148. *Id.*

149. *Id.*

150. *See id.*

151. Anna F. Leshner, Carrie M. Kelly, Kerri E. Schutz & David W. Foy, *Retraumatization*, *in* ENCYCLOPEDIA OF TRAUMA: AN INTERDISCIPLINARY GUIDE 569, 569 (Charles R. Figley ed., 2012).

152. Rebecca Campbell, Sharon M. Wasco, Courtney E. Ahrens, Tracy Sefl & Holly E. Barnes, *Preventing the "Second Rape": Rape Survivors' Experiences with Community Service Providers*, 16 J. INTERPERSONAL VIOLENCE 1239, 1240 (2001).

153. *See* Katrin Schock & Christine Knaevelsrud, *Retraumatization: The Vicious Circle of Intrusive Memory*, *in* HURTING MEMORIES AND BENEFICIAL FORGETTING: POSTTRAUMATIC STRESS DISORDERS, BIOGRAPHICAL DEVELOPMENTS AND SOCIAL CONFLICTS 59, 59 (Michael Linden & Krzysztof Rutkowski eds., 2013).

the original traumatic event.[154] Perhaps unsurprisingly, those who are already suffering from PTSD after a traumatic event such as a rape or sexual assault are at greater risk of yet more PTSD symptoms after additional traumatic events.[155]

The legal system itself and the criminal adjudicative process can serve as their own sources of trauma and retraumatization for victims of rape and sexual assault.[156] Because of the Confrontation Clause, if rape or sexual assault charges proceed to trial, victims must often testify in the same room as the accused as well as be subject to cross-examination by the defendant's attorney.[157] There are a number of harmful behaviors that can be undertaken by different actors in the criminal adjudication process that cause retraumatization, such as "victim-blaming, insensitive remarks, and statements that minimize the harm caused by the abuse."[158]

In attempting to empathize with victims and recognize the harm they have sustained by saying they have been "ruined" or "destroyed" by rape, judges may think they are showing greater compassion than they would if remaining dispassionate and neutral, which some scholars have argued is what judges should strive for.[159] Telling a victim, the courtroom, and the community that a victim of sexual assault is "ruined" is anything but compassionate and, if anything, could be one of the types of negative comments on a horrifying experience that leaves a victim retraumatized.

I am not arguing that judges must approach their jobs with a robotic sort of efficiency and functionality, even if the emotionless judge has become the overwhelmingly accepted role in the American legal system.[160] I believe that it is inevitable that judges will be influenced not only by legal arguments but also by their own human feelings.[161] If judges were not human and did not have their own feelings or agendas, perhaps judicial confirmation hearings would not be as fraught with drama as they are now. Judges will have emotions that arise when they are on the bench and even during sentencing. Even if they cannot all be trauma informed, they should be aware that what they may think is a compassionate treatment of an issue may not feel the same or read the same way to someone with a distinct set of experiences from their own.

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154. *Id*. at 60–61, 64.

155. *Id*. at 66.

156. Negar Katirai, *Retraumatized in Court*, 62 ARIZ. L. REV. 81, 89 (2020).

157. *See id*. at 85–86, 102.

158. *Id*. at 90.

159. *See id*. at 104–05 (citing Ann E. Freedman, *Fact-Finding in Civil Domestic Violence Cases: Secondary Traumatic Stress and the Need for Compassionate Witnesses*, 11 AM. U. J. GENDER, SOC. POL'Y & L. 567, 630 (2003)) (arguing for "a more openly emotional and compassionate approach to judging").

160. *See* Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CALIF. L. REV. 629, 633 (2011).

161. See *id*. at 640–41 for a list of instances where judges have admitted freely that their emotions influenced the decisions they were making.

4. Perpetuating Stereotypical Versions of Victimhood

Pronouncing a victim "ruined" or "broken" can not only be stigmatizing, retraumatizing, and essentializing, but it also perpetuates myths about victims, who they are, and how they should react to their circumstances. One of the difficulties in criminally prosecuting rape and sexual assault, as well as in handling such wrongdoing in other settings such as discipline after sexual assault on college campuses, is that many believe in a "perfect victim" who can easily respond to questions, testify about the experience, recall what occurred easily and without temporal gaps, and remember details in ways that are not perceptibly impacted by trauma.[162]

There are a variety of ways a victim may respond to rape and sexual assault, some of which may seem counterintuitive to those who have never experienced the same. Though rape is a significant and traumatic event in a victim's life, the circumstances leading up to the event as well as details of the rape or sexual assault itself may be difficult to recall or relate in chronological order.[163] Many victims, dealing with the most serious victimization they will have to endure in their lives, may take a long time to report what happened, and, in some cases, may still maintain contact with the person alleged to have perpetrated the rape or sexual assault or even ask alleged assailants to keep the circumstances of a rape secret.[164] Behaviors like these fly in the face of stereotypes of the "perfect victim."

Behaviors like these also make prosecuting rape and sexual assault cases uniquely difficult given that jury expectations of a perfect victim are challenging, if not impossible, to meet. This perfect victim "is weak compared to the offender; engaged in morally virtuous and/or ordinary, everyday behavior; blameless for the criminal conduct; unknown to the assailant; harmed by someone who can be understood as unambiguously 'big and bad'; and not threatening to powerful countervailing interests."[165] That the constellation of potential reactions to rape and sexual assault that do not meet this perfect victim narrative have been grouped together under the umbrella of rape trauma syndrome[166] reveals how

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162. *See* Kelly Alison Behre, *Ensuring Choice and Voice for Campus Sexual Assault Victims: A Call for Victims' Attorneys*, 65 DRAKE L. REV. 293, 352 (2017).

163. *See id.* (explaining that victims of sexual assault may "initially present an incomplete timeline").

164. *See* Yxta Maya Murray, *Rape Trauma, the State, and the Art of Tracey Emin*, 100 CALIF. L. REV. 1631, 1644 (2012); Behre, *supra* note 162.

165. Rose Corrigan & Corey S. Shdaimah, *People with Secrets: Contesting, Constructing, and Resisting Women's Claims About Sexualized Victimization*, 65 CATH. U. L. REV. 429, 437 (2016) (citing Nils Christie, *The Ideal Victim*, *in* FROM CRIME POLICY TO VICTIM POLICY: REORIENTING THE JUSTICE SYSTEM 17, 18–19 (Ezzat A. Fattah ed., 1986)).

166. Rape trauma syndrome is a "type of post-traumatic stress disorder suffered by victims of rape." It can only be diagnosed with the presence of four symptoms: (1) the stressor event must be "outside the range of normal human experience" or one that would cause "severe distress in most individuals"; (2) the victim must reexperience the trauma, often through "recurrent recollections of the event, recurrent distressing dreams, or suddenly acting or feeling as if the traumatic event were recurring"; (3) there must be "avoidance of stimuli associated with the event"; and (4) there must be "[p]ersistent symptoms of

much both law and psychology as disciplines police women and their reactions to victimization such that any that cause more than inconvenience are stigmatized as part of a "syndrome."

In pronouncing women who have been through rape and sexual assault "ruined," judges, with the imprimatur of their offices, continue to promulgate the ideal reactions that a victim should display. While these victims are judged to no longer function as normal women do after they have been "ruined," they are also not expected to be functional. The correct response, according to the diminishing language used from the bench on which this Article focuses, is being ruined. A type of dysfunction, but a culturally appropriate dysfunction, is what a judge highlights when engaging in the behavior critiqued throughout this Article. When the judge says that a victim has been ruined, the judge is also endorsing that condition as a normal result of sustaining such harm.

5. My Experience of "Ruin"

Having to listen to women being told time and again that they or their lives were ruined may have been one of the more trying aspects of being a prosecutor for me. Each time I listened to a judge tell a courtroom that he[167] was sentencing a defendant to prison because the defendant had "ruined the life of" or, even, "ruined" an actual victim herself, I grew more convinced that not only the judge, but also the community the judge purported to serve, viewed both the defendant convicted of rape and the victim as tied together forever. The defendant had left the victim broken. Whatever ruin or brokenness the defendant bore or experienced on sentencing was also meted out again upon a victim.

I began to wonder about my own reaction to my rape and long-running sexual abuse while listening to these sentencing hearings. While my home life at the time was far less than ideal, I was able to function not just as a productive adult, but as an attorney in what was traditionally considered to be a demanding job by most. I began to internalize the notion of the ideal, perfect victim over time—a victim who could remember the details of what had happened during her assault, but also a victim appropriately devastated by the event. After some time, I felt that something was the matter with me. Heartbroken as I was over what I was forced to experience as a child, I started to doubt myself. I began to wonder: if I can function relatively well but also not have completely clear or chronological recollections of what happened, was it all in my head? I started doubting my recollections and "gaslighting"[168] myself because I did not feel "ruined" enough to

increased arousal" such as having a hard time sleeping, having exaggerated startled responses, or other signs of hypervigilance. Malia McLaughlin, *Rape Trauma Syndrome* §§ 3–4, *in* 12 AM. JUR. PROOF OF FACTS 3D 401, 411, 413–14 (1991).

167. All the county-level trial court judges in the northern Utah county in which I prosecuted were men until 2019. Jackson Wilde, *1st District First: A Woman on the Bench*, HJ NEWS (Oct. 18, 2019), https://www.hjnews.com/news/crime_courts/1st-district-first-a-woman-on-the-bench/article_37302838-7a17-56cc-95de-e7db2e64525e.html [https://perma.cc/B58M-48BJ].

168. To gaslight can be defined as "to psychologically manipulate (a person) usually over an extended period of time so that the victim questions the validity of their own thoughts, perception of reality, or memories and experiences confusion, loss of confidence and self-esteem, and doubts

match my experience. With more time I began to feel guilty and deficient. If I did not feel ruined or broken, I figured there must have been something wrong with me, something defective or maybe even sinister.

There were several reasons why I ended up quitting my job as a county prosecutor, my first job after law school, after only three years. I did not feel that I could do the job in the way I wanted, prioritizing fairness and creative, less carceral solutions. I could not disguise my revulsion for the discriminatory and often unconstitutional investigatory tactics that law enforcement employed daily. The sort of "gallows humor" that many of the prosecutors in my office engaged in, which ridiculed not only defendants and their life circumstances but also, oftentimes, victims, was demoralizing and felt actively retraumatizing every day.

There was also a knowledge of my own role in this that started to become apparent to me, first slowly, then in crushing, oppressive fashion. I began not only to feel a complicity with the criminal legal system that treats accused offenders, including those charged with sexual crimes, as something inhuman, but also to feel I was doing the same to those very victims whom I wanted to help or save somehow. I was naive and thought that I was working to bring those who were charged with sex crimes "to justice," but I found that I was doing the opposite. I helped to essentialize victims of rape and sexual assault by trying to mold them into "perfect victims" for purposes of potential trials. And I began to absorb the sentiment personally when judges would pronounce sentences in rape and sexual assault cases from the bench, justifying harsh punishment that the victim often felt no investment in by saying the defendant "ruined" the victim's life. Perhaps I really was ruined and that was evident by my flat affect. Perhaps the evidence was there all along that I was ruined given that I had made critical life and career choices based significantly on what had happened to me years before.

One sentencing hearing where a judge offered what felt like a throwaway remark about a defendant leaving a sexual assault victim "broken" was, in large part, what broke my own resolve to keep working as a prosecutor. After the sentencing hearing, I spoke with the victim, who appeared understandably visibly shaken by the entire ordeal. She told me that she did not feel "broken," and that the term had thrown her off her bearings because she was focusing on moving the best she could through and past the trauma of what had happened to her. I forget what platitudes I began to offer in response—it was some canned response because I was not expecting anyone to articulate what I found so painful about the language of brokenness and ruin to my face. She then guessed my secret: "This happened to you too, didn't it?" While I thought my own experience made it easier for me to be a good prosecutor and see her as an individual, something unexpected happened. She saw me back. I quit a few months later. I had my doubts about staying in the office, but it was that experience of recognition that ended up proving too much for me.

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concerning their own emotional or mental stability." *Gaslight*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/gaslight [https://perma.cc/8EDP-G27C] (last visited Oct. 24, 2022).

III. FINDING ALTERNATIVES TO "RUIN"

In Part I, this Article provides examples of judges using language that is degrading to label the victims of rape and sexual assault during sentencing. This language includes using words such as "ruined" or "broken" to describe the state of a victim after being victimized. Part I also draws connections from this language to other examples of historic patriarchy and misogyny in realms such as family law and criminal law. By doing so, this Article demonstrates that the language in question was not rooted in a benevolent concern for rape victims but more so was part of a long-running sexist trope and understanding in the law.

In Part II, a brief treatment of both traditional and more recently developed theories of punishment is offered to help understand why judges choose to use such language. This review also helps to understand the justifications judges may rely upon for using such language, such as attempting to justify harsh outcome severity in sentencing. While these inclinations may not be born of any nefarious impulse—I do not believe that judges are attempting to actively harm victims by using the language of ruin and brokenness during sentencing—Part II also argues that these efforts are at best ill-advised and at worst actively cause harm by engaging in stigmatization, retraumatization, the essentialization of victims, and the perpetuation of myths about "perfect victims."

As Professor Rachel A. Smith has explained, "[t]he process of dehumanizing members of a community is not unusual, atypical, nor out-of-date."[169] The language on which this Article focuses—of ruin and brokenness as used by judges during sentencings—has historically been and continues to be used in stigmatizing fashion. Even if judges use this language to describe victims during rape and sexual assault case sentencings, they are still engaging in the sort of stigmatization that this Article seeks to address and to stop.

I now turn to parallels in other fields of study that have been undergoing similar inquiries regarding language use, word choice, what labels convey, and the messaging that occurs when one label or descriptor is chosen over another. While I do not yet offer a set of concrete proposals for reforming the language of sentencing in rape and sexual assault cases in this paper (I believe that that would require another article devoted just to those proposals), investigating how other fields have handled the problem of stigmatizing language can be fruitful as a starting point in determining how to move beyond the language of ruin at sentencing hearings. There are, perhaps, alternative ways that judges may be able to express acknowledgment of the serious harm done to a victim without merely offering equivalently diminishing language. The next Sections discuss whether "there [is] a way to share information about community concerns" that might be the genesis of stigma "without using stigma communication."[170]

169. Smith, *supra* note 136, at 462.
170. *See id*. at 478.

A. ADDICTION

Addictions, or substance use disorders, "are characterized by impaired functioning and considerable harm to the individuals with the disorders and to society as a whole."[171] Medical practitioners and other service providers focused on working with those who experience addiction have made recent strides in attempting to reduce the stigma of addiction. Those on the frontlines of these efforts have been focusing on working against long-standing assumptions about addiction, especially the assumption that addiction is a moral failing. Historical stigmas regarding addiction can prevent people from admitting they have a substance use disorder and from seeking treatment.[172] Stigma regarding substance use disorders not only prevents those with such disorders from seeking help,[173] but also impacts "public opinion of policies, funding, and desire for social distance."[174] While stigma can be explicit, it can also be more subtle, such as the formation and manifestation of implicit bias.[175] These forms of stigma may be correlated with worse health outcomes for those with substance use disorders.[176]

There has been growing recognition that language shapes the way people understand the world around them, and that choice of language can communicate even unintended negative information such as "harmful stereotypes and assumptions."[177] And much as judges do during sentencing hearings, service providers and others in positions of authority, such as physicians, engage in the stigmatization of people with substance use disorders.[178] Much as the law has seen victims of rape and sexual assault as objects or as people who can be "broken," much of the public as well as medical practitioners perceive substance use disorders "as character flaws or even as deviance."[179] The use of language in the realm of

171. *See* Lawrence H. Yang, Liang Y. Wong, Margaux M. Grivel & Deborah S. Hasin, *Stigma and Substance Use Disorders: An International Phenomenon*, 30 CURRENT OP. PSYCHIATRY 378, 378 (2017).

172. *Id.*

173. "For instance, people with alcohol use disorder (AUD) who perceive a high degree of public stigma toward those with their condition were about half as likely to seek help as those perceiving a low degree of stigma." Nora D. Volkow, Joshua A. Gordon & George F. Koob, *Choosing Appropriate Language to Reduce the Stigma Around Mental Illness and Substance Use Disorders*, 46 NEUROPSYCHOPHARMACOLOGY 2230, 2230 (2021) (citing K.M. Keyes, M.L. Hatzenbuehlher, K.A. McLaughlin, B. Link, M. Olfson, B.F. Grant & D. Hasin, *Stigma and Treatment for Alcohol Disorders in the United States*, 172 AM. J. EPIDEMIOLOGY 1364, 1364–72 (2010)).

174. Robert D. Ashford, Austin M. Brown, Jessica McDaniel & Brenda Curtis, *Biased Labels: An Experimental Study of Language and Stigma Among Individuals in Recovery and Health Professionals*, 54 SUBSTANCE USE & MISUSE 1376, 1376 (2019).

175. *Id.* at 1377.

176. *See* Kathleen A. Crapanzano, Rebecca Hammarlund, Bilal Ahmad, Natalie Hunsinger & Rumneet Kullar, *The Association Between Perceived Stigma and Substance Use Disorder Treatment Outcomes: A Review*, 10 SUBSTANCE ABUSE & REHAB. 1, 2, 11 (2019).

177. Volkow et al., *supra* note 173.

178. *Id.*

179. *See id.*

substance use disorders, such as calling someone an "addict" or an "abuser," certainly does not help.[180]

Recognition of the stigmatizing nature of such language seems to have come earlier to the medical and public health fields than to the law; it was in the 1970s that the World Health Organization began using the term "alcohol dependence syndrome" rather than the old term perhaps more familiar to readers of this Article, "alcoholism."[181] Criminal law practitioners who work with those who have been convicted of drug-related offenses may already be familiar with much of the stigmatizing terminology used in the course of the adjudication of a case or while providing services, such as pronouncing a person "dirty" with a positive drug test result. However well-intentioned the person using such language may be, the word "dirty" suggests a person who is unclean and should be socially isolated from those who are "clean."[182]

Much as victims of rape and sexual assault may have the law and criminal adjudicative processes contribute to their further stigma, including by judges at sentencing, the criminalization of substance use may also contribute to stigma.[183] Several types of interventions have been shown to reduce stigma, such as those focusing on self-stigma as well as social stigma.[184] Structural stigma interventions, too—such as those focused on improving "attitudes of medical students towards people with substance use problems"—have also been found to be effective, with significant decrease in dislike of those with substance use issues.[185] Some of these systemic interventions have focused on changing the attitudes of police officers and counselors toward those with substance use issues,[186] with "a

180. *See id*. Hanna Pickard explains some of the difficulties in determining how to label those who are contending with addiction; while calling someone an addict is certainly essentializing and such terms are used in ways to denigrate those managing or attempting to manage substance use disorder, many of those same people call themselves "addicts." Hanna Pickard, *Addiction and the Self*, 55 NOÛS 737, 738, 746–47, 751–52 (2021).

181. Ekaterina Pivovarova & Michael Stein, *In Their Own Words: Language Preferences of Individuals Who Use Heroin*, 114 ADDICTION 1785, 1785 (2019).

182. Michael P. Botticelli & Howard K. Koh, *Changing the Language of Addiction*, 316 JAMA 1361, 1361–62 (2016).

183. James D. Livingston, Teresa Milne, Mei Lan Fang & Erica Amari, *The Effectiveness of Interventions for Reducing Stigma Related to Substance Use Disorders: A Systematic Review*, 107 ADDICTION 39, 40 (2011).

184. *Id*. at 39, 47. Social or public stigma refers to stigma held by others that a stigmatized person "is socially undesirable," while self-stigma is the manifestation of the internalization of "perceived prejudices." Klara Latalova, Dana Kamaradova & Jan Prasko, *Perspectives on Perceived Stigma and Self-Stigma in Adult Male Patients with Depression*, 10 NEUROPSYCHIATRIC DISEASE & TREATMENT 1399, 1399 (2014).

Therapy for self-stigma might include workshops and treatment programs focusing on "mindfulness, acceptance, and values work in relation to self-stigma." Jason B. Luoma, Barbara S. Kohlenberg, Steven C. Hayes, Kara Bunting & Alyssa K. Rye, *Reducing Self-Stigma in Substance Abuse Through Acceptance and Commitment Therapy: Model, Manual Development, and Pilot Outcomes*, 16 ADDICTION RSCH. & THEORY 149, 149 (2008). Interventions for dealing with related social stigma may look like "communicating positive stories of people with substance use disorders." Livingston et al., *supra* note 183, at 39.

185. Livingston et al., *supra* note 183, at 45–46.

186. *Id*. at 45.

growing body of research suggesting that interventions can maximize their effectiveness by targeting implicit-automatic processes underlying stigma."[187]

B. MENTAL ILLNESS

Just as with addiction and substance use disorders, mental illness has been seriously and historically stigmatized, leading to poor outcomes and difficulties such as "social isolation"; "reduced employment, housing, and educational opportunities"; "discrimination"; and more.[188] Although it may be, unfortunately, unsurprising that most Americans have stigmatizing attitudes toward mental illness, even those who should know better, such as mental health clinicians and service providers, also exhibit this sort of stigmatization.[189] Pop cultural representations of mental illness exacerbate the problem by essentializing those who have mental illness, stereotyping in three main ways: "homicidal maniacs who need to be feared," people with "childlike perceptions of the world that should be marveled," and people who are "responsible for their illness because they have weak character."[190] It is, perhaps, for these reasons that mental illness is not globally regarded as seriously or with the same urgency as other, more physical forms of illness on a larger public health policy scale.[191]

The first nationwide campaign to fight against the stigma of mental illness was launched in 1999 after the White House Conference on Mental Health.[192] There have since been, at least in the realms of federal government and policymaking, more overt signs that mental illness is slowly being destigmatized and treated more similarly to physical illness.[193] Just as with addiction and substance use disorders, there have been a number of approaches in addressing the stigma attached to mental illness. There is evidence that, at least for adults, personal contact, such as meeting another person with serious mental illness, is an especially effective way to challenge stigma rather than some other methods, such as trainings and education.[194] Choice of language, just as with combatting stigma against substance use disorders, can also help to lessen stigma toward mental illness. Although not all patients may necessarily want it, person-centered language can help to emphasize that a person is not only their mental illness and provide a

187. *Id.* at 47.

188. Amy L. Drapalski, Alicia Lucksted, Clayton H. Brown & Li Juan Fang, *Outcomes of Ending Self-Stigma, a Group Intervention to Reduce Internalized Stigma, Among Individuals with Serious Mental Illness*, 72 PSYCHIATRIC SERVS. 136, 136 (2021).

189. *See* Patrick W. Corrigan & Amy C. Watson, *Understanding the Impact of Stigma on People with Mental Illness*, 1 WORLD PSYCHIATRY 16, 16 (2002).

190. *Id.* at 17.

191. *See* H. Stuart, *Reducing the Stigma of Mental Illness*, 3 GLOB. MENTAL HEALTH, No. e17, 2016, at 1, 1.

192. Patrick W. Corrigan, Scott B. Morris, Patrick J. Michaels, Jennifer D. Rafacz & Nicolas Rüsch, *Challenging the Public Stigma of Mental Illness: A Meta-Analysis of Outcome Studies*, 63 PSYCHIATRIC SERVS. 963, 963 (2012).

193. *See* Francis X. Shen, *Mind, Body, and the Criminal Law*, 97 MINN. L. REV. 2036, 2038 (2013) (quoting Speaker of the House Nancy Pelosi: "[I]llness of the brain must be treated just like illness anywhere else in the body." (citation omitted)).

194. Corrigan et al., *supra* note 192, at 969–70.

vocabulary free of the moral judgments that are implicit in other, more antiquated labels—for example, calling a person "psychotic."[195]

C. POTENTIAL INTERVENTIONS RATHER THAN FACING "RUIN"

While still slow, when it comes to recognizing the need to work to actively destigmatize conditions that are beyond anyone's control, such as substance use disorders and mental illness, the medical and public health fields move faster than the legal field, which can crawl along at glacial pace. As demonstrated in Part I, the association of the language of ruin and brokenness as applied to victims of sexual assault arises from historical misogyny and gender inequities. These associations are particularly damaging and problematic when employed and, therefore, entrenched from the bench. There are, of course, many different theories on the roles of judges and the act of judging. Some argue that the will of a community is embodied by the law, "which a judge can discern by using the appropriate" interpretive tools.[196] To make sweeping generalizations, legal formalists believe that "judges find—not make—law,"[197] while legal realists believe that "judges only make law."[198] Some judges somewhat audaciously even believe that they themselves are embodiments of the rule of law.[199] No matter what theory one may adopt, and I do not subscribe to a specific one here in this Article, it is clear that what judges say and do matters, and that the things that they say from the bench carry the imprimatur of something weighty and important, be it the state or the law. When judges call victims of sexual assault "ruined" or "broken," they are not just doing so in their individual capacities, but with the full weight of their office and what that means in their respective communities.

What language could be used in a way that would be empathetic and make sure that the gravity of what happened to a victim is respected and acknowledged? This Article can only begin to scratch at the surface of the best solutions to the problem it describes and is meant to serve as a descriptive staging point for future research addressing this question more fully. Using the language of trauma is one possibility. When speaking of trauma that does not arise from a physical injury, it is, as defined by the American Psychological Association, "an emotional response to a terrible event like an accident, rape, or natural disaster."[200] The definition of trauma in the physical sense, however, is broad: "a serious injury to the body."[201] Both physical and mental trauma can be temporary, and both can be

195. Volkow et al., *supra* note 173, at 2231.

196. Anya Bernstein & Glen Staszewski, *Judicial Populism*, 106 MINN. L. REV. 283, 328 (2021).

197. Jason Iuliano, *The Supreme Court's Noble Lie*, 51 U.C. DAVIS L. REV. 911, 921 (2018).

198. *Id.* at 936.

199. *One Judge's Story: The Impact of Violence on Judicial Independence*, 47 U. MEM. L. REV. 1235, 1245 (2017) (interviewing U.S. District Judge Timothy J. Corrigan).

200. *Trauma*, AM. PSYCH. ASS'N, https://www.apa.org/topics/trauma [https://perma.cc/648N-S373] (last visited Oct. 24, 2022).

201. *Physical Trauma*, NAT'L INST. GEN. MED. SCIS., NAT'L INST. HEALTH, https://www.nigms.nih.gov/education/fact-sheets/Pages/physical-trauma.aspx [https://perma.cc/5HNQ-HDWR] (last visited Oct. 24, 2022).

permanent. Trauma's definitional broadness as well as its moral neutrality could make using a term like "suffered trauma" or "sustained trauma" an alternative that empathizes with victims but also does not speak to or make assumptions about their long-term functionality. Human beings can sustain trauma; objects cannot. This still may not be the best option, however. Trauma may not fully convey the severity of what occurs with rape and sexual assault and the term, as this very Article mentions,[202] is overused.

Judges at rape and sexual assault sentencings might also call what has been done to a victim by its real name—harm. Stating that a convicted defendant has harmed a victim would also avoid the patronizing and misogynistic value judgments that exist when a judge says that a victim has been "ruined." By describing the harm and its seriousness, judges could cease to engage in using language that stigmatizes, essentializes, and diminishes victims while continuing to be able to communicate many of the same types of messages, including explanations for why a given sentence might be particularly severe.

IV. THE ADVANTAGES OF OPENNESS

This Article has been the most difficult that I have ever written. It is one that I have contemplated writing for years and could only do so once I was in a place where I felt safe enough, both personally and professionally, to do so. I have wavered between fear of the judgment it would bring due to the ever-present stigma of being a rape and sexual assault victim, along with the feeling of near illness of pretending none of it ever happened. I am a criminal law professor, and I teach about rape and sexual assault in my first-year criminal law class. I cannot pretend that the rape and sexual abuse of my childhood never happened.

I could have written this paper without acknowledging and sharing details of my own experience, including the ways that it influenced how I approached my work as a prosecutor as well as how it was instrumental in my leaving that position. It would have been easier and much more comfortable to proceed in traditional fashion by sticking to the usual script where I would "describe legal cases, analyze appellate opinions, and propose sound solutions to the thorny problems raised by 'real world' controversies"[203] outside of my own experience. This has become a standard method for approaching legal scholarship. It is effective and is one that I have used many times over. This template and method of approaching legal scholarship—with a supposed dispassionate remove—is part of a deeply rooted "host of stories, narratives, conventions, and understandings that today, through repetition, seem natural and true."[204]

Telling stories in legal scholarship and relying on personal narratives has often been met with harsh critique; some claim that because such narratives are not told

202. *See supra* Section II.D.3.

203. *See* Jean C. Love, Commentary, *The Value of Narrative in Legal Scholarship and Teaching*, 2 J. RACE, GENDER & JUST. 87, 88 (1998).

204. *See* Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665, 666 (1993).

from a neutral perspective, they lack value in legal and other scholarship.[205] Such a view presupposes that there are other methods of engaging in scholarship that have greater value, even if those methods are ones that are dictated by dominant groups.[206]

Other critiques have questioned whether storytelling and narrative can offer anything truly distinct from more traditional modes of legal scholarship.[207] These critiques flatten experience and engage in much of the same type of essentializing that is described earlier in this Article.[208] When it comes to rape, sexual assault, and sexual abuse, there have been long-standing stories told that have been allowed to ossify into the traditional view dictating how we talk about those crimes, how they are adjudicated, and how those convicted are sentenced.[209]

In contributing my own story in this Article, much of what I attempt to accomplish is to offer my own version of what Professor Delgado calls a "counter-story."[210] I am a Latina law professor, and we only account for 1.3% of all law professors.[211] I am a rape, sexual assault, and sexual abuse victim willing to come forward to share and talk about her experiences when many others, with good reason, might be unable or unwilling to do so. My perspective is made even more notable by my experience as a prosecutor, especially in a wider criminal legal system where 95% of elected prosecutors are white and 79% are white men.[212] My perspective is unique and has the ability to "open new windows into reality."[213] My great hope as well in engaging in autoethnographic and narrative scholarship is to help to lessen the stigma that many still attempt to attach to victims, to show victims that they are not alone, and to help them feel less marginalized, especially by the language used by judges at sentencing hearings.[214] As Anita Hill said during an interview regarding her recently published memoir *Believing*: "There is victory in being able to come forward and state what has happened to you."[215]

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205. *See* Devon W. Carbado & Daria Roithmayr, *Critical Race Theory Meets Social Science*, 10 ANN. REV. L. & SOC. SCI. 149, 161 (2014).

206. *See* Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412 (1989).

207. *See* Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 815–17 (1993).

208. *See supra* Section II.D.2.

209. *See supra* Part I.

210. *See* Delgado, *supra* note 204, at 666, 670–71; Delgado, *supra* note 206, at 2414.

211. Raul A. Reyes, *Can This Latina Law Professor Tapped by Biden Help Reform the Supreme Court?*, NBC NEWS (Apr. 14, 2021, 2:22 PM), https://www.nbcnews.com/news/latino/can-latina-law-professor-cristina-m-rodriguez-help-reform-supreme-cour-rcna672 [https://perma.cc/6JHP-RCGJ].

212. REFLECTIVE DEMOCRACY CAMPAIGN, JUSTICE FOR ALL*? 1 (2015), https://wholeads.us/wp-content/uploads/2019/03/Justice-For-All-Report_31319.pdf [https://perma.cc/LAD7-LCNA].

213. *See* Delgado, *supra* note 206, at 2414.

214. Richard Delgado described the positive effects of such storytelling for those in "outgroups," or those whose voices have "been suppressed, devalued, and abnormalized," because the stories "represent cohesion, shared understandings, and meanings." *Id*. at 2412.

215. Fresh Air, *Anita Hill*, NPR, at 19:05 (Sept. 28, 2021, 4:03 PM), https://www.npr.org/2021/09/28/1041135804/anita-hill [https://perma.cc/FCS9-N966].

I realize, too, that my students will be able to read this Article and learn more about me than perhaps some of my other law professor colleagues might be comfortable with. My own experiences, I hope, can provide "a contemporary embodiment" of "legal experiences."[216] They offer a lens to view the issue at the heart of this Article—the language that judges use during sentencing of sexual assault defendants—that students may not have had before.

CONCLUSION

In efforts to appear empathetic to victims of rape, sexual assault, and sexual abuse, judges oftentimes choose to describe the harm that victims went through and sustained by characterizing the victim's state itself as being "broken" or even "ruined." This type of objectifying and diminishing language, with its roots in historical and legal misogyny, should be avoided by judges at sentencing because such language can prove stigmatizing, essentializing, and retraumatizing. These are all aftereffects that I felt myself after listening to judges tell victims they were broken or ruined repeatedly during my years as a county prosecutor. Judges and the legal profession should consider efforts to destigmatize previously stigmatized conditions, such as substance use disorders and mental illness, as examples of how to engage in the linguistic and cultural change needed for judges to start treating victims of rape and sexual assault in ways that affirm their own autonomy and ability to survive after their victimization. I offer narratives of my own story of childhood rape and sexual abuse to highlight why these linguistic reforms are needed. Further investigation into potential changes is desperately needed and will follow this Article, which is the first to describe the problem at its core.

216. Jerome McCristal Culp, Jr., Essay, *Autobiography and Legal Scholarship and Teaching: Finding the Me in the Legal Academy*, 77 VA. L. REV. 539, 545 (1991).