Article

Unwanted Pregnancy: Sex, Contraception, and the Limits of Consent

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Rape exceptions to abortion bans, widely popular among the American electorate, are cleaved from a rule that defines pregnancy as the byproduct of choice. According to the logic of this rule and its remarkably limited exception, a person who is not raped consents to sex and therefore to the pregnancy that results. An empirical analysis of women's experiences with sex and contraception upends this logic, exposing the narrowness of abortion law, rape law, and law's underlying conception of consent. In particular, the legal consent paradigm conceals a range of harm to marginalized women. My account of unwanted pregnancy contests this understanding along with its supremacy within and outside law. As an alternative to the consent paradigm, I describe a theory of reproductive agency that centers persistent structural constraints on women's sexual and reproductive lives. By surfacing law's deep entanglement in these background conditions, the theory bolsters a case for an affirmative state obligation to provide comprehensive sex education, contraceptive access, and abortion care.

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INTRODUCTION

Hadley Duvall, a twenty-one-year-old white woman who attended a small Christian university in Kentucky, has been called "the all-American girl."[1] For many years, Duvall kept a secret: Beginning at the age of five and throughout her childhood, she was raped by her stepfather.[2] During seventh grade, she became pregnant by him before miscarrying.[3] "The first thing I was told when I saw that pregnancy test was 'you have options,'" Duvall recalls.[4] When she took the stage at the Democratic National Convention in August 2024, the moment was powerful. Not having options was unimaginable, Duvall explained, but "that's the reality for many women and girls across the country because of Donald Trump's abortion bans."[5] To a visibly moved audience, Hadley added, "[Trump] calls it a beautiful thing. What is so beautiful about a child having to carry her parent's child?"[6]

This was not the first time Duvall's story figured in the political arena. The previous year, Duvall became the face of opposition to Kentucky's near-total abortion ban when she was featured in a viral ad against Daniel Cameron, the Republican

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1. Caroline Kitchener, *"Everybody's Daughter": The Rape Victim Behind Kentucky's Viral Abortion Ad*, WASH. POST (Dec. 4, 2023), https://www.washingtonpost.com/politics/2023/12/04/kentucky-abortion-ad [https://perma.cc/Q5XP-B53B]. Duvall's race and other privileged social statuses enhanced the ad's impact, as she has candidly acknowledged. *Id.* A similar observation can be made of Duvall's resemblance to the "perfect victim." *See infra* note 107 and accompanying text.

2. Kitchener, *supra* note 1.

3. *See* Lauren Floyd, *Woman Raped by Stepfather at 12 Years Old Shares Story, Reacts to State's Abortion Trigger Law*, WBKO (June 29, 2022), https://www.wbko.com/2022/06/29/woman-raped-by-stepfather-12-years-old-shares-her-story-reacts-kentuckys-trigger-law [https://perma.cc/F726-T83P]. Duvall's stepfather pleaded guilty to sexual abuse and is now serving a lengthy prison sentence. *See* Kitchener, *supra* note 1.

4. *See* Alex Gangitano, *Biden Campaign Releases Ad Narrated by Rape Victim to Hit Trump, Vance on Abortion*, HILL (July 17, 2024), https://thehill.com/homenews/campaign/4778496-joe-biden-jd-vance-donald-trump-abortion [https://perma.cc/TL6Y-S5S4]. The ad, titled "They Don't Care," concludes with Duvall remarking "Trump and JD Vance don't care about women, they don't care about girls in this situation." *Id.*

5. *See* Jazmine Ulloa, *Hadley Duvall Says Her Abortion Speech Will 'Keep My Heart Full*,*'* N.Y. TIMES (Aug. 21, 2024), https://www.nytimes.com/2024/08/21/us/politics/hadley-duvall-dnc-abortion.html [https://perma.cc/ZZF2-SF37].

6. *Id.* Hadley was joined onstage by two women whose pregnancy care was significantly jeopardized by restrictive abortion laws; together, their remarks were "among the most dramatic moments onstage all week." *Id.*

gubernatorial candidate, who at the time opposed adding a rape exception to the law.[7] "This is to you, Daniel Cameron," Duvall says in the ad, "[t]o tell a 12-year-old girl she must have the baby of her stepfather who raped her is unthinkable."[8] When Cameron was defeated by Andy Beshear, the Democratic incumbent who supported a rape exception, Duvall was widely credited with having influenced the outcome.[9] Republicans took note,[10] as did Democrats,[11] including Beshear, who promptly called on lawmakers to soften the state's abortion ban by including an exception for rape and incest.[12]

Kentucky's story—and Duvall's—captures several nationwide trends that foretell the continuing centrality of abortion to elections, legislative initiatives, and state referenda.[13] As policymakers and activists contemplate the regulation of abortion, they must reckon with rape exceptions, which are hugely popular across the ideological spectrum.[14] A 2022 survey found that

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7. Cameron switched his position after the ad went viral. *See* Kitchener, *supra* note 1; *see also* Sylvia Goodman, *Kentucky's Near Total Abortion Ban Takes Center Stage in Gubernatorial Election*, NPR (Sept. 22, 2023), https://www.npr.org/2023/09/22/1200954703/kentuckys-near-total-abortion-ban-takes-center-stage-in-gubernatorial-election [https://perma.cc/9WJCBUDT].

8. *See* Kitchener, *supra* note 1.

9. *See id.* (quoting the Chair of the Republican National Committee, who remarked on the ad's contribution to Beshear's win).

10. *See id.*

11. *See* Chris Smith, *What Joe Biden Could Learn About Reelection from One of America's Most Popular Governor's*, VANITY FAIR (Nov. 29, 2023), https://www.vanityfair.com/news/2023/11/joe-biden-andy-beshear [https://perma.cc/4RS7-VBVT] (noting that President Biden is "indeed studying what worked for Beshear"); Zach Montellaro, *Beshear's Win in Kentucky Shows, Once More, Democrats Aren't Extinct in Trump States*, POLITICO (Nov. 7, 2023), https://www.politico.com/news/2023/11/07/beshear-democrats-red-states-00125968 [https://perma.cc/ZD3B-7TNQ] ("Democrats are likely to go full steam ahead on abortion-related advertising next year—even in battlegrounds where talking about abortion even two years ago would have been unthinkable.").

12. *See* McKenna Horsley, *Beshear Calls on Lawmakers to Add Exceptions to Abortion Ban, Fund Teacher Raises*, HOPTOWN CHRON. (Nov. 8, 2023), https://hoptownchronicle.org/beshear-calls-on-lawmakers-to-add-exceptions-to-abortion-ban-fund-teacher-raises [https://perma.cc/J3H3-AZMU]. "Hadley's Law" stalled in the legislature. *See* Josh James, *Last Minute Push to Debate Exceptions to Kentucky's Abortion Ban Fails*, WUKY (Apr. 15, 2024), https://www.wuky.org/local-regional-news/2024-04-15/last-minute-push-to-add-exceptions-to-kentuckys-abortion-ban-fails [https://perma.cc/7XZ4-KSF9].

13. *See infra* notes 76–80 and accompanying text.

14. *See* Jessica Valenti, *Abortion Exceptions Don't Exist*, SUBSTACK: ABORTION, EVERY DAY (July 5, 2023), https://jessica.substack.com/p/abortion-

86% of Americans "think a pregnant woman should be able to legally have an abortion if she becomes pregnant as a result of rape or incest."[15] This number is compared to 59% of Americans who "think a pregnant woman should be able to legally have an abortion in the first trimester of pregnancy under any circumstance, as a matter of choice," and 34% of Americans who think the same with regard to pregnancy in the combined category of "second or third trimester."[16] Broad-based support for the rape exception among survey respondents included 94% of Democrats, 89% of Independents, and 76% of Republicans.[17] Other recent polls find similar results,[18] raising newly urgent questions

exceptions-dont-exist [https://perma.cc/NS9P-9JGS] ("The only thing that Americans want more than broad access to abortion is access to abortion for sexual violence victims and those whose health and lives are in danger.").

15. Approximately 22,000 American adults were surveyed over the course of several weeks by the Penn Program on Opinion Research and Election Studies (PORES) and SurveyMonkey. *See* Laura Wronski, *PORES/Survey Monkey Poll: Abortion,* SURVEYMONKEY (2022), https://www.surveymonkey.com/curiosity/pores-poll-abortion [https://perma.cc/D6DX-VCBD].

16. *Id.* Women were more likely than men to support abortion "as a matter of choice" in the first trimester by a margin of 63% to 55%; there were no meaningful differences in support for rape exceptions or a right to second/third trimester abortions. *Id.*

17. *Id.*

18. *See, e.g.*, *America's Abortion Quandary*, PEW RSCH. CTR. (2022), https://www.pewresearch.org/religion/wp-content/uploads/sites/7/2022/05/PF_05.06.22_abortion.views_.fullreport.pdf [https://perma.cc/EN4Z-L4LN]. In a survey of more than 10,000 respondents in March 2023, researchers found that "seven-in-ten Americans say abortion should be legal in some cases and illegal in others—including 42% who say abortion should be generally legal, but with some exceptions, and 29% who say it should be generally illegal, except in certain cases." *Id.* With respect to rape exceptions, 69% of respondents (including 83% of Democrats and 56% of Republicans) agreed that abortion should be "legal if the pregnancy is the result of rape." *Id.*; *see* Scott Clement, *2022-04-28 Trend for Release*, DOCUMENTCLOUD (May 3, 2022), https://www.documentcloud.org/documents/21846336-2022-04-28-trend-for-release [https://perma.cc/5A66-8XMF] (finding that 79% of Americans say abortion should be legal in cases of rape or incest, while 58% of Americans say abortion should be legal in "most cases" or "all cases"); *NPR/PBS NewsHour/Marist Poll of 1,259 National Adults*, MARIST (2023), https://maristpoll.marist.edu/wp-content/uploads/2023/12/NPR_PBS-NewsHour_Marist-Poll_USA-NOS-and-Tables_202312081315.pdf [https://perma.cc/D2QA-VUJA] (finding that 85% of Americans support exceptions "for rape, incest, or to save the life of the pregnant person," while 25% believe that abortion should be allowed at "any time during the pregnancy").

about whether policymakers should advance rape exceptions at the expense of broader abortion protections.[19]

Despite growing scrutiny of their workability,[20] the logics of the rape exception have gone largely uninterrogated. As I will show, abortion bans that exempt only rape draw on ways of thinking about sex and pregnancy that are faulty: To wit, rape exceptions rely on core assumptions about consent that are belied by the realities of women's lives. These dominant ways of thinking about consent are woven into both rape law and abortion law, which in turn fortify powerful constraints on sex and contraception. These constraints routinely cause vulnerable women's choices to diverge from their preferences.[21] My account of the rape exception thus widens to a critique of the legal regulation of unwanted pregnancy—from abortion bans and well beyond, to law's deep entanglement in the very conditions that defy the consent paradigm.[22]

The Article unfolds in three parts. In Part I, I begin by describing how the rape exception originated in retrograde understandings of worthy women, and then how these understandings were enshrined in a model code.[23] Next, I detail the workings of rape exceptions in contemporary abortion law and politics.[24] Even apart from the practical impediments that effectively foreclose abortion access across the board,[25] rape exceptions are by design of no use to most women[26] whose pregnancy results from

19. *See* Rachel Cohen Booth, *If Democrats Could Compromise with Republicans on Abortion, Should They?*, VOX (Nov. 20, 2024), https://www.vox.com/abortion/386228/abortion-ivf-roe-republicans-congress-bipartisan-ban-birth-control [https://perma.cc/4CZ3-EEW6] (given widespread agreement on abortion exceptions, asking whether Democrats will maintain "their red line" or instead "consider seeking federal protections for abortion exceptions during Republican control as a harm reduction measure").

20. *See infra* notes 77–90 and accompanying text.

21. Preferences may be constructed by an array of forces, including law, which means they too exist within structures of inequality. Nevertheless, bringing choices into alignment with preferences can advance essential norms of freedom and equality. This is particularly true for subordinated groups who tend to experience the widest gulfs between choice and desire.

22. *See infra* notes 320–31 and accompanying text.

23. *See infra* notes 57–71 and accompanying text.

24. *See infra* notes 76–83 and accompanying text.

25. *See infra* notes 84–90 and accompanying text.

26. Throughout this discussion, I often use the word "women" to describe people who are pregnant or capable of pregnancy. This should not obscure the reproductive health needs of male-identifying transgender people and nonbinary people. *See* Heidi Moseson et al., *Abortion Experiences and Preferences of*

sexual assault.[27] To explain why, the discussion uncovers a set of core ideas that give rise to the rape exception.[28] These ideas are derived from a closely circumscribed notion of victimhood, and a dichotomous view of choice used to justify special treatment of the (ideal) victim at the expense of all others. By default, women forfeit their right to abortion because they are seen as having consented to sex, and therefore to pregnancy, regardless of the magnitude of constraints on their choices, much less their actual desires. Having identified the sustaining logics of the rape exception, the remaining discussion mounts a challenge to their coherence.

In Part II, I establish that an exceedingly narrow definition of rape prohibits only a small sliver of unwanted sex. Traditionally, a crude force requirement rendered consent almost entirely beside the point.[29] Although the category of rape has expanded in many states, present-day rape law continues to minimize the significance of sexual consent by tacitly embedding verbal resistance requirements,[30] and by overlooking structural constraints that blur the meaning of consent.[31] The implications are far reaching. Because rape law holds undue sway, *unwanted sex*—sex that just clears the low bar of consent—escapes public consideration, hindering the possibility of collective change.[32] Rape myopia, as I call it, is reflected in an abortion regime that uses criminal rape as a proxy for unwanted sex.

Transgender, Nonbinary, and Gender-Expansive People in the United States, 224 AM. J. OBSTETRICS & GYNECOLOGY 376.e1, 376.e3–.e6 (Apr. 2021); *Committee Opinion: Increasing Access to Abortion*, 136 AM. COLL. OBSTETRICIANS & GYNECOLOGISTS e107, e108 (2020) ("[P]eople of all genders have sexual and reproductive health needs, including women, transgender people, nonbinary people, and those who are otherwise gender-diverse."). Following the practice of bioethicist Katie Watson, my repeated reference to "women" is meant to "center the history of sex-based discrimination that helps define the current status of abortion care" and, more broadly, the control of sex and reproduction. *See* Katie Watson, *The Ethics of Access: Reframing the Need for Abortion Care as a Health Disparity*, 22 AM. J. BIOETHICS 22, 22 n.1 (2022). Empirical research in these areas—on which I rely heavily—also tends to focus on women, which manifests in my descriptions of the studies.

27. *See infra* note 83 and accompanying text (noting how the rape exception is bound to the criminal rape definition, whether expressly or impliedly).

28. *See infra* notes 92–124 and accompanying text.

29. *See infra* notes 127–43 and accompanying text.

30. *See infra* notes 148–51 and accompanying text.

31. *See infra* notes 150–56 and accompanying text.

32. *See infra* notes 159–64 and accompanying text.

Quite apart from unwanted sex, which can of course lead to unwanted pregnancy,[33] a range of pressures constrain women's reproductive lives. In Part III, I detail abundant empirical evidence of contraceptive inequity that encompasses information deficits and other access barriers.[34] As research convincingly demonstrates, these constraints are most severe for women who disproportionately confront systemic burdens on decision making:[35] women who are poor,[36] young,[37] victims of domestic violence,[38] disabled,[39] and especially women with intersectional identities.[40] Coercive forces that recur in the lives of those who are vulnerable fall on a continuum—a continuum of coercion[41]—that is fundamentally incompatible with the legal binary of consent.

An alternative norm, which I call *reproductive agency*,[42] concerns itself not simply with whether a choice was made, but with the closer alignment of choosing and wanting.[43] Toward this end, a brief conclusion reflects on the post-*Dobbs*, post-#MeToo prospects for destabilizing our consent-based jurisprudence.

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33. To be clear, unwanted sex can also lead to wanted pregnancy (and, as discussed at length in Part III, wanted sex can lead to unwanted pregnancy).

34. *See infra* notes 200–17 and accompanying text.

35. The impact of race is significant across all other identity groups and is interwoven throughout the discussion.

36. *See infra* notes 200–24 and accompanying text.

37. *See infra* notes 226–67 and accompanying text.

38. *See infra* notes 269–83 and accompanying text.

39. *See infra* notes 284–317 and accompanying text.

40. *See* Leslie McCall, *The Complexity of Intersectionality*, 30 SIGNS: J. WOMEN CULTURE & SOC'Y 1771, 1773 (2005) (mapping the challenges of "anticategorical" and "intercategorical" complexity).

41. In a different disciplinary setting, medical ethicist Jill Fisher has emphasized the effects of "structural coercion" in constraining an individual's options. *See* Jill A. Fisher, *Expanding the Frame of 'Voluntariness' in Informed Consent: Structural Coercion and the Power of Social and Economic Context*, 23 KENNEDY INST. ETHICS J. 355, 360–66 (2013). Kennedy's attention to "social, cultural, economic, and political contexts" corresponds to what I am describing as a continuum of coercion. *Id.* at 360. To be sure, this continuum also includes power dynamics within a relationship (which Kennedy includes, as well, in her discussion of coercion). *Id.* at 357–59.

42. *See infra* notes 320–42 and accompanying text.

43. *See infra* notes 320–42 and accompanying text.

I. THE RAPE EXCEPTION

Over the past five decades, rape exceptions have become a fixture of federal and state laws.[44] Throughout this time, notwithstanding its meager practical utility[45] and perhaps because of it, the rape exception has maintained[46] enormous popularity.[47] As a result, even among those who would restrict abortion, the politics of the exception have long seemed relatively straightforward.[48]

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44. *See infra* note 76 (listing states with rape exceptions); *infra* note 75 (noting that Hyde Amendment restrictions on funding for abortions under Medicaid contain an exception for rape). Federal funding restrictions contained in the Hyde Amendment—including the rape exception—have also been extended to federal employees, women in the Indian Health Service, and military service members and their dependents. *See* Alina Salganicoff et al., *Coverage for Abortion Services in Medicaid, Marketplace Plans, and Private Plans*, KFF (June 24, 2019), https://www.kff.org/womens-health-policy/issue-brief/coverage-for-abortion-services-in-medicaid-marketplace-plans-and-private-plans [https://perma.cc/7YHM-LPB8]. A rape exception is also included in the Affordable Health Care Act, which "applies the Hyde restrictions to Marketplace plans, ensuring that federal funds are only used to subsidize coverage for pregnancy terminations that endanger the life of the woman or that are a result of rape or incest." *Id.* (further noting that "President Obama issued an executive order as part of health reform that restated the federal limits specifically for Medicaid coverage of abortion").

45. *See infra* notes 77–90 and accompanying text.

46. *See Abortion*, GALLUP, https://news.gallup.com/poll/1576/abortion.aspx [https://perma.cc/72AB-AAK9]. In a May 2003 survey, 72% of respondents said that abortion should be legal in the first trimester when the pregnancy was caused by rape or incest, compared to 41% who said that abortion should be legal in the first trimester "when the woman does not want the child for any reason." *Id.* In the same 2003 survey, when asked about the legality of abortion in the last trimester, 59% of respondents said that abortion should be legal when the pregnancy was caused by rape or incest, while 24% said it should be legal for any reason. *Id.*

47. *See supra* notes 13–19 and accompanying text.

48. "Every Republican presidential candidate since *Roe* was decided in 1973, including Donald Trump, has said they support the [rape] exception." Fabiola Cineas, *Rape and Incest Abortion Exceptions Don't Really Exist*, VOX (July 22, 2022), https://www.vox.com/23271352/rape-and-incest-abortion-exception [https://perma.cc/56TV-PHJ9]; *see* Burgess Everett et al., *Graham's Abortion Ban Stuns Senate GOP*, POLITICO (Sept. 13, 2022), https://www.politico.com/news/2022/09/13/grahams-abortion-ban-senate-gop-00056423 [https://perma.cc/3CZF-YLDJ] (describing a proposed bill enacting a nationwide ban on abortion after fifteen weeks of pregnancy; the proposal contained a rape exception). The anti-abortion movement has largely opposed exceptions. *See* Mary Ziegler, *Abortion and the Law of Innocence*, 2021 U. ILL. L. REV. 865, 916–18 (2021) (observing a "deep strategic cleavage" among anti-abortion groups and conservative lawmakers in the wake of Donald Trump's election that encompassed whether to abolish the rape exception).

The fall of *Roe* upended this calculus[49] for lawmakers across the abortion rights spectrum.[50] For those who oppose abortion, politically palatable rape exceptions have become cover for new restrictions.[51] At the same time, proponents of rape exceptions can offer them as a reasonable compromise, or at least preferable

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49. *See generally* Amelia Thomson-DeVeaux, *Abortion Rights Are Reshaping American Politics*, FIVETHIRTYEIGHT (Nov. 9, 2022), https://fivethirtyeight.com/features/abortion-rights-are-reshaping-american-politics [https://perma.cc/C6YL-VJVS] ("[T]he unpopularity of the Supreme Court's decision [in *Dobbs*] isn't just registering in polls—it's also reshaping the country's political landscape.").

50. *See supra* notes 1–12 and accompanying text (describing political ads featuring Hadley Duvall).

51. *See* Cineas, *supra* note 48 ("The exceptions have been more useful as a political fig leaf, one that makes draconian bans seem less punitive . . . ."); Dabney P. Evans et al., *"A Daily Reminder of an Ugly Incident . . . ": Analysis of Debate on Rape and Incest Exceptions in Early Abortion Ban Legislation in Six States in the Southern US*, 31 SEXUAL & REPROD. HEALTH MATTERS 1, 2 (2023) (noting that rape exceptions are often "included to counter claims that the Republican party supports a 'War on Women'"); Valenti, *supra* note 14 (explaining why exceptions "allow Republicans to feign concession while giving up nothing"); Jessica Valenti, *The Exceptions Lie*, SUBSTACK: ABORTION, EVERY DAY (Sept. 30, 2022), https://jessica.substack.com/p/the-exceptions-lie [https://perma.cc/NW6E-JD2P] (describing as political hocus pocus "the bone [Republicans are] throwing women"). On the electoral dynamics at play and how Republican lawmakers and candidates are responding, see, for example, Patrick Svitek, *Texas Republicans in Tight Races Open to Rape and Incest Exceptions to Abortion Ban*, TEX. TRIB. (Oct. 26, 2022), https://www.texastribune.org/2022/10/26/texas-republicans-abortion-exception-rape-incest [https://perma.cc/9E3Z-ZWTL]; Sam Stockard, *Stockard on the Stump: Lawmakers Line Up to Add Exceptions to the Abortion Law*, TENN. LOOKOUT (Jan. 6, 2023), https://tennesseelookout.com/2023/01/06/stockard-on-the-stump-lawmakers-line-up-to-add-exceptions-to-abortion-law [https://perma.cc/2D48DMWQ] (detailing Republicans' efforts to add rape and incest exceptions to recently enacted state abortion laws); Matt Friedman, *In Two Competitive South Jersey Districts, GOP Fights Over Candidates' Anti-Abortion and Anti-Muslim Posts*, POLITICO (Mar. 2, 2023), https://www.politico.com/news/2023/03/02/in-two-competitive-south-jersey-districts-gop-fights-over-candidates-anti-abortion-and-anti-muslim-posts-00085205 [https://perma.cc/F8KV-2QMT] (noting that some Republicans believe their party's extreme anti-abortion rhetoric has helped Democrats win elections); Scott Bauer, *Wisconsin Republicans Propose Abortion Ban Exceptions*, ASSOCIATED PRESS (Mar. 15, 2023), https://apnews.com/article/abortion-ban-wisconsin-republicans-exceptions-36e41d37ce8ba416ee2f4ad1730aa511 [https://perma.cc/3HAX-DNJJ] (highlighting that Democratic lawmakers say the introduction of rape and incest exceptions to Wisconsin's abortion ban is "a cynical ploy to deceive voters"); Blake Hounshell, *How Republicans Watered Down Their Abortion Message*, N.Y. TIMES (Nov. 2, 2022), https://www.nytimes.com/2022/11/02/us/politics/republicans-abortion-elections.html [https://perma.cc/4YQ4-JLU9] (explaining how Republicans attempted to appeal to "middle-of-the-road voters" by supporting abortion exceptions for rape or incest).

to a more draconian alternative.[52] With abortion among the most salient issues for the American public,[53] the rape exception can be expected to remain a mainstay of our politics for the foreseeable future.[54] But despite its longevity, the exception's

52. *See supra* notes 8–12 (discussing Democratic Governor Andy Beshear's support for the rape exception); *see also* Sara Cline, *For a Louisiana Lawmaker, Exempting Incest and Rape from the State's Abortion Ban Is Personal*, ASSOCIATED PRESS (May 6, 2024), https://apnews.com/article/abortion-exceptions-louisiana-rape-incest-0b334b0a5f2eb7823f263067302800f3 [https://perma.cc/FBS8-JZ8M] (describing conditions for rape and incest survivors in Louisiana). Abortion abolitionists generally oppose rape exceptions altogether. *See, e.g.*, Sara Cline, *Louisiana Lawmakers Reject Adding Exceptions for Some Rape Cases to Abortion Ban*, ASSOCIATED PRESS (June 3, 2025), https://www.cbs42.com/news/national/ap-louisiana-lawmakers-reject-adding-exceptions-for-some-rape-cases-to-abortion-ban [https://perma.cc/K8AH-M368]; Eren Orbey, *An Anti-Abortionist's Quest to End the Rape Exception*, NEW YORKER (Dec. 5, 2022), https://www.newyorker.com/magazine/2022/12/12/an-anti-abortion-activists-quest-to-end-the-rape-exception [https://perma.cc/SK6H-TPSZ].

53. *See* Thomson-DeVeaux, *supra* note 49 ("[I]t's clear that the *Dobbs* decision did turn abortion into one of the most salient issues in the country . . . .").

54. *See* Amy Schoenfeld Walker, *Most Abortions Bans Include Exceptions. In Practice, Few Are Granted*, N.Y. TIMES (Jan. 21, 2023), https://www.nytimes.com/interactive/2023/01/21/us/abortion-ban-exceptions.html [https://perma.cc/8V8G-42XP] ("[A]s conservative state lawmakers prepare to take up new restrictions on abortion in upcoming legislative sessions, exceptions will be at the heart of the debate."). For the prominence of rape exceptions in future state legislative contests, see, for example, Anna Spoerre, *Judge Approves Ballot Language for Amendment Reinstating Missouri Abortion Ban*, MO. INDEP. (Oct. 7, 2025), https://missouriindependent.com/2025/10/07/missouri-abortion-ban-amendment-ballot-language-2026 [https://perma.cc/KUQ6-TWCV] (describing a proposed constitutional amendment that would impose an abortion ban containing a rape exception); Amelia Ferrell Knisely, *GOP Lawmakers Seek to Remove Rape, Incest Exemption from West Virginia's Near Total Abortion Ban*, W. VA. WATCH (Feb. 21, 2025), https://westvirginiawatch.com/2025/02/21/gop-lawmakers-seek-to-remove-rape-incest-exemption-from-west-virginias-near-total-abortion-ban [https://perma.cc/M66K-WZ3U] (discussing Republican efforts to abolish the state's rape exception); Niki Kelly, *Proposal Would Outlaw Use of Abortion Pills and Tighten Rape Exception*, IND. CAP. CHRON. (Jan. 8, 2025), https://indianacapitalchronicle.com/2025/01/08/proposal-would-outlaw-use-of-abortion-pills-and-tighten-rape-exception [https://perma.cc/A93N-QNUF] (explaining that proposed legislation would require women seeking abortion under the state's rape exception to provide the provider with an "affidavit under penalty of perjury attesting to the rape").

foundations in rape law have gone unexamined,[55] allowing archaic notions of the "perfect victim" to further ossify.[56]

A. ORIGINS TO TODAY

In the decades before *Roe*, abortion was the province of criminal law.[57] The rape exception first originated with the American Law Institute (ALI), in its 1962 Model Penal Code (MPC) prohibiting abortion after twenty-six weeks.[58] The MPC defined "justifiable abortion" to include occasions where the physician "believes there is substantial risk" the pregnancy resulted from rape.[59] Unlike the lifesaving or health exceptions already

55. The history of the rape exception until now has been told as part of a larger narrative about abortion law and politics. But the exception's origin story is incomplete without considering how rape was understood at the time—in particular, by the body that first proposed to exempt rape from abortion bans. Here, there is no need to speculate: In a separate section of the MPC defining rape, the ALI embedded exceedingly narrow (if also prevailing) conceptions of choice and consent, limiting the reach of rape law and, in turn, the rape exception. *See infra* notes 127–56 and accompanying text.

56. *See infra* notes 96–121 and accompanying text.

57. *See* LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES 1–18, 1867–973 (1997) (encapsulating the history of abortion regulation and noting that the three decades before *Roe* were "marked by increasing restrictions on abortion by state and medical authorities and intensifying demand for abortion from women of all groups").

58. MODEL PENAL CODE § 230.3 (AM. L. INST., Proposed Official Draft 1962).

59. In context, the provision reads as follows:

> 1) Unjustified Abortion. A person who purposely and unjustifiably terminates the pregnancy of another otherwise than by a live birth commits a felony of the third degree or, where the pregnancy has continued beyond the twenty-sixth week, a felony of the second degree.
>
> (2) Justifiable Abortion. A licensed physician is justified in terminating a pregnancy if he believes there is substantial risk that continuance of the pregnancy would gravely impair the physical or mental health of the mother or that the child would be born with grave physical or mental defect, or that the pregnancy resulted from rape, incest, or other felonious intercourse. All illicit intercourse with a girl below the age of 16 shall be deemed felonious for purposes of this subsection . . . .
>
> (3) Physicians' Certificates; Presumption from Non-Compliance. No abortion shall be performed unless two physicians, one of whom may be the person performing the abortion, shall have certified in writing the circumstances which they believe to justify the abortion. Such certificate shall be submitted before the abortion to the hospital where it is to be performed and, in the case of abortion following felonious intercourse, to the prosecuting attorney or the police. Failure to comply with any of the requirements of this Subsection gives rise to a presumption that the abortion was unjustified.

embraced by reformers, the exemption for rape and incest was "a bit of an outlier" when first proposed.[60]

The chief proponent of the rape exception[61] offered two cases in support—one involving a fourteen-year-old English girl who was able to find a doctor willing to terminate her pregnancy, the other a "married woman . . . raped in Colorado" who was not.[62] Implicit in the proposal if not expressly stated (because it seemed self-evident)[63] was that these women were victims rather than agents of their misfortune.[64] Just as the English girl and the Coloradan woman had been *forced* to engage in the sex

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Id. Commentary on the MPC's abortion provisions explains that "other felonious intercourse" was included in the exception because "sexual imposition of a young girl—commonly known as 'statutory rape'—ought not to be differentiated, for present purposes, from other rape." MODEL PENAL CODE § 230.3 cmt. at 434 (AM. L. INST. 1959).

60. *See* Ziegler, *supra* note 48, at 870 (describing initial reactions to the proposed exception); *see also* REAGAN, *supra* note 57, at 220–21 (observing that ALI reformers sought to align abortion law with "the morals of a substantial, responsible professional group"—namely physicians who sought to perform abortions for reasons that included rape and incest). For a discussion of the nineteenth century campaign by women's rights advocates for "voluntary motherhood," endorsing "the absolute right of a woman to say no to her husband's request, or demand, for sex" rather than a right to contraception or abortion, see RICKIE SOLINGER, PREGNANCY AND POWER: A SHORT HISTORY OF REPRODUCTIVE POLITICS IN AMERICA, 74 (2005).

61. Louis Schwartz was one of two associate reporters to lead the MPC project, along with the Reporter Herbert Wechsler. Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1097 n.2 (1952).

62. *See Continuation of Discussion on the Model Penal Code*, 36 A.L.I. PROC. 243, 255 (1959). Because marital rape would not be considered a crime until several decades later, the "married woman" described was necessarily raped by a man who was not her husband, selectively qualifying her as a victim. *See id.*

63. Ziegler, *supra* note 48, at 872 ("The distinction between rape victims and other women seemed obvious to ALI members.").

64. As Martha Mahoney once observed, "[i]n our society, agency and victimization are each known by the absence of the other: you are an agent if you are not a victim, and you are a victim if you are in no way an agent . . . . This all-agent or all-victim conceptual dichotomy will not be easy to escape or transform." Martha R. Mahoney, *Victimization or Oppression? Women's Lives, Violence and Agency*, *in* THE PUBLIC NATURE OF PRIVATE VIOLENCE 64, 64 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994). Feminist legal scholars have long worked to collapse this dichotomy. *See, e.g.*, Elizabeth M. Schneider, *Feminism and the False Dichotomy of Victimization and Agency*, 38 N.Y.L. SCH. L. REV. 387, 387–88 (1993) (challenging the dichotomy between victimization and agency).

resulting in pregnancy,[65] others like them would be allowed to terminate a pregnancy similarly resulting from circumstances not under their control.

In the ensuing discussion of the proposal among the ALI membership, several concerns arose. One was that women would falsely claim to have been raped in order to obtain an abortion.[66] A separate worry was that the exception would expand to allow unmarried women to avoid giving birth to "illegitimate" children.[67] The troubling scenario, as one member described it, was "just some girl who goes out and gets herself in trouble and wants to get out of it by an abortion."[68] Another member urged against "extending an invitation to promiscuity."[69] In the end, the ALI decided against allowing unmarried women to obtain abortions simply by virtue of their marital status.[70] By limiting the exception to cases of rape, a distinction was drawn between women who were deemed responsible for engaging in sex and therefore responsible for the consequences of their choices, and the women—victims—who were not.

This same rationale was integral to legislative debates surrounding passage of the ALI's abortion provision in the years that followed.[71] After several states adopted the ban along with its exceptions in 1967,[72] reformers set their sights on repealing abortion prohibitions altogether, and the rape exception receded in importance.[73] Several years later, the Court's decision in *Doe*

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65. *See* Ziegler, *supra* note 48, at 872 ("[Schwartz] highlighted the 'anxiety and shame' that a victim would feel through no fault or choice of her own.").

66. *See Continuation of Discussion*, *supra* note 62, at 267–68 (explaining that because "not all rape or incest cases get to court, and in some there would not be a prosecution," the proposal included a requirement of "two physicians having accepted some demonstration to them and believing it"); *see also infra* notes 100–06 and accompanying text (describing how rape exceptions formalize skepticism of women's allegations).

67. *See* Ziegler, *supra* note 48, at 872 (noting "longstanding concerns within the ALI about the legitimacy of children").

68. *Continuation of Discussion*, *supra* note 62, at 279.

69. *Id.* at 281.

70. *See* Ziegler, *supra* note 48, at 872 ("The ALI concluded that allowing abortion for cases of out-of-wedlock pregnancy would be far too controversial and tabled the proposal.").

71. *See id.* at 874–75, 918 (discussing how the rape and incest exception played a prominent role in the legislative debates). Ziegler's comprehensive legal history of the rape exception covers its inception through 2021.

72. *See id.* at 875.

73. *See id.* at 876.

v. Bolton invalidated laws that resembled the ALI's model,[74] relocating the dispute about exempting rape to pitched battles over public funding of abortion.[75]

All this changed when *Dobbs* overturned *Roe*. Since then, about half the states have enacted abortion bans, many of which include an exception for rape.[76] Yet scant few abortions are provided under these exceptions.[77] Among the reasons is the very

74. *See* Doe v. Bolton, 410 U.S. 179, 182–83 (1973) (striking down Georgia's abortion ban on the day *Roe* was decided that included exceptions for rape and preserving the life of the mother); *see also* Ziegler, *supra* note 48, at 881 (discussing the invalidation of state abortion laws after *Roe*).

75. *See* Ziegler, *supra* note 48, at 881–90 (discussing debates over public funding of abortion). In brief, the original Hyde Amendment prohibited use of Medicaid funds to pay for abortions while allowing reimbursement in cases of rape and incest. *See id.* at 883; *see also* Harris v. McRae, 448 U.S. 297, 297 (1980) (upholding public funding restrictions against constitutional challenge). The Hyde Amendment's rape exception was subject to several years of intense political contestation before becoming accepted by widespread consensus. *See supra* note 44 and accompanying text. For evidence that exceptions to the Hyde Amendment prohibitions are "not being applied or [are] implemented arbitrarily," see Deborah Kacanek et al., *Medicaid Funding for Abortion: Providers' Experiences with Cases Involving Rape, Incest and Life Endangerment*, 42 PERSPS. ON SEXUAL & REPROD. HEALTH 79, 84 (2010).

76. States that have passed bans containing a rape exception (including those that provide an affirmative defense for doctors who perform an abortion in cases of rape) include Georgia, Idaho, Indiana, Iowa, Mississippi, Nebraska, North Carolina, North Dakota, South Carolina, Utah, West Virginia, and Wyoming. *See* GA. CODE ANN. § 16-12-141 (2025); IOWA CODE § 146E (2025); IDAHO CODE §§ 18-604, -622 (2025); IND. CODE § 16-34-2-1 (2025); MISS. CODE ANN. § 41-41-45 (2025); NEB. CONST. art. I, § 31; N.C. GEN. STAT. § 90-21.81B (2025); N.D. CENT. CODE § 12.1-19.1-03 (2025); S.C. CODE ANN. §§ 44-41-10, -650 (2025); UTAH CODE ANN. § 76-7-302 (LexisNexis 2025); W. VA. CODE § 16-2R-3 (2025); WYO. STAT. ANN. § 35-6-124 (2025). Almost all legislative exceptions for rape also include incest. *See* Mabel Felix et al., *A Review of Exceptions in State Abortion Bans: Implications for the Provision of Abortion Services*, KFF HEALTH (June 6, 2024), https://www.kff.org/womens-health-policy/issue-brief/a-review-of-exceptions-in-state-abortions-bans-implications-for-the-provision-of-abortion-services [https://perma.cc/WZ5C-99RM] (reviewing the exceptions, including for incest, in state abortion bans). In Indiana, North Dakota, Utah, and Wyoming, challenges to the bans are making their way through courts. *See* Felix et al., *supra*.

77. *See* Walker, *supra* note 54 (noting that while "[t]here is no reliable estimate for the number of patients who seek abortions because of sexual assault," the evidence suggests that "very few exceptions to these new abortion bans have been granted"); Katia Riddle & Julie Luchetta, *Many State Abortion Bans Include Exceptions for Rape. How Often Are They Granted?*, NPR (Oct. 26, 2024), https://www.npr.org/2024/10/25/g-s1-28955/abortion-rape-pregnancy-exception-doctor-police-report [https://perma.cc/Y83F-3PSM] (reviewing existing annual data that show, "in many states, the numbers of known abortions performed due to rape are in the single digits or, in some cases, zero"); *see also*

content of the laws, which on their face prevent women from using the exception they purportedly provide.[78] Some contain express time limits as short as six weeks.[79] Several require victims to report the rape to law enforcement officers.[80] These formal requirements have a synergistic effect, since even among the fraction of victims who choose to lodge a complaint with the

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Mary Kekatos, *Why Rape Exceptions in Abortion Bans Are More Complicated In Reality*, ABC NEWS (Aug. 19, 2022), https://abcnews.go.com/US/rape-exceptions-abortions-bans-complicated-reality/story?id=88237926 [https://perma.cc/VM4G-5LUJ] (discussing challenges to the implementation of rape exception); Cineas, *supra* note 48 ("Exceptions are narrowly tailored and difficult to interpret, which is scary for providers and patients.").

78. As writer Jessica Valenti aptly noted, "[a]bortion ban exceptions aren't real." *See* Valenti, *supra* note 51 (noting the illusory nature of abortion exceptions). Other experts have dismissed the exceptions in similar terms, including "kind of a fool's gold," "bullshit," "nearly purely theoretical," and "impossible." *See, e.g.*, Kekatos, *supra* note 77 (describing the exceptions as "not entirely meaningless but so difficult to navigate"); Elizabeth Tobin-Tyler & Samuel L. Dickman, *Rape, Homicide, and Abortion Bans—The Abandonment of People Subjected to Sexual and Intimate Partner Violence*, 391 NEW ENG. J. MED. 289, 291 (2024) ("[I]n reality these exceptions don't enable meaningful access to abortion."); Megan Messerly, *In States that Allow Abortion for Rape and Incest, Finding a Doctor May Prove Impossible*, POLITICO (June 27, 2022), https://www.politico.com/news/2022/06/27/abortion-exceptions-doctor-shortage-00042373 [https://perma.cc/6NWX-C377] (discussing provider perceptions of exceptions).

79. These states include Georgia (twenty weeks); Indiana (ten weeks); Iowa (six weeks); North Carolina (twenty weeks); North Dakota (six weeks); South Carolina (twelve weeks); and West Virginia (eight weeks for adults and fourteen weeks for minors). *See supra* note 76 (citing statutes); Felix et al., *supra* note 76 (reviewing state exceptions).

80. These states include Idaho, Iowa (within forty-five days of rape), South Carolina, Mississippi, and Utah. *See supra* note 76 (citing statutes); Felix et al., *supra* note 76 (reviewing state exceptions); Walker, *supra* note 54 (noting that requiring women to report their rape to law enforcement is a significant barrier to their obtaining an abortion); *see also* Becky Budds, *How South Carolina's New Abortion Ban Could Impact Sexual Assault Survivors*, WLTX (Aug. 25, 2023), https://www.wltx.com/article/news/local/sexual-assault-victim-advocates-abortion-bans-impact/101-c16f4169-cf02-49c0-b30c-0012692ac796 [https://perma.cc/V4MB-JTM5] (describing South Carolina's law that requires reporting to law enforcement); *infra* notes 100–06 and accompanying text (describing how rape exceptions reflect and reinforce widespread distrust of accusers). Requiring a law enforcement report binds the rape exception to the criminal rape definition; absent an express reporting requirement, this linkage is implied. *See* Walker, *supra* note 54.

police,[81] delayed reporting is common.[82] The narrowness of rape law further impedes the application of rape exceptions, which do not offer their own definition of rape.[83]

Beyond these legal limitations, as a practical matter, rape exceptions have very little utility. For example, in Mississippi, abortion is permitted in cases of rape—but no clinics remain open in the state.[84] Across the states, abortion bans (even if they contain exceptions) make it financially difficult or impossible for clinics to operate.[85] In theory, a rape victim might turn to hospitals for abortion care—but, here too, realities on the ground

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81. *See Statistics: The Criminal Justice System*, RAINN (Aug. 28, 2025), https://www.rainn.org/statistics/criminal-justice-system [https://perma.cc/Q2FR-WDJE] (emphasizing that less than one third of sexual assault victims report to police). Rape victims who belong to vulnerable populations are even less likely to turn to law enforcement. *See, e.g.*, Timothy Williams, *For Native American Women, Scourge of Rape, Rare Justice*, N.Y. TIMES (May 22, 2012), https://www.nytimes.com/2012/05/23/us/native-americans-struggle-with-high-rate-of-rape.html [https://perma.cc/3HZN-2EJN] ("[Though] distressingly common for generations, [Native women] say tribal officials and the federal and state authorities have done little to help halt [rape], leading to its being significantly underreported. . . . Women's advocates on the [Navajo] reservation say only about 10 percent of sexual assaults are reported.").

82. *See* DEBORAH TUERKHEIMER, CREDIBLE: WHY WE DOUBT ACCUSERS AND PROTECT ABUSERS 28–30 (2021) (discussing how "the credibility complex works in advance to keep sexual abuse allegations from ever surfacing"); *see also Statistics*, *supra* note 81 (listing common reasons for not reporting rape).

83. *See supra* note 76 (citing statutes); *see also infra* notes 96–99 and accompanying text.

84. *See* Carter Sherman, *This Teen Was Raped in a State That Has an Abortion Exception. She Still Couldn't Get One.*, VICE (Dec. 2, 2022), https://www.vice.com/en/article/g5vnay/rape-and-incest-abortion-exception-doesnt-work [https://perma.cc/4W2F-VZBL] (describing one teenage rape victim's experience with seeking an abortion). In one reported case, a Mississippi rape victim seeking an abortion was directed to a clinic in Louisiana, which had closed; the teen eventually drove over seven hours to a clinic in Illinois. *See id.*; *see also* Isabelle Taft, *Can Rape Victims Access Abortion in Mississippi? Doctors, Advocates Say No.*, MISS. TODAY (Sept. 15, 2022), https://mississippitoday.org/2022/09/15/rape-victims-abortion-access [https://perma.cc/9E8S-XZT7] (quoting the owner of Jackson Women's Health Organization, which closed after Mississippi's trigger ban took effect, saying she does not believe any doctor in the state will provide abortion care to rape victims because "[n]o one is going to take the responsibility or the liability . . . . People are scared to death, not just there but all over the country about what they can and can't do. And they're just not going to be willing to put themselves or their licenses on the line").

85. *See* Sherman, *supra* note 84 ("Now that *Roe v. Wade* has fallen and abortion bans have snapped into place, it's simply not financially feasible for clinics to stay open in states with bans, because there just aren't enough patients.").

dictate otherwise.[86] Many religiously affiliated hospitals maintain a policy of not performing abortions in cases of rape.[87] Even where abortion is not expressly prohibited by their hospital, many doctors are unwilling to provide care in states with bans that make exceptions for rape. Ambiguity in the laws along with the consequences of violating them[88] largely deter the provision of abortion care.[89] In sum, even in states that provide exceptions

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86. In addition to facing daunting abortion-specific barriers, rape victims—many of whom are dealing with trauma—must confront a set of questions facing any patient contemplating hospital-based medical care. *See* Leslie Bonilla Muñiz, *Hospitals Close-Lipped on Post-Rape Abortion Policies*, IND. CAP. CHRON. (Aug. 30, 2023), https://indianacapitalchronicle.com/2023/08/30/hospitals-close-lipped-on-post-rape-abortion-policies [https://perma.cc/5RVBE9SC] ("How much will it cost? Do they have to be patients of the hospital system already? How do you make an appointment?" (quoting Beth White, President and CEO of the Indiana Coalition to End Sexual Assault and Human Trafficking)).

87. *See id.* (reporting that among the state's eight largest hospital systems, three religiously affiliated hospitals indicated they do not perform abortion in cases of rape, while four others did not respond to the inquiry). For related findings on the non-provision of abortion care in religiously affiliated hospitals, see Sarah Garcia-Ricketts et al., *The Role of Religiously-Affiliated Hospitals in Reproductive Health Care for Women with Public Insurance in Cook County, Illinois*, UNIV. CHI., https://ci3.uchicago.edu/wp-content/uploads/2020/09/The-Role-of-Religiously-affiliated-Hospitals-in-Reproductive-Health-Care-for-Women-with-public-insurance-in-Cook-County.pdf [https://perma.cc/DKD5-SZG5] (noting that, in 2016, Catholic hospitals controlled one in six U.S. hospital beds, a fast-growing share of the market, and providers in these hospitals are prohibited by the U.S. Conference of Catholic Bishops from providing abortions). *See also* Amy Littlefield et al., *The Southern Hospitals Report: Faith, Culture, and Abortion Bans in the U.S. South*, COLUM. L. SCH., https://lawrightsreligion.law.columbia.edu/sites/default/files/content/Reports/The_Southern_Hospitals_Report.pdf [https://perma.cc/EB9K-8S3N] (describing abortion-restrictive policies in Protestant hospitals pre-*Dobbs*).

88. Depending on the state, these consequences may include criminal prosecution, civil penalties, and licensure revocation. On the licensure threat, see Madison Pauly, *Medical Boards That Can Strip Abortion Providers of Licenses Are Stacked with Republican Donors*, MOTHER JONES (Aug. 11, 2022), https://www.motherjones.com/politics/2022/08/medical-boards-that-can-strip-abortion-providers-of-licenses-are-stacked-with-republican-donors [https://perma.cc/36J8-CLKA] (discussing several abortion providers' experiences with medical boards and licensing).

89. *See* Cineas, *supra* note 48 (quoting one expert explaining that "[t]he ambiguity of these laws is a real barrier to access"); Kekatos, *supra* note 77 (relating that "providers may be scared to act due to fear they will be prosecuted if they act," and describing a widespread "concern that if a provider tries to meet the requirements of the exception that, in some way, they will fall short").

for cases of rape, obtaining an abortion after a rape is a virtual impossibility.[90]

Even so, it is inaccurate to say that rape exceptions do nothing. While functionally preventing rape victims from terminating a pregnancy,[91] restrictions exempting rape simultaneously shore up conceptual frames that conceal the harms of unwanted sex and unwanted pregnancy. This brings us to the logics that sustain the rape exception.[92]

B. SUSTAINING LOGICS

A nested set of widely shared intuitions distinguish rape victims from other women who might want to terminate their pregnancies.[93] To begin, the law narrows and polices the boundaries of the category—rape victim. It does so both by tightly constricting the definition of rape[94] and by engraining deep skepticism of those who say they qualify.[95]

To impose close borders around victimhood, the criminal law maintains a traditional preoccupation with force as the defining feature of rape.[96] In about half the states, the crime is defined by physical force rather than the absence of consent.[97] In the other half, consent stays mostly tethered to longstanding

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90. *See* Messerly, *supra* note 78 (explaining that according to those who work for clinics and abortion funds in states with abortion bans excepting cases of rape, "it will likely be easier to get patients across state lines for an abortion than try to clear the hurdles associated with obtaining one legally in their home state"); *see also* Fiona de Londras et al., *The Impact of 'Grounds' on Abortion-Related Outcomes: A Synthesis of Legal and Health Evidence*, BMC PUB. HEALTH, May 10, 2022, at 10 (concluding that, based on a global review, exceptions "are consistently interpreted very restrictively, leading to the denial of abortion").

91. *See supra* notes 77–90 and accompanying text.

92. In this context, "logics" encompasses the reasoning that constructs rape victims as categorically different from others who seek abortion, and the tacit assumptions that underlie this categorical distinction.

93. These commonplace intuitions resonate with the exception's mid-twentieth century origins. *See supra* notes 61–71 and accompanying text.

94. *See infra* notes 96–99 and accompanying text.

95. *See infra* notes 100–06 and accompanying text.

96. *See infra* notes 127–49 and accompanying text.

97. *See* Stephen J. Schulhofer, *Consent: What It Means and Why It's Time to Require It*, 47 U. PAC. L. REV. 665, 672 (2016) (citing twenty-seven jurisdictions, including the U.S., D.C., and military codes, that prohibit penetration without consent as either a felony or a misdemeanor).

concepts of force and resistance, whether physical or verbal.[98] Most victims of sexual violation do not satisfy the criminal law's cabined definition of rape, meaning that most victims of sexual violation cannot—even in theory[99]—claim the abortion exception.

Rape exceptions further qualify women as victims via the imposition of unreasonable markers of credibility. By insisting on some form of "objective" evidence of the crime, typically in the form of a police report,[100] rape exceptions encode and promote a perception of women as untrustworthy reporters at best, if not outright liars.[101] This skepticism is baked into verification requirements, whether or not the rationale for them is explicitly articulated.

But often it is. According to a study of lawmakers' rhetoric surrounding state abortion bans: "Pregnant people's trustworthiness when reporting rape and incest was frequently questioned during legislative sessions. This doubt of victims' veracity sparked debate over the need for third-party confirmation and institutional responsibility in determining the truth behind rape and/or incest claims."[102]

In another instance of expressed distrust of accusers, legislators in Tennessee recently introduced a rape exception that included a provision amending its criminal law definition of "false reports" to specifically outlaw false statements made "in order to obtain an abortion."[103] The bill proposed a mandatory minimum

98. *See id.* at 672–73 ("[S]ome jurisdictions . . . directly or indirectly require force, duress, verbal resistance."); *see also* TUERKHEIMER, *supra* note 82, at 46–47 (describing status of contemporary resistance requirements).

99. *See also supra* notes 84–90 and accompanying text (discussing practical impediments to access).

100. *See supra* note 80 and accompanying text.

101. *See supra* notes 80–82 and accompanying text.

102. Evans et al., *supra* note 51, at 5. Using publicly available legislative session data, the study examined six states that introduced early abortion bans in 2019 (pre-*Dobbs*). *See id.* at 3–4. Researchers identified several themes used to defend a view of rape as an "extraordinary" case for abortion. *See id.* at 2.

103. *See* Kylie Cheung, *Tennessee Bill Would Imprison People for 3 Years if They 'Lie' About Rape to Get an Abortion*, JEZEBEL (Feb. 2, 2023), https://jezebel.com/tennessee-rape-exception-abortion-ban-prison-1850064263 [https://perma.cc/6ZGC-8JEL] (discussing the content of Tennessee's proposed rape exception).

sentence of three years in prison, of which "one hundred percent" must be served.[104]

Even without formally attaching harsh carceral consequences, rape exceptions that condition the right to abortion on something more than a victim's report reinforce the notion that, as a default, accusers should not and will not be believed.[105] By codifying this view, rape exceptions bolster what I call the "credibility discount,"[106] while, at the same time, excluding from the category of victim the many whose proof is mainly their word.

An understanding of the abortion right as yoked to rape does not necessarily entail agreement about *why* rape is exceptional; on this score, there are several non-mutually exclusive possibilities. One is that rape victims are worthy of care or concern in a way that other women who carry an unwanted pregnancy are not.[107] Empathy is a recurring theme in legislative debates over rape exceptions,[108] with a notable emphasis on physical violence and continuing trauma.[109] To be sure, victims of physical violence and continuing trauma are fully entitled to collective

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104. *See* S. 857, 113th Gen. Assembly, Reg. Sess. (Tenn. 2023). In Indiana, a bill with a similarly skeptical orientation would require patients seeking an abortion under the rape exception to sign an affidavit attesting to the rape under penalty of perjury. *See* Kelly, *supra* note 54.

105. *See* TUERKHEIMER, *supra* note 82, at 68–69 (critiquing the typical resolution of "he said, she said" contests and the conventional dismissal of rape accusers' accounts as *not evidence*).

106. *See id.* at 9 ("The rule is simple: credibility is meted out too sparingly to women, whether cis or trans, whatever their race or socioeconomic status, their sexual orientation or immigration status. At the same time, the intersections are critical—just as there is no female prototype, there is no singular experience of what I call the *credibility discount*.").

107. *See id.* at 41 ("The 'perfect victim' is an amalgam of how we think women *do* respond to abuse and how we think women *should* respond to abuse. If an accuser fails to satisfy these benchmarks, she doesn't seem like a victim."). For elaboration on the perfect victim and connection to the stranger rape paradigm which (among other features) "entails a great deal of physical violence," see *id.* at 38–50.

108. *See* Evans et al., *supra* note 51, at 8 (describing a rape exception supporter urging fellow legislators, "[w]hat I am going to ask is picture your child being raped crying to you not understanding having to suffer the consequences for something that was not their own doing").

109. *See id.* at 7–9 (providing examples of legislative characterizations of rape as a "violent horrible experience," and entailing "lifetime scars and traumas"). For analysis of the function of trauma in rape prosecutions, see Deborah Tuerkheimer, *Victim, Reconstructed: Sex Crimes Experts and the New Rape Paradigm*, 2024 U. ILL. L. REV. 55 (2024).

care.[110] At the same time, abortion exceptions withhold this care from *most* women with unwanted pregnancies—even those whose circumstances are easily analogized to rape.[111] The worthy victim is violently raped[112] and perpetually traumatized.[113] She alone is the recipient of empathy, while those who fail to resemble the ideal rape victim[114] are effectively consigned to the category of undeserving other.[115] This category includes marginalized accusers,[116] as well as anyone whose sexual and reproductive options are limited for reasons that go unpunishable by criminal law.

There is yet another way to understand this stingy assignment of care, which is to see its denial as tacit punishment of those who fail to conform to sexual and reproductive norms. As others have demonstrated, abortion restrictions are a highly racialized[117] mechanism for enforcing traditional gender roles; the

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110. Care should be distinguished from an empty expression of care.

111. These apparently undeserving others often experience one or more traumatic events. *See, e.g.*, Judith Lewis Herman, *Complex PTSD: A Syndrome in Survivors of Prolonged and Repeated Trauma*, 5 J. TRAUMATIC STRESS 377, 377 (1992) (noting the occurrence of "prolonged, repeated trauma" for rape victims). Members of marginalized populations often face especially high levels of trauma exposure. *See, e.g.*, Jacob Kraemer Tebes et al., *Population Health and Trauma-Informed Practice: Implications for Programs, Systems, and Policies*, 64 AM. J. CMTY. PSYCH. 494, 494–95 (2019) ("In the United States, persons of color, sexual minorities, persons of lower socioeconomic status (SES), and individuals with intellectual and developmental disabilities have higher rates of traumatic stress exposure." (citations omitted)).

112. *See* Evans et al., *supra* note 51, at 10 (finding, in an analysis of legislative debates surrounding rape exceptions, "continually shared stories that focused on extremes," including "extreme violence (e.g. violent rape, rape of very young children)").

113. *See id.* (noting that "establishing long-lasting trauma as a result of rape and/or pregnancy as a result of rape was important to the arguments made by supporters;" these impacts included the rape-induced pregnancy itself).

114. The ideal rape victim behaves in certain ways and possesses certain attributes that impact whether an actual victim's suffering registers. *See* TUERKHEIMER, *supra* note 82, at 135.

115. "The care gap reflects structural inequalities while covertly bolstering them. This gap actually consists of many asymmetries, which track hierarchies that include gender, race, class, and more. In other words, the odds that a person's suffering will matter correlates with privilege and status—we tend to care less about some victims than others, and more about some abusers than others. . . . Because care is distributed along lines of power, marginalized accusers are the most readily dismissed." *Id.*

116. *See supra* notes 114–15 and accompanying text.

117. *See, e.g.*, Melissa Murray, *Race-ing* Roe*: Reproductive Justice, Racial Justice, and the Battle for* Roe v. Wade, 134 HARV. L. REV. 2025, 2031–55 (2021)

mechanism works by coercing motherhood[118] and controlling women's sexuality.[119] Rape exceptions accentuate the divide between women who follow the rules—rules channeling female sexuality to marital and procreational ends—and women who deviate from them. Harms to the rule-followers may be legible; harms to the rule-breakers are not. Since those deemed not to have been raped are considered responsible for their plight, implicit[120] attributions of blame help explain the rape exception's staying power. Put differently, the choice frame invites judgments about whether a woman's choices were the proper ones.[121]

(documenting efforts from slavery to the present to restrict Black women's reproductive rights, including the abortion right). *See generally* DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY (1997) (providing a detailed history of race and reproductive freedom).

118. For a comprehensive account, see generally Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261 (1992). As Siegel notes: "From a historical perspective it is clear that abortion-restrictive regulation is caste legislation, a traditional mode of regulating women's conduct, concerned with compelling them to perform the work that has traditionally defined their subordinate social role and status. From a historical perspective, it is also clear that this society's reasons for enacting restrictions on abortion have been deeply entangled in its conceptions of women as mothers." *Id.* at 351; *see also* Brief for Equal Protection Constitutional Law Scholars Serena Mayeri et al. as Amici Curiae Supporting Respondents at 16–20, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (No. 19-1392) (characterizing the asserted justifications for a contemporary abortion regulation as a "modern twist on the same old sex-role stereotypes that animated anti-abortion campaigners in centuries past").

119. *See* Siegel, *supra* note 118, at 364 n.413 ("By imposing unilateral duties on women for engaging in consensual sex, the state has defined the proper ends of *female* sexuality as procreative, and punished women who violate this norm by forcing them to bear children."). For a postwar history of race-based regulation of women's sexuality, see RICKIE SOLINGER, WAKE UP LITTLE SUSIE 37 (2000) (chronicling how courts and society "took special steps to subdue sexually disobedient and socially unassimilated females").

120. These attributions of blame are sometimes made explicit. *See, e.g.*, Amanda Marcotte, *"Keep Her Legs Closed!": Republicans Are Mad One of Them Said the Quiet Part Out Loud*, SALON (Oct. 16, 2023), https://www.salon.com/2023/10/16/keep-her-legs-closed-angry-that-one-of-them-said-the-quiet-part-out-loud [https://perma.cc/662H-Y8NA] (reporting on a New Jersey state senator's 2020 Facebook post reading: "A woman does have a choice! Keep her legs closed").

121. Blame may derive from retrograde impulses that remain in broad circulation. *See* TUERKHEIMER, *supra* note 82, at 99–129 (describing cultural and legal blame-shifting). Blame may also reflect the sense that a woman who was not raped voluntarily engaged in activities that "assumed the risk" of unwanted pregnancy, ergo she (unlike the archetypical rape victim) should experience the

To briefly encapsulate: Rape exceptions draw a bright line between those who should be believed and those who should not,[122] between those who are worthy of care and those who are not,[123] and between those who are blameless and those who are not.[124] While differently inflected, these distinctions between rape victims and others all rest on an underlying intuition about the choices that were made (by those who are not-rape victims), or not made (by rape victims). The rape exception is thus unavailable to those who are viewed as having *chosen sex* and therefore *chosen pregnancy*.

Insofar as those who are seen as consenting are denied a right to abortion, a binary version of consent justifies a binary distribution of the right. But decision making around sex and pregnancy is decidedly more constrained than a simple dichotomy allows. Despite the law's inattention to a spectrum of coercive forces, these forces shrink the options available to vulnerable women so that, often, nominal choices bear no resemblance whatsoever to preferences. As we will see, a continuum of coercion results in both *unwanted sex* and *unwanted pregnancy*.

II. UNWANTED SEX

The rape exception selects a narrow class of victims entitled to an abortion purportedly because they did not choose the sex that led to the pregnancy. But rape law has always embedded a troubled conception of choice. While the traditional requirement of force is slowly giving way, even the most modernized statutory iterations maintain a narrow definition of prohibited conduct.[125] Moreover, rape myopia ensures that crabbed criminal law definitions exert considerable influence outside law, in cultural realms, where unwanted sex is commonplace. By insisting that

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consequences of her choices. The notion that a woman assumes the risk of conception by consenting to sex, as Reva Siegel observes, is "riddled with so many difficulties that its persuasive force would seem, in fact, to depend on *a priori* assumptions about women's obligations as mothers." Siegel, *supra* note 118, at 361 n.403; *see* Robin West, Hobby Lobby*, Birth Control, and Our Ongoing Cultural Wars: Pleasure and Desire in the Crossfires*, 26 HEALTH MATRIX 67, 85–86 (2016) ("[T]he harms of unwanted pregnancies simply disappear behind the veil of the apparently consensual assumption of their risk.").

122. *See supra* notes 100–06 and accompanying text.

123. *See supra* notes 107–19 and accompanying text.

124. *See supra* notes 120–21 and accompanying text.

125. This is appropriate, in my view, given the consequences that can be imposed for a criminal violation.

consent is binary and paramount, modern rape law casts a long shadow that immunizes a range of unwanted sex from critique.[126]

A. CONSENT PROBLEMS

When the rape exception first materialized in abortion law, force, rather than non-consent, was elemental to rape.[127] According to the 1962 MPC,[128] "[a] male who has sexual intercourse with a female not his wife is guilty of rape if . . . he compels her to submit by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping, to be inflicted on anyone."[129] For present purposes, what is most important about this definition is that force is essential to it.[130] As the drafters observe, the definition is consistent with a longstanding common law tradition of requiring that, to constitute rape, intercourse must be accomplished "by force and against [the victim's] will."[131] The challenge facing the drafters, as they described it at the time, was to "draw[] a line between forcible rape on the one hand and reluctant submission on the other, between true aggression and

126. *See infra* notes 157–64 and accompanying text.

127. *See infra* notes 128–43 and accompanying text.

128. The MPC provisions governing sexual assault were just recently revised; preparation of the official text is in progress. *See Sexual Assault and Related Offenses*, AM. L. INST., https://www.ali.org/project/sexual-assault-and-related-offenses [https://perma.cc/VB4S-YXL7]; *see also infra* note 147 (describing new model language).

129. *See* MODEL PENAL CODE § 213.1 (AM. L. INST. 1980). Under these conditions, rape is a felony of the second degree. *Id.* Rape is aggravated to a felony of the first degree when a male either "inflicts serious bodily injury upon anyone" or evidence shows "the victim was not [his] voluntary social companion . . . upon the occasion of the crime and had not previously permitted him sexual liberties." *Id.* For discussion of the so-called voluntary social companion defense, see TUERKHEIMER, *supra* note 82, at 158–60.

130. Other aspects of the traditional rape definition have also been the subject of powerful critique. *See generally* Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 FLA. L. REV. 45 (1990) (challenging immunity for marital rape); Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259 (2011) (criticizing the legal overlook of male victimization).

131. MODEL PENAL CODE § 213.1 cmt. 1 (AM. L. INST. 1980). At the time, the MPC was heralded as a progressive alternative to the traditional common law, largely because it contemplated gradations in offense levels (and punishment) and because it created a crime of "gross sexual imposition," which prohibited "[c]ompulsion by lesser threats" and added protection where "the victim is suffering from mental disease or defect which the actor knows to render her incapable of appraising the nature of her conduct." *Id.* at introductory cmt.

desired intimacy."[132] While relevant to this inquiry, consent was only part of the equation.[133]

Justifying the perpetuation of a force requirement in a little-noticed section of the MPC commentary,[134] the drafters cautioned that "exclusive focus on non-consent would collect under one label the wholly uninvited and forceful attack by a total stranger" and "the excessive zeal of a sometime boyfriend."[135] These scenarios—both ostensibly described as nonconsensual sexual encounters—were conceived as distinct enough on their face to warrant placement in different categories (one criminal, one not). By appealing to commonplace intuitions about the relative culpability of the "total stranger" and the "sometime boyfriend," the drafters could demote the function of consent in rape law and elevate a requisite of "male imposition" by force.[136] As a practical matter, the force requirement would ensure that large swaths of intercourse without consent did *not* count as rape.[137] In this respect, the rape exception to the ALI's abortion ban was

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132. *Id.* at cmt. 2. The commentary added:

> The difficulty of drawing this line is compounded by the fact that there often will be no witness to the event other than the participants and that their perceptions may change over time. The trial may turn as much on an assessment of the motives of the victim as of the actor.

Id. at 280. In a passage further impugning rape accusers' credibility, the commentary also noted the "fear that a woman who subconsciously wanted to have sexual intercourse will later feel guilty and 'cry rape,'" while suggesting that a woman's "confusion at the time of the act may later resolve into non-consent." *Id.* at cmt. 4.

133. *See id.* ("[P]roblems [will] arise if too much emphasis is placed upon the non-consent of the victim as opposed to the overreaching of the actor.").

134. For the lone exception, see Daphne Edwards, Comment, *Acquaintance Rape and the "Force" Element: When "No" Is Not Enough*, 26 GOLDEN GATE U. L. REV. 241, 253 n.64 (1996).

135. MODEL PENAL CODE § 213.1, *supra* note 131 cmt. 4 ("In the words of one commentator, such an approach would compress into a single statute a diversity of conduct ranging from 'brutal attacks . . . to half won arguments . . . in parked cars.'" (citation omitted)).

136. *See id.* ("What is required is that a balanced inquiry be made into the factors that indicate imposition by the male as well as those that indicate non-consent by the victim. It is appropriate in this effort to focus primarily upon the conduct of the male, particularly in the more serious forms of the offense, and to seek objective verification in the actor's conduct of the overreaching and imposition that is the major characteristic of the offense in its most serious form.").

137. *See* Deborah Tuerkheimer, *Rape On and Off Campus*, 65 EMORY L.J. 1, 15–38 (2015) (identifying several recurring fact patterns—sleep, intoxication, and trust—where the presence of force and the absence of consent tend to diverge).

incompatible with the logic of consent upon which the ban supposedly rested.

Notwithstanding a preoccupation with force as the defining feature of rape, the complexities of consent as the drafters understood them were not entirely lost in the MPC drafting process. On the contrary, these complexities were viewed as a separate reason, related to culpability, for minimizing the importance of consent in rape law.[138] A passage betraying deep confusion about the meaning of consent conjures the woman who "may not want intercourse, may fear it, or may desire it but feel compelled to say 'no.'"[139] To complicate matters, the commentary warns, "[f]urther ambiguity may be introduced by the fact that the woman may appear to consent because she is frozen by fear and panic, or because she quite rationally decides to 'consent' rather than risk being killed or injured."[140] Rather than attempt to address these ambiguities via a legal definition of consent, the MPC drafters sought to avoid their messiness altogether[141] by substituting a force requirement,[142] leaving rape law unmoored from choice.[143]

The force requirement defines a violent stranger rape that is atypical.[144] Excessive physical force is not at all necessary to

138. *See* MODEL PENAL CODE § 213.1 cmt. 4 (AM. L. INST. 1980) ("Evidentiary considerations aside, consent appears to be a conceptually simple issue. Either the female assented to intercourse, or she did not. Searching for consent in a particular case, however, may reveal depths of ambiguity and contradiction that are scarcely suspected when the question is put in the abstract.").

139. *Id.*

140. *Id.*

141. *See id.* ("The deceptively simple notion of consent may obscure a tangled mesh of psychological complexity, ambiguous communication, and unconscious restructuring of the event by the participants.").

142. *See id.* ("This is not to say that consent by the victim is irrelevant or that inquiry into the level of resistance by the victim cannot or should not be made. Compulsion plainly implies non-consent, just as resistance is evidence of non-consent.").

143. Married women were categorically unable to choose not to be penetrated by their husband. *See supra* note 62 (noting the durability of legal protection for marital rape); *see also* West, *supra* note 130 (critiquing the marital rape exemption).

144. Of women victimized by rape, half are raped by an intimate partner and forty percent by an acquaintance. NAT'L CTR. FOR INJ. PREVENTION & CONTROL OF THE CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 21 (2010).

accomplish nonconsensual sexual penetration.[145] Still, force maintains its hold on modern rape law. Today, the force requirement endures in nearly half the states.[146] In the other half, where the substitution of nonconsent for force[147] comes closer to making willingness the divider between sex and rape,[148] consent definitions vary considerably. Most definitions require an

145. For a taxonomy of common scenarios involving sexual penetration without force and without consent, see Tuerkheimer, *supra* note 137.

146. *See* Stephen J. Schulhofer, *Reforming the Law of Rape*, 35 L. & INEQ. 335, 342–43 (2017) ("In almost half the states, sexual penetration is not a crime unless there is *both* non-consent *and* some sort of force. ***Penetration without consent is not, in itself, a crime.***").

147. In June 2021, the American Law Institute approved revisions to the Model Penal Code's sexual assault provisions, recognizing the offense of "Sexual Assault in the Absence of Consent" as a felony in the fifth degree. *See* MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213.6 (AM. L. INST., Tentative Draft No. 5, 2021); MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES § 213 reporter's memorandum (AM. L. INST., Tentative Draft No. 6, 2022); *see also supra* note 128 and accompanying text.

148. Feminist legal scholars have long insisted that defining sexual assault by reference to the use of physical force elides the harm of sexual assault. *See, e.g.*, STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 254 (1998) ("Under most existing criminal codes, the absence of consent does not by itself make intercourse illegal. Criminal penalties apply only when the sexual aggressor uses too much physical force. But respect for sexual autonomy requires a different view. Intercourse without consent should always be considered a serious offense."); Robin L. West, *Legitimating the Illegitimate: A Comment on* Beyond Rape, 93 COLUM. L. REV. 1442, 1445 (1993) ("Many, if not most, rape law commentators from a range of perspectives have addressed the underenforcement of laws against sexual assault by arguing that rape should be defined simply as nonconsensual sex—by dropping, in effect, the force requirement altogether."). The force requirement is also problematic in application. *See, e.g.*, Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT L. REV. 359, 363–64 (1993) ("Although rape statutes and cases articulate the tests of force and nonconsent, their meaning has always depended on the identity of the victim and the accused. . . . Women are not angry about the law's treatment of 'acquaintance rape' just because rape laws only protect against violence. They are angry because courts often do not recognize forced sex by acquaintances as rape, even when they use violence."). In light of these deficiencies, many feminist legal scholars (myself included) have advocated a criminal rape definition that centers the absence of consent, full stop. *See, e.g.*, Deborah Tuerkheimer, *Sexual Violation Without Law*, 76 N.Y.U. ANN. SURV. AM. L. 609, 614–25 (2021); Deborah Tuerkheimer, *Sex Without Consent*, 123 YALE L.J.F. 335, 347–51 (2013). For a notable alternative to consent as the optimal criminal law standard, see Catharine A. MacKinnon, *Rape Redefined*, 10 HARV. L. & POL'Y REV. 431, 465 (2016) ("Consent is a pathetic standard of equal sex for a free people."); see also *infra* note 152 for a proposed statutory alternative; Scott A. Anderson, *Conceptualizing Rape as Coerced Sex*, 127 ETHICS 50, 51–52 (2016).

unwilling complainant to *demonstrate* her unwillingness,[149] thereby presuming that silence and passivity constitute consent.

In fact, silence or passivity often have less to do with willingness than with stark power differentials.[150] Yet dominant legal understandings render these dynamics invisible.[151] While recognizing that physical threats invalidate consent, the law is blind to other types of coercive forces,[152] including not just

149. *See, e.g.*, NEB. REV. STAT. ANN. §§ 28-318(8), 319(1) (West 2025) (criminalizing penetration without consent and defining "[w]ithout consent" as "express[ing] a lack of consent through words . . . or . . . conduct" and requiring the victim to "reasonably make known to the actor the victim's refusal to consent"); N.H. REV. STAT. ANN. § 632-A:2(I)(m) (2025) (prohibiting penetration "[w]hen at the time of the sexual assault, the victim indicates by speech or conduct that there is not freely given consent to performance of the sexual act"); N.Y. PENAL LAW § 130.05(2)(d) (McKinney 2025) (defining "[l]ack of consent" to require that "the victim clearly expressed that he or she did not consent to engage in [a sexual] act, and a reasonable person in the actor's situation would have understood such person's words and acts as an expression of lack of consent to such act under all the circumstances"); UTAH CODE ANN. §§ 76-5-402(1), 406(1) (West 2025) (criminalizing sexual intercourse without consent and defining consent as the victim "express[ing] lack of consent through words or conduct"). By contrast, a small minority of states incorporate an affirmative consent standard in the criminal code. *See, e.g.*, WIS. STAT. ANN. § 940.225(4) (West 2025) (requiring "words or overt actions by a person who is competent to give informed consent indicating a freely given agreement to have sexual intercourse or sexual contact"); VT. STAT. ANN. tit. 13, § 3251(3) (West 2025) (defining consent as "words or actions by a person indicating a voluntary agreement to engage in a sexual act"); *see also* State *ex rel.* M.T.S., 609 A.2d 1266, 1277 (N.J. 1992) (holding that consent requires "permission to engage in sexual penetration [that] must be affirmative and it must be given freely").

150. *See* Tuerkheimer, *Sexual Violation Without Law*, *supra* note 148, at 623 ("Apart from the element of surprise that is present in many of the allegations, it is typical for an accuser to describe significant power differentials between herself and her abuser and to recount how this imbalance undermined her ability to express a lack of consent to the (mis)conduct. In jurisdictions with resistance-based consent definitions, as we might call them, these accusers would likely be deemed to have consented.").

151. *See id.* at 622 ("[T]he criminal law's extant failure to adopt an affirmative consent standard reifies a view of passive female sexuality—that is, a view of women as sexual subjects who exist for the touching and the taking."); *id.* at 624 ("Again and again, we have seen how power can be deployed to inhibit resistance to conduct that is, by any reasonable measure, unconsented-to. Put differently, resistance-based consent definitions, physical and verbal alike, are incompatible with extremely hierarchical interactions.").

152. There are rare exceptions. *See, e.g.*, 18 PA. STAT. AND CONS. STAT. ANN. § 3101 (West 2025) (defining forcible compulsion as "compulsion by use of physical, intellectual, moral, emotional or psychological force, either express or implied"); *see also* MacKinnon, *supra* note 148, at 474 (proposing a rape definition that would recognize "[p]sychological, economic, and other hierarchical forms of force—including age, mental and physical disability, and other inequalities,

conduct on the part of the coercing party, but also social inequalities that augment the conduct's coercive effects.[153] By assigning totemic significance to the performance of resistance—whether physical or verbal—in sexual interactions, law pretends away the influence of steep and pervasive hierarchies.

To the extent consent is increasingly replacing force as the key definitional component of rape, its legal instantiation also fails to account for coercion, structural inequalities, or their interplay.[154] Abusers often harness structural constraints to compel an apparent willingness to engage in conduct that is, by any meaningful measure of choice, unchosen.[155] But the criminal law ignores these dynamics and their effects on sexual interactions.

In short, modern rape law embeds a binary, abstracted formulation of consent that overlooks a continuum of coercion.[156] As a consequence, the full spectrum of sexual violation as victims experience it fades from view.

B. RAPE MYOPIA

Within criminal law, we have seen that consent has significant shortcomings. Beyond the context of criminalization, consent fails miserably as a marker of wanted sex. Rape law's version of consent is far too influential outside law, occupying the field of sex—even sex that is bound up in conditions of inequality. Although it maps on poorly to these conditions, the crabbed legal definition of consent has become a conventional signifier of normative sexual conduct.[157] This move insulates sex that is

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including sex, gender, race, class, and caste *when deployed as forms of force or coercion* in the sexual setting").

153. This is a recurring problem in criminal law. As I have previously observed, "With few exceptions, the criminalization of gender violence rests on the faulty premise that context does not matter." Tuerkheimer, *supra* note 109, at 78.

154. *See supra* notes 141–53; *see also infra* notes 155–57.

155. The #MeToo movement exposed an array of forces that can vitiate outward manifestations of willingness. These forces are especially present in the lives of marginalized women. For illustrations, see Tuerkheimer, *Sexual Violation Without Law*, *supra* note 148, at 628–30.

156. *See supra* notes 150–55 and accompanying text. For a different conception, see *infra* notes 320–42 and accompanying text.

157. As critique and alternative vision, the idea of ethical or just sex has received considerable attention by philosophers. *See, e.g.*, Quill R. Kukla, *A Nonideal Theory of Sexual Consent*, 131 ETHICS 270, 271 (2021) (discussing ethical sex under conditions of partial autonomy); Ann J. Cahill, *Unjust Sex vs. Rape*, 31 HYPATIA 746, 748 (2016) (arguing that sexual agency distinguishes a

nominally consensual and legal (rightly so[158]), but nevertheless unwanted.[159]

Over a decade ago, Robin West observed that "consensual sex, when it is *unwanted and unwelcome*, often carries harms to the personhood, autonomy, integrity, and identity of the person who consents to it—and that these harms are unreckoned by law and more or less unnoticed by the rest of us."[160] In the intervening years, accelerated by #MeToo, it has become ever more apparent that consent is routinely compelled by means other than physical force.[161] For instance, a familiar pattern involves men badgering women into reluctant submission.[162] Women are often

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"gray area" of unjust sexual interactions from sexual assault). *See generally* JOSEPH J. FISCHEL, SCREW CONSENT: A BETTER POLITICS OF SEXUAL JUSTICE (2019) (arguing that an exclusive focus on consent is insufficient for a robust conception of sexual justice).

158. *See* Tuerkheimer, *Sexual Violation Without Law*, *supra* note 148, at 631 n.123 (suggesting that "considerations of moral blameworthiness, degrees of harm, and rule administrability" all "militate against outlawing pressured sex").

159. Researchers have described unwanted sex as "sex that an individual does not want or desire to engage in," adding that "sometimes individuals willingly agree to engage in sex that they do not entirely wish for or desire even though the other person does not employ any coercive tactic." Sara G. Kern & Zoë D. Peterson, *From Freewill to Force: Examining Types of Coercion and Psychological Outcomes in Unwanted Sex*, 57 J. SEX RSCH. 570, 570 (2020); *see* Zoë D. Peterson & Charlene L. Muehlenhard, *Conceptualizing the "Wantedness" of Women's Consensual and Nonconsensual Sexual Experiences: Implications for How Women Label Their Experiences with Rape*, 44 J. SEX RSCH. 72, 74, 81 (2007) (offering empirical support for a "wanting-consenting distinction" and suggesting a multidimensional model of wanting).

160. *See* Robin West, *Sex, Law, and Consent*, *in* THE ETHICS OF CONSENT 221, 224, 239 (Franklin G. Miller & Alan Wertheimer eds., 2010) (emphasis added). West has further developed the "wanting-consenting" distinction in a rich body of subsequent work. *See, e.g.*, Robin West, *Consent, Legitimation, and Dysphoria,* 83 MOD. L. REV. 1, 5 (2020) (discussing the harms of consensual but unwanted sex); Robin West, *Consensual Sexual Dysphoria: A Challenge for Campus Life*, 66 J. LEGAL EDUC. 804, 806–7 (2017) (same). For empirical evidence of harm, see, for example, Kern & Peterson, *supra* note 159, at 579–80 (citing research demonstrating that "coerced sexual experiences are associated with a range of negative psychological and cognitive consequences like PTSD, self-blame, and negative beliefs about the self and the world").

161. *See* Tuerkheimer, *Sexual Violation Without Law*, *supra* note 148, at 625–30 (describing cases involving "coerced consent").

162. *See* Kern & Peterson, *supra* note 159, at 577 ("Many participants . . . described experiences that involved verbally coercive behavior, including pressuring the participant, saying mean or hurtful things, threatening to end their relationship with the participant, and getting angry when the participant refused."); *see also infra* notes 240, 260 and accompanying text (discussing

seen as vessels for male sexual pleasure—as objects, not subjects.[163] What matters is not their actual desires but, rather, securing their permission to be acted upon.[164]

The disregard of coercive pressures other than the most extreme extends well beyond the confines of rape law to the creation and maintenance of sexual norms. Rape law's creep induces the cultural transplant of a notion of consent that sidelines wantedness and conceives choice as dichotomous. What results is a massive extralegal erasure of all but the most physically forceful sexual violation, along with a tacit fortification of the hierarchical structures that give rise to this violation.

Rape myopia also seeps into abortion law in the form of its rape exception, which neglects unwanted sex that falls short of the legal definition of rape (to say nothing of all other causes of unwanted pregnancy[165]). What motivates the rape exception, as I have discussed,[166] is an insistence that those who are *not victims* made certain choices about sex, choices that negate the not-victims' right to terminate their pregnancy. But the lives of women who fall outside the tightly circumscribed category of "rape victim" tell a very different story.

For example, research demonstrates a close relationship between poverty and sexual violation that fails to satisfy the criminal law's conception of rape or sexual assault.[167] One recent study found a significant association between unwanted sex and health-related socioeconomic vulnerabilities, including food insecurity, housing instability, transportation difficulties, utilities

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gendered sexual scripts). Of course, non-gendered factors may also contribute to unwanted sex.

163. Catharine MacKinnon has famously theorized objectification as central to women's subordination. *See* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 50 (1987) ("To say women are sex objects is . . . redundant. Sexualized objectification is what defines women as sexual and as women under male supremacy.").

164. This model of sexual relations is incompatible with sexual agency. *See infra* notes 320–22 and accompanying text.

165. *See infra* notes 188–317 and accompanying text.

166. *See supra* notes 107–21 and accompanying text.

167. It should also be noted that the poorest Americans are twelve times more likely to be sexually assaulted than those with household income of more than $75,000. *See* Kathryn Casteel et al., *What We Know About Victims of Sexual Assault in America*, FIVETHIRTYEIGHT (Sept. 21, 2018), https://web.archive.org/web/20200819175523/https://projects.fivethirtyeight.com/sexual-assault-victims [https://perma.cc/4SDT-G96C].

concerns, and interpersonal violence.[168] During the early stages of the COVID-19 pandemic, when the study was conducted, nearly a quarter of socioeconomically vulnerable women experienced unwanted sex.[169] As the researchers concluded, "[w]hen resources are scarce or exogenous conditions are threatening, some women may engage in sexual activity primarily to maintain socioeconomic security."[170]

Like poverty, other vulnerabilities increase the prevalence of sex that is unchosen and sex that is unwanted.[171] Youth is one such vulnerability. Sexual victimization is commonplace among high school girls,[172] young women in college,[173] and, most of all, young women who are not college students.[174] Members of these

168. *See* Stacy T. Lindau et al., *Unwanted Sexual Activity Among United States Women Early in the COVID-19 Pandemic*, 228 AM. J. OBSTETRICS & GYNECOLOGY 209.e1, 209.e2–.e6 (2023). For discussion of how domestic violence constrains reproductive choices, see *infra* notes 268–83 and accompanying text.

169. Lindau et al., *supra* note 168, at 209.e6. The study found that nearly 75% of sexually active women who reported having unwanted sex early in the pandemic were food insecure in the twelve months preceding the pandemic (versus 34% of those who were not food insecure). *Id.* at 209.e4. "Women having unwanted sex also had much higher rates of pre-pandemic lack of reliable transportation (46% versus 14%), concerns with utilities (36% versus 9%), housing instability (27% versus 9%), and [intimate partner violence] (34% versus 8%)." *Id.* at 209.e4–.e5.

170. *Id.* at 209.e1.

171. *See infra* notes 260–63, 269–83, 313–17 and accompanying text (discussing empirical evidence of unwanted sex in the lives of young women, victims of abuse, and disabled women).

172. *See Youth Risk Behavior Survey: Data Summary and Trends Report 2011–2021*, CTRS. FOR DISEASE CONTROL & PREVENTION 2 (2023), https://www.cdc.gov/yrbs/dstr/pdf/YRBS_Data-Summary-Trends_Report2023_508.pdf [https://perma.cc/38ZU-8UDJ] ("Almost 20% of female [high school] students experienced sexual violence by anyone during the past year and 14% had ever been physically forced to have sex.").

173. Among undergraduate students, researchers have found that more than a quarter (25.9%) of females experience rape or sexual assault through physical force, violence, or incapacitation; approximately 50% of these assaults involve sexual penetration (as opposed to other kinds of touching). David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct*, ASS'N AM. UNIVS., A7-5 (2020), https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7_(01-16-2020_FINAL).pdf [https://perma.cc/PE4U-K9FE].

174. *See* U.S. DEP'T OF JUST., NCJ 248471, RAPE AND SEXUAL VICTIMIZATION AMONG COLLEGE-AGED FEMALES, 1995–2013, at 1 (2014), https://bjs.ojp.gov/content/pub/pdf/rsavcaf9513.pdf [https://perma.cc/B8JL-H5ZQ] (reporting that females ages 18 to 24 experienced the highest rate of

cohorts suffer disproportionately from unwanted sex that is not captured by the legal definition of rape, defying the binary choice paradigm.[175] Research shows that many young women[176] and teen girls[177] experience sexual coercion that spans a

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rape and sexual assault victimization, and the rate among this population was 1.2 times higher for nonstudents than for students).

175. *See* Margaret J. Blythe et al., *Incidence and Correlates of Unwanted Sex in Relationships of Middle and Late Adolescent Women*, 160 ARCHIVES PEDIATRICS & ADOLESCENT MED. 591, 591 (2006) ("Unwanted sex is a common element of many young women's sexual experiences."); *see also supra* notes 146–55 and accompanying text.

176. *See, e.g.*, Ngozi Anyadike-Danes et al., *Defining and Measuring Sexual Consent within the Context of University Students' Unwanted and Nonconsensual Sexual Experiences: A Systematic Literature Review*, 25 TRAUMA, VIOLENCE, & ABUSE 231, 242 (2024) (collecting research on unwanted but nominally consensual sexual experiences among college-age students and concluding that "sexual consent is contextual and perhaps reflective of their sexual inexperience and adaptation to the university setting"); Jacquelyn C. Campbell et al., *Unwanted Sexual Acts Among University Students: Correlates of Victimization and Perpetration*, 36 J. INTERPERSONAL VIOLENCE NP504, NP518 (2021) (analyzing data from nearly 4,000 university students and finding that "[f]emale undergraduate students were the most victimized group, with more than a quarter experiencing unwanted sexual contact using verbal pressure tactics or sexual violence using force or weapon, threat of physical harm, or taken advantage of when intoxicated or asleep"); Blythe et al., *supra* note 175, at 591 (finding, in a longitudinal study comprised of nearly three hundred adolescent women, that over forty percent of participants reported "increasing degrees of incentive, pressure, or threat used by one partner to obtain sex that is unwanted by the other partner," and that unwanted sex was associated with condom nonuse).

177. *See, e.g.*, Laura Hawks et al., *Association Between Forced Sexual Initiation and Health Outcomes Among US Women*, 179 JAMA INTERNAL MED. 1551, 1551–53 (2019) (surveying 13,310 women and finding that 6.5% (roughly one in sixteen women) reported experiencing forced sexual initiation—"an unwanted first sexual intercourse that is physically forced or coerced"—at an average age of 15.6 years; compared to those with voluntary sexual initiation, women who experienced forced sexual initiation were less likely to be white and more likely to have income below the poverty level); Julianna M. Nemeth et al., *Adolescent Reproductive and Sexual Coercion: Measurement Invariance in a Population-Based Sample of Male and Female High School Students*, 35 J. FAM. VIOLENCE 619, 620 (2020) (finding that the most common form of coercion was "related to verbal pressure"); *see also* Alison J. Huang & Carolyn J. Gibson, *Forced and Coerced Sexual Initiation in Women: New Insights, Even More Questions*, 179 JAMA INTERNAL MED. 1558, 1559 (2019) (finding that women with forced sexual initiation were more likely than those with voluntary initiation to experience an unwanted first pregnancy and noting that "involuntary sexual experiences are often related to verbal or emotional coercion rather than physical force, while still having potentially powerful and negative consequences"); Blythe et al., *supra* note 175, at 591 ("Unwanted sex occurs often within the sexual relationships of teens.").

continuum.[178] Young women and girls also suffer notably high rates of violence, including sexual violence, at the hands of their intimate or dating partner,[179] and many endure a spectrum of controlling behaviors.[180]

In a similar vein, adult victims of intimate partner violence[181] often experience unwanted sex as integral to a course of conduct characterized by the patterned exercise of power and control.[182] Abusers use a slew of techniques to "usurp and

178. *See supra* note 41 and accompanying text.

179. *See, e.g.*, DEP'T OF JUST., NCJ 244697, NONFATAL DOMESTIC VIOLENCE, 2003–2012, at 11 (2014), https://bjs.ojp.gov/content/pub/pdf/ndv0312.pdf [https://perma.cc/KV67-5M4F] (reporting that women between the ages of eighteen and twenty-four constitute the group most commonly abused by an intimate partner); *Teen Dating Violence in the United States: A Fact Sheet for Schools*, U.S. DEP'T OF EDUC. (2015), https://files.eric.ed.gov/fulltext/ED605152.pdf [https://perma.cc/4M6Z-JVK6] (citing survey results finding that forty-three percent of college women reportedly experienced abusive dating behaviors including physical, sexual, verbal, and controlling abuse, while twenty-two percent reportedly experienced physical abuse, sexual abuse, or threats of physical violence).

180. *See* Jennifer Gerson, *More Teens Are Reporting that a Partner Has Threatened Their Reproductive Health*, 19TH NEWS (Feb. 22, 2024), https://19thnews.org/2024/02/teens-national-domestic-violence-hotline-reproductive-coercion [https://perma.cc/BL3S-GM7C] (describing reproductive coercion among teens as involving "any situation in which one partner is exerting power over the other in a way that impacts their reproductive health," including forced sex, refusal to use contraception, interference with contraception, and restricting access to reproductive health care); *see also infra* notes 269–83 and accompanying text.

181. One in four American women—millions—are victims of intimate partner violence. Martin R. Huecker et al., *Domestic Violence*, *in* STATPEARLS 1 (last updated Apr. 9, 2023), http://www.ncbi.nlm.nih.gov/books/NBK499891 [https://perma.cc/K7RV-C6TZ]. These rates vary significantly across populations; for example, women of color experience domestic violence at disproportionately high levels. *See* U.S. DEP'T OF JUST., NCJ 178247, INTIMATE PARTNER VIOLENCE 4 (2000), https://bjs.ojp.gov/content/pub/pdf/ipv.pdf [https://perma.cc/EB83-YUSR] (reporting—based on estimates from the National Crime Victimization Survey—that Black women experience victimization at a rate thirty-five percent higher than that of white females); *see also infra* notes 200–24 and accompanying text (discussing poverty); *infra* notes 285–317 and accompanying text (discussing disability).

182. *See* Deborah Tuerkheimer, *Recognizing and Remedying the Harm of Battering: A Call to Criminalize Domestic Violence*, 94 J. CRIM. L. & CRIMINOLOGY 959, 962–69 (2004) (describing domestic violence as an ongoing course of conduct that remains largely out of the criminal law's reach); EVAN STARK, COERCIVE CONTROL: HOW MEN ENTRAP WOMEN IN PERSONAL LIFE 99–100, 205 (2007) (discussing the "pattern of coercive and controlling behaviors that causes a range of harms in addition to [physical] injury").

master a partner's subjectivity,"[183] as sociologist Evan Stark has written. One such technique is sexual coercion, which induces unwanted sex, whether consensual or not.[184] Describing this gendered dynamic,[185] one woman recalled that after her husband's sexual assault, "I never said no to him again."[186]

Unwanted sex—even sex that is consensual and therefore not rape—can result in many harms,[187] including unwanted pregnancy. Abortion law's rape exception is at odds with this reality. But the unspoken logic of banning abortion while exempting rape fails on yet another dimension: It equates consent to sex with consent to pregnancy. To see how this premise is flawed, we turn now to the continuum of coercion that gives rise to unwanted pregnancy.

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183. STARK, *supra* note 182, at 205.

184. *See id.* at 273 (identifying a common tactic of coercive control where "[a]ll manner of punishment is used to control the when, where, how, and with whom of a woman's sexual activity"); *see also* Alexandra L. Snead & Julia C. Babcock, *Differential Predictors of Intimate Partner Sexual Coercion Versus Physical Assault Perpetration*, 25 J. SEXUAL AGGRESSION 146, 146 (2019) (defining sexual coercion as behavior intended to compel a partner into unwanted sexual activity—including pressure, emotional force, or threats).

185. *See* STARK, *supra* note 182, at 205 (describing domestic violence as a "condition of 'unfreedom' (what is experienced as *entrapment*) that is 'gendered' in its construction, delivery, and consequence"); *see also* NAT'L CTR. FOR INJ. PREVENTION & CONTROL OF THE CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 144, at 1–2 (reporting that women are at significantly higher risk than men of experiencing intimate partner violence and of sustaining serious injuries).

186. STARK, *supra* note 182, at 243. Another woman explained that her husband's past violence made her feel like she was living with a "time bomb," which compelled her to comply with his sexual demands even when they were unaccompanied by explicit threats. *Id.*

187. *See supra* note 160 and accompanying text.

III. UNWANTED PREGNANCY

Sex that is consensual and wanted can lead to pregnancy that is unchosen[188] and unwanted.[189] Rape exceptions incorporate a contrary presumption—that pregnancy resulting from wanted and consensual sex is itself wanted and consensual. This presumption is belied by intersecting structural inequalities that feature in the lives of many, perhaps even most, women. But marginalized women experience distinctively unrelenting constraints on reproductive decision making.[190] Their experiences bring into sharpest relief the limits of the consent paradigm.

The discussion that follows gathers empirical evidence of contraception-related constraints on poor women,[191] young women,[192] women in abusive relationships,[193] and disabled women.[194] Identities (including racial identities[195]) and marginalized statuses[196] of course overlap. My categorization should

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188. For critique of the idea that consent to sex is consent to pregnancy, see KATIE WATSON, SCARLET A: THE ETHICS, LAW, AND POLITICS OF ORDINARY ABORTION 121 (2018) (observing that, in the context of medical treatment, reasoning of this nature "only applies to women," and could be "justified only by an argument about the proper role of sex or an argument about the moral status of an embryo"); *see also* West, *supra* note 121, at 81–84 (explaining natural law's mandate that marital sex remain open to conception and identifying the harms caused when a resulting pregnancy is undesired by the woman). For consideration of how rape exceptions punish women who fail to conform to gendered norms around sexuality and reproduction, *see supra* notes 117–21 and accompanying text.

189. For discussion of the distinct harms of unwanted pregnancy, see West, *supra* note 121, at 82–84 (describing a constellation of financial, physical, psychic, emotional, and political harms).

190. Even under constraints, people can make choices that align with their preferences. But without social power, the effects of coercion often overwhelm a choice such that it becomes an extremely poor proxy for what is desired.

191. *See infra* notes 200–24 and accompanying text.

192. *See infra* notes 225–67 and accompanying text.

193. *See infra* notes 268–83 and accompanying text.

194. *See infra* notes 284–317 and accompanying text.

195. Racial identity is integral to all these categories. Accordingly, I attend throughout the discussion to ways in which race and racism deepen contraceptive inequities, particularly for Black women.

196. For example, immigration status and gender identity may shape contraceptive access. *See generally* Liza Fuentes et al., *New Analyses on US Immigrant Health Care Access Underscore the Need to Eliminate Discriminatory Policies*, GUTTMACHER INST. (May 2022), https://www.guttmacher.org/report/new-analyses-us-immigrant-health-care-access-underscore-need-eliminate-discriminatory [https://perma.cc/WZV7-HTC6]; Connor L. Allen et al., *Barriers*

not obscure vital intersections[197]—for instance, between poverty and domestic violence, poverty and disability, youth and domestic violence, disability and domestic violence, and so forth. Across these and other populations,[198] limited access to effective contraceptive information and care frequently gives rise to pregnancy that—whether at inception or some later point in time, when circumstances have changed—is unwanted.[199]

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to Sexual and Reproductive Health Care Faced by Transgender and Gender Diverse People: A Systematic Review, 22 REPROD. HEALTH, June 25, 2025, at 1 (identifying provider blind spots, systemic discrimination, financial barriers, and cis-normative health system practices that impede transgender and gender-diverse individuals' access to contraceptive care).

197. In the discussion that follows, I highlight these connections.

198. Members of other marginalized groups also experience high levels of sexual and reproductive coercion. *See, e.g.*, Usha Ranji et al., *In Their Own Voices: Low-Income Women and Their Health Providers in Three Communities Talk About Access to Care, Reproductive Health, and Immigration*, KFF 29 (Sept. 3, 2019), https://www.kff.org/womens-health-policy/report/in-their-own-voices-low-income-women-and-their-health-providers-in-three-communities-talk-about-access-to-care-reproductive-health-and-immigration [https://perma.cc/SR5L-GH9A] ("Many immigrant women and providers who see them said they hesitated to enroll in public programs that they qualify for because they feared reprisals from immigration enforcement or negative impact on their citizenship applications."); *see also* Liza Fuentes, *Inequity in U.S. Abortion Rights and Access: The End of Roe is Deepening Existing Divides*, GUTTMACHER INST. 2–3, https://www.guttmacher.org/2023/01/inequity-us-abortion-rights-and-access-end-roe-deepening-existing-divides [https://perma.cc/VXP2-LHCV] ("[I]mmigrants living without documentation are restricted from purchasing health insurance with their own money on the exchanges established by the Affordable Care Act.").

199. Researchers have begun moving away from the conventional pregnancy planning paradigm—one that makes *intentions* the metric—toward a more nuanced model that better captures pregnancy *preferences*. *See, e.g.*, Abigail R.A. Aiken et al., *Rethinking the Pregnancy Planning Paradigm: Unintended Conceptions or Unrepresentative Concepts?*, 48 PERSPS. ON SEXUAL & REPROD. HEALTH 147, 147 (2016). This new approach has been described as follows:

> At the center of the model are women's perceptions of pregnancy, which we propose as an umbrella term to capture not only pregnancy intentions, but also more immediate desires to achieve and to avoid pregnancy, as well as emotional orientations toward pregnancy. Theoretically, these perceptions can be influenced by myriad internal factors, including the anticipated reality of a pregnancy in the context of a woman's life, attitudes toward contraception and perceived susceptibility to pregnancy. Perhaps the most important of these is women's anticipated realities of pregnancy, including the expected positive and negative social and economic impacts, as well as how the pregnancy might be valued in the context of internalized social and cultural norms regarding pregnancy, childbearing, motherhood and abortion.

Id. at 148–49. For a psychometric scale that measures the desire to avoid pregnancy, see Corinne H. Rocca et al., *Psychometric Evaluation of an Instrument*

A. POVERTY

Unwanted pregnancy is far more commonplace among women who are poor than among higher-income women.[200] A primary reason is that poor women confront severe and often insurmountable impediments to accessing contraception, particularly its most effective forms.[201] Research consistently shows that the cost of contraception puts it beyond reach for many low-

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to Measure Prospective Pregnancy Preferences, 57 MED. CARE 152, 156–57 (2019). For state-level estimates of women's pregnancy desires, see Kathryn Kost et al., *Pregnancies and Pregnancy Desires at the State Level: Estimates for 2017 and Trends Since 2012*, GUTTMACHER INST. 5 (Sept. 2021), https://www.guttmacher.org/report/pregnancy-desires-and-pregnancies-state-level-estimates-2017 [https://perma.cc/D8DY-ELM6].

200. *See Fact Sheet: Unintended Pregnancy in the United States*, GUTTMACHER INST. (2019), https://www.guttmacher.org/sites/default/files/factsheet/fb-unintended-pregnancy-us.pdf [https://perma.cc/4MPE-7TE8] ("The rate of unintended pregnancy among women with incomes less than 100% of the [federal poverty line] was 112 per 1,000 in 2011, more than five times the rate among women with incomes of at least 200% of poverty (20 per 1,000 women)."). Explaining its chosen metric of intent, Guttmacher acknowledges that

> [a]lthough researchers have been measuring unintended pregnancy for decades, the conventional approach to categorizing recalled pregnancy desires does not capture the complexities of women's and couples' desires, their experiences prior to pregnancy or the context in which a pregnancy occurs. As a result, sources of data available to characterize pregnancy desires and experiences are limited. The Guttmacher Institute is aware of these limitations, and our experts are working to address them in our work.

Id.

201. *See* Aparna Sundaram et al., *Contraceptive Failure in the United States: Estimates from the 2006–2010 National Survey of Family Growth*, 49 PERSPS. ON SEXUAL & REPROD. HEALTH 7, 12 (2017) (finding that women living below the poverty line had significantly higher contraceptive failure rates across all methods—including 17% vs. 6% for all methods combined and 10% vs. 4% for hormonal contraceptives or an IUD—than women with incomes at least 200% above poverty); *Fact Sheet: Contraceptive Effectiveness in the United States*, GUTTMACHER INST. 3 (Apr. 2020), https://www.guttmacher.org/fact-sheet/contraceptive-effectiveness-united-states [https://perma.cc/8K6D-JZHT] (noting that IUDs and implants are far more effective than short-acting methods); *see also Birth Control*, PLANNED PARENTHOOD (2025) https://www.plannedparenthood.org/learn/birth-control [https://perma.cc/6HMX-8EVA] (showing both cost and estimated effectiveness of common birth control methods).

income women,[202] whether or not they technically qualify as poor under federal guidelines.[203]

For women with private insurance that covers contraception, high out-of-pocket costs, deductibles, and copayments restrict access.[204] Even if these costs are not ultimately prohibitive, they can cause delays that interrupt contraception.[205] Similar delays also result from plan limits on the number of contraceptive products allowed monthly.[206] Moreover, some

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202. *See infra* notes 203–218 and accompanying text; *see also* Khiara M. Bridges, *Deploying Death*, 68 UCLA L. REV. 1510, 1529 (2022) ("Poverty makes it difficult for people to access basic healthcare, including contraceptives. When people do not have access to the tools to avoid pregnancy, they will experience unwanted pregnancy."). Likewise, poverty makes it difficult or impossible for people to access abortion. *See* Shirin Ali, *Abortion Restrictions Will Disproportionately Burden Low-Income Americans*, HILL (July 6, 2022), https://thehill.com/changing-america/respect/poverty/3548067-abortion-restrictions-will-disproportionately-burden-low-income-americans [https://perma.cc/CU9W-VKXS]; *see also infra* note 341.

203. *See Federal Poverty Level (FPL)*, HEALTHCARE.GOV, https://www.healthcare.gov/glossary/federal-poverty-level-fpl [https://perma.cc/7TCN-PVNM] (noting that the 2025 federal poverty level for a single person is $15,650 or less). For research on the relationship between income and contraceptive access, see, for example, Liza Fuentes et al., *Primary and Reproductive Healthcare Access and Use Among Reproductive Aged Women and Female Family Planning Patients in 3 States*, PLOS ONE, May 24, 2023, at 14 (finding that "cost is a primary barrier to healthcare services broadly and desired contraception specifically," not just for women considered poor); see also *Committee Opinion No. 615: Access to Contraception*, 125 AM. COLL. OBSTETRICIANS & GYNECOLOGISTS 250, 254 (2015) ("[L]ow-income women face health system barriers to contraceptive access because they are more likely to be uninsured, a major risk factor for nonuse of prescription contraceptives.").

204. *See Committee Opinion No. 615*, *supra* note 203, at 252 ("[E]ven when contraception is covered, women pay approximately 60% of the cost out of pocket compared with the typical out-of-pocket cost of only 33% for noncontraceptive drugs.").

205. *See* Fuentes et al., *supra* note 203, at 14 (finding that between ten and nineteen percent of reproductive age women "had trouble or delays in obtaining their desired method of birth control in the past year, indicating that a significant proportion of women in all study populations are not fully getting their sexual and reproductive health care needs met"). *Id.* Among women who reported trouble or delays in obtaining contraceptives, the most common reasons were lack of health insurance and the cost of care, as well as logistical barriers, such as transportation and childcare that increase the financial burden of access. *Id.*

206. *See Committee Opinion No. 615*, *supra* note 203, at 252 (noting that insurance-plan restrictions prevent seventy-three percent of women from receiving more than a single month's supply of contraception at a time, and most women are unable to obtain contraceptive refills on a timely basis).

insurers require that certain methods fail before approving coverage for more expensive (and effective) methods.[207]

For the many millions of women needing contraception whose incomes fall below the federal poverty level,[208] publicly funded programs vary considerably in terms of allowable access.[209] Most states require a health care provider's prescription, posing distinct challenges for women who live in poverty.[210] Only a few states cover contraception obtained through telehealth platforms, which might otherwise remove transportation-related barriers facing poor and rural women.[211] In states that do allow pharmacy prescribing, some states limit reimbursement to designated methods.[212] Coverage for less effective but non-prescribed over-the-counter (OTC) contraception is similarly spotty.[213] Alongside these considerable gaps, it remains

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207. *See id.*

208. *See id.* (estimating that more than one half of the thirty-seven million U.S. women who need contraceptive services also need publicly funded services).

209. *See* Usha Ranji et al., *Medicaid Coverage of Family Planning Benefits: Findings from a 2021 State Survey*, KFF 1, 3 (2022), https://files.kff.org/attachment/medicaid-coverage-of-family-planning-benefits-findings-from-a-2021-state-survey.pdf [https://perma.cc/7P54-JHW5] ("States have considerable discretion regarding Medicaid eligibility criteria, managed care enrollment, and payment structures which also affect beneficiaries' coverage for and access to family planning care as well as the amount, duration and scope of the services that are covered.").

210. *See id.* at 16–18 (explaining that most states require a prescription for Medicaid to cover OTC contraceptives—creating barriers for people without provider access and for those facing logistical obstacles to visiting a provider).

211. *See, e.g.*, Fuentes et al., *supra* note 203, at 14 (observing that transportation is a common logistical hurdle for low-income women seeking to access abortion).

212. *See* Ranji et al., *supra* note 209, at 19 ("Some states will only reimburse pharmacist-prescribed oral contraceptives, while others also reimburse pharmacist-prescribing for other hormonal methods too, such as the ring and the patch.").

213. *See* Michelle Long et al., *Insurance Coverage of OTC Oral Contraceptives: Lessons from the Field*, KFF 32 (Sept. 14, 2023), https://www.kff.org/report-section/insurance-coverage-of-otc-oral-contraceptives-lessons-from-the-field-report [https://perma.cc/EZY5-HKJV] (reporting that state laws requiring coverage of OTC contraception face "extensive challenges and confusion" in implementation, including "the mechanics of billing for a medication that is not accompanied by a prescription, lack of awareness about these laws (for health plans, pharmacists, and enrollees), and reliance on pharmacist prescribing as a fallback approach in states that allow it," and that these "state benefit requirements only apply to fully-insured plans and do not apply to self-funded employer plans, which are only regulated by federal law").

unclear whether federal laws pertaining to coverage by both private health insurance plans and Medicaid expansion programs will require insurers to cover Opill, the newly approved, first-of-its-kind OTC oral contraceptive.[214] In sum, for any number of reasons, women in poverty may find themselves unable to afford the cost of contraception.

Women of color, who are at even greater risk of unwanted pregnancy,[215] face distinct burdens. Compared to their white counterparts, women of color are generally less able to access contraception and more likely to experience contraceptive failure.[216] Apart from barriers to affording highly effective

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214. *See id.* at 33 ("The extent to which OTC contraceptive pills can broaden the availability of effective contraceptives to those who seek them will depend on many factors including state and federal policies, pharmacy engagement, public awareness and education, affordability, as well as the implementation of systems of coverage. Absent federal guidance or regulations, the availability of private insurance and Medicaid coverage of OTC contraception without a prescription will continue to depend on the state in which one lives and, if covered by employer-sponsored insurance, the plan's funding structure.").

215. *See* Bridges, *supra* note 202, at 1529–30 ("Simply put, the disproportionate poverty that black people with the capacity for pregnancy experience is correlated with a decreased ability to control the conditions and the circumstances under which they have sex. The decreased capacity to determine how, when, and whether they have sex—combined with the decreased capacity to access safe and effective contraception—contributes to a higher frequency of unwanted pregnancy, and a consequent higher rate of abortion, among black people with the ability to become pregnant."); *see also* Corinne H. Rocca & Cynthia C. Harper, *Do Racial and Ethnic Differences in Contraceptive Attitudes and Knowledge Explain Disparities in Method Use?*, 44 PERSPS. ON SEXUAL & REPROD. HEALTH 150, 150 (2012) ("Unintended and teenage pregnancy rates have been persistently high for decades in the United States, and subgroups of the population, including black women, Latinas and the socioeconomically disadvantaged, are at greatly elevated risk for these outcomes."); Marcela Howell et al., *Contraceptive Equity for Black Women*, IN OUR OWN VOICE: NAT'L BLACK WOMEN'S REPROD. JUST. AGENDA 1 (2020), http://blackrj.org/wp-content/uploads/2020/04/6217-IOOV_ContraceptiveEquity.pdf [https://perma.cc/4S3J-PTP5] ("[C]ontraceptive choices are unduly influenced by structural racism, gender discrimination, and socio-economic barriers. These factors influence whether Black women have health insurance, what types of contraception are covered by their insurance, and how accessible contraception—and health care itself—are in their community.").

216. *See* Fuentes, *supra* note 198 (citing race- and income-level disparities in contraceptive access and health care); Andrea V. Jackson et al., *Racial and Ethnic Differences in Contraception Use and Obstetric Outcomes: A Review*, 41 SEMINARS PERINATOLOGY 273, 274 (2017) (reviewing literature finding that 58% of Black and Latina women used contraception, compared to 65% of white women, and that Black and Latina women experienced significantly higher contraceptive failure rates—21.3% and 15% versus 10.1% among white women);

contraceptive methods, women of color are more likely to attend public schools that fail to provide comprehensive education about sex and pregnancy, which also contributes to higher rates of unwanted pregnancy.[217]

Systemic discrimination further restricts the contraceptive choices of many women of color, especially those who are poor.[218] Women of color have long been the targets of reproductive control by medical and governmental bodies alike.[219] Racist policies and practices generate enduring institutional mistrust.[220] Still today, among members of groups whose fertility has been exploited over time[221]—Black women in particular[222]—the

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see also infra notes 218–23 (describing the corrosive effects of structural and medical racism on contraceptive trust).

217. *See* Bridges, *supra* note 202, at 1530–31 ("Another important factor in the higher rates of unwanted pregnancy among black people—especially young black people—is the refusal of schools to educate students about the basic facts of sex and pregnancy. Public school districts' decisions to withhold comprehensive reproductive health education from their students fall disproportionately on people of color, who are much more likely to attend public schools than their white counterparts. When people with the capacity for pregnancy—as well as people who are incapable of pregnancy—are not provided with accurate information about their bodies, sex, heterosexual intercourse, pregnancy, and how to safely and effectively prevent pregnancy, they will encounter unwanted pregnancy."). For more extensive discussion of the impact of sex and reproductive health education on unwanted pregnancy, see *infra* notes 250–59 and accompanying text.

218. Howell et al., *supra* note 215, at 2 ("The U.S. has a long and troubling history of reproductive oppression on the part of physicians, government agencies, and medical institutions—which have sought to control and limit the fertility of marginalized communities, particularly Black women, women of color, women with low incomes, immigrant and Indigenous women, uninsured women, women with disabilities, and women whose bodily autonomy and sexuality was not respected."). For one of many examples, see Maya Manian, *Coerced Sterilization of Mexican-American Women: The Story of Madrigal v. Quilligan*, *in* REPRODUCTIVE JUSTICE STORIES 97 (Melissa Murray et al. eds., 2019).

219. *See* ANGELA Y. DAVIS, *Racism, Birth Control, and Reproductive Rights*, *in* WOMEN, RACE AND CLASS 202–21 (1982) (recounting the long history of coercive sterilization and population control programs imposed on women of color by medical and governmental institutions).

220. *See infra* note 223 and accompanying text (documenting evidence of medical mistrust).

221. *See* Howell et al., *supra* note 215 and accompanying text; *see also infra* notes 222–23 and accompanying text.

222. Howell et al., *supra* note 215, at 2 ("For decades, Black women have faced coercive contraceptive practices and policies, misinformation about contraceptive side-effects, and unethical testing of new contraceptive methods (e.g., the Pill, Norplant, Depo-Provera). Family planning decisions were often made *for* Black women, not *by* Black women, with the goal of either controlling Black women and their reproduction or to advancing contraceptive research at Black

experience of oppression continues to shape perceptions around contraception, impeding access and inhibiting use of its most effective forms.[223] In complex ways that legal conceptions of consent do not recognize, poverty hinders choice.[224]

B. YOUTH[225]

Youth is a known risk factor for unwanted pregnancy.[226] Although teen birth rates among American adolescents have

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women's expense. This history includes both sterilization and administration of contraceptives without women's knowledge or permission, as occurred in many states well into the 1970s.").

223. *See id.* at 3 ("Both historically and today, medical racism has resulted in experiments on, exploitation of, and mistrust of Black women's sexual and reproductive health care. The result is a culture of fear and mistrust of healthcare institutions, which makes it more difficult for Black women to access contraceptive coverage and care."). For examples of population-based research on attitudes toward contraception, see, Sheryl Thorburn & Laura M. Bogart, *African American Women and Family Planning Services: Perceptions of Discrimination*, 42 WOMEN & HEALTH 23, 23–39 (2005) (in a survey of 326 African American women finding that sixty-seven percent reported experiencing race-based discrimination in obtaining family planning services); Sylvia Guendelman et al., *Perceptions of Hormonal Contraceptive Safety and Side Effects Among Low-Income Latina and Non-Latina Women*, 4 MATERNAL & CHILD HEALTH J. 233, 233–39 (2000) (documenting widespread concerns, among focus groups and surveys of low-income white and Latina women, about the safety and side effects of oral and injectable contraceptives); Pavithra Venkat et al., *Knowledge and Beliefs about Contraception in Urban Latina Women*, 33 J. CMTY. HEALTH 357, 357–62 (2008) (in a survey of 102 Latina women, finding low confidence in contraceptive safety, especially oral contraceptives and injectables, and particular concerns about side effects); see also Michele Troutman et al., *Are Higher Unintended Pregnancy Rates Among Minorities a Result of Disparate Access to Contraception?*, CONTRACEPTION & REPROD. MEDICINE, Oct. 1, 2020, at 1, 3 ("Attitudes and norms regarding contraception in minority groups are often different than those of Caucasian women. Frequently, when African-American and Latina women choose contraception, they choose less effective contraception options (i.e. condoms) compared to white women."); *supra* note 201 and accompanying text (comparing the efficacy of alternate forms of contraception).

224. Many of the pressures that constrain poor women's choices around contraception also constrain their choices around sex. *See supra* notes 168–70 and accompanying text.

225. In this context, "youth" refers to populations up to and including age twenty-four. The cited research at times focuses more narrowly on high school students, teens, college students, college-age women, or young women within a specific age range.

226. *See Fact Sheet: Unintended Pregnancy in the United States*, *supra* note 200 (reporting that "[u]nintended pregnancy rates are highest among low-income women (i.e., women with incomes less than 200% of the federal poverty level), women aged eighteen to twenty-four, cohabiting women[,] and women of

declined in recent decades,[227] they remain stubbornly high (and higher than in many other high-income nations).[228] About a third of female high school students have engaged in intercourse,[229] and, in later adolescence, this number increases dramatically.[230] Yet across the population of teens and young adults, effective contraceptive usage[231] is remarkably inconsistent.[232]

Even apart from cost,[233] adolescents face a thicket of obstacles to accessing contraception.[234] For many young women, particularly those from disadvantaged backgrounds, "efficacy," a sociological concept akin to assertiveness, plays an important role.[235] One recent study found that "contraceptive inconsistency sometimes results from having too little efficacy,"[236] which research suggests might be associated with socioeconomic status

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color"); *Data and Statistics on Adolescent Sexual and Reproductive Health*, U.S. DEP'T OF HEALTH & HUM. SERVS: OFF. OF POPULATION AFFS., https://opa.hhs.gov/adolescent-health/reproductive-health-and-teen-pregnancy/trends-teen-pregnancy-and-childbearing [https://perma.cc/Q36N-SR9G] (describing economic and social costs imposed on adolescent parents, particularly mothers).

227. *See Data and Statistics on Adolescent Sexual and Reproductive Health*, *supra* note 226 (collecting data showing that "[w]hile [teen birth] rates are declining for all adolescents," the rate of decline "varies by race and Hispanic origin" (citation omitted)).

228. "Since 2009, the birth rate for females ages 15–19 in the [U.S.] has fallen to a new low every year. Still the U.S. teen birth rate remains higher than that of other high-income nations." *Id.* (citation omitted).

229. *Youth Risk Behavior Survey*, *supra* note 172.

230. *See* Sarah Melancon, *College Sexuality Statistics: Latest Insights*, WOMEN'S HEALTH INTERACTIVE (last updated Nov. 2023), https://www.womens-health.com/college-sexuality-statistics [https://perma.cc/9FT3-DTXQ] (describing both male and female college students as having an average of nearly five different sexual partners during their college years).

231. *See supra* note 201 and accompanying text (comparing the efficacy of alternate forms of contraception).

232. Melancon, *supra* note 230. *See generally US Adolescents' Receipt of Formal Sex Education*, GUTTMACHER INST. (Apr. 2020), https://www.guttmacher.org/fact-sheet/contraceptive-use-among-adolescents-united-states [https://perma.cc/7HRG-63CJ] (describing nationwide landscape of teen sex education regarding contraceptives).

233. *See supra* notes 204–14 and accompanying text.

234. *See supra* notes 235–59 and accompanying text.

235. Paula England et al., *Why Do Young, Unmarried Women Who Do Not Want to Get Pregnant Contracept Inconsistently? Mixed-Method Evidence for the Role of Efficacy*, SOCIUS, Feb. 11, 2016, at 1; *see infra* note 239 and accompanying text.

236. England, *supra* note 235, at 1.

(SES).[237] In other words, diminished efficacy among lower-SES women may contribute to inconsistent contraceptive use *and* result from identifiable structural constraints associated with poverty.[238] Although sociological research on efficacy and contraceptive use has focused on women in their twenties, typical developmental features of earlier adolescence might likewise undermine the capacity for "planfulness, self-regulation, assertiveness, and believing that one can affect one's goals"[239]—notably but not exclusively in populations of girls who are vulnerable or marginalized.[240]

Many girls confront a more concrete barrier to effective contraception: parental consent laws. In about half the states, minors are prohibited from receiving contraceptive care without a parent's permission or qualifying exception.[241] Parental consent requirements exacerbate already substantial cost and logistical burdens on teens, making contraception a practical impossibility

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237. *Id.* at 9.

238. For possible explanations, see *id.* at 4 (positing that "the chaos and uncertainty of life in poverty work against believing one's own efforts at self-regulation can make a difference," while noting evidence that "scarcity of money leads to an intensive focus on anything that might alleviate that scarcity immediately, using up 'bandwidth' that could otherwise be used to bolster one's self-regulation"). The authors are careful to stress that, to the extent "class differences in the skill of efficacy" reflect "aspects of culture," culture should be understood as connected to "the structural constraints emanating from class position." *Id.* (citations omitted); *see also id.* at 13 ("[W]e do not see explaining behavior in terms of a personal characteristic such as efficacy to imply blame . . . . We hope our research helps advance a theoretical perspective that sees structural constraints, such as social class, to affect outcomes both directly and through personal characteristics, like efficacy, that the constraints encourage." (citation omitted)).

239. *See id.* at 1.

240. *See, e.g.*, PEGGY ORENSTEIN, GIRLS & SEX 195–97 (2016) (describing socialized gender roles and conventional sexual scripts among young men and women); *see also infra* note 260.

241. *See Minors' Access to Contraceptive Services*, GUTTMACHER INST. (2023), https://www.guttmacher.org/state-policy/explore/minors-access-contraceptive-services [https://perma.cc/64ER-DWQE]; *see also infra* notes 244–49 and accompanying text (discussing Title X and ongoing legal challenges). These regulations are in considerable tension with the U.S. Supreme Court decision invalidating a New York law that criminalized the distribution of contraceptives to a minor. Carey v. Population Servs. Int'l, 431 U.S. 678, 701 (1977); *see* Planned Parenthood Ass'n of Utah v. Matheson, 582 F. Supp. 1001, 1008–09 (D. Utah 1983) (striking down Utah's parental notification law on constitutional grounds).

for an untold number of girls.[242] Teens who require a parent's consent in order to access contraceptive services may be compelled to forego those services, with unwanted pregnancy too often the result.[243]

Legal constraints on minors' reproductive decision making are mounting. Federal grants to providers under the Title X Family Planning Program (Title X) have long been conditioned on the provision of contraceptive services to adolescents without requiring parental consent.[244] But recently, in a challenge to Title X's parental consent and notification prohibition, a U.S. district court in Texas held that the provision in question violated a father's state statutory right to consent to his child's receipt of contraceptive services and, even more sweepingly, his federal due process right to direct his child's upbringing.[245] In March 2024, the Fifth Circuit affirmed the district court's declaration that Title X does not preempt Texas's parental consent law.[246] As a result, Texas teens now need parental consent to access contraceptive services at federally funded clinics.[247] The ruling

242. As Deborah Brake and Joanna Grossman observe, "[m]inors thus start with less of a right, compounded by unique challenges that impair access such as the lack of transportation or money and the inability to sneak away for medical appointments undetected by a disapproving parent." Deborah L. Brake & Joanna L. Grossman, *Reproducing Inequality Under Title IX*, 43 HARV. J.L. & GENDER 171, 216–17 (2020) (citation omitted).

243. *See* Madeline Zevodny, *Fertility and Parental Consent for Minors to Receive Contraceptives*, 8 AM. J. PUB. HEALTH 1347, 1347 (2004) (finding that pregnancies and births among young women increased in a county that imposed a parental consent requirement for contraceptives); *see also* Brake & Grossman, *supra* note 242, at 217 (explaining how parental consent requirements run counter to abundant evidence that minors benefit from unfettered access to contraception).

244. 42 C.F.R. § 59.10(b) (2025).

245. Deanda v. Becerra, 645 F. Supp. 3d 600 (N.D. Tex. 2022), *aff'd*, 96 F.4th 750 (5th Cir. 2024).

246. Deanda v. Becerra, 96 F.4th 750 (5th Cir. 2024). The Fifth Circuit also affirmed the district court's standing analysis but reversed its decision to vacate a regulation prohibiting Title X grantees from obtaining parental consent because said regulation was promulgated after the plaintiff filed suit. *Id.* at 767–68.

247. *See* Press Release, Mishka Espey, Ctr. For Am. Progress, 5th Circuit Ruling Will Almost Certainly Lead to More Teen Pregnancies, Says CAPS Sabrina Talukder (Mar. 12, 2024), https://www.americanprogress.org/press/statement-5th-circuit-ruling-will-almost-certainly-lead-to-more-teen-pregnancies-says-caps-sabrina-talukder [https://perma.cc/8DER-PXR2] ("If upheld, today's ruling strips youth of their sexual and reproductive autonomy and will almost certainly lead to more teen pregnancies in Texas—a state with some

provides a worrisome roadmap for placing contraceptive care out of the reach of teens, not only in states that currently require parental consent,[248] but throughout the nation.[249]

For young women and girls, challenges to accessing contraception are compounded by limited informational access. Sex education in American schools is woefully inadequate.[250] Nearly half the states have no sex education requirement whatsoever; where sex education is provided, most states mandate that abstinence be emphasized,[251] and only twenty states require that

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of the most restrictive sex education and abortion laws and, consequently, some of the highest teen pregnancy rates in the country.").

248. *See* WEN W. SHEN, CONG. RSCH. SERV., LSB10916, TITLE X PARENTAL CONSENT FOR CONTRACEPTIVE SERVICES LITIGATION: OVERVIEW AND INITIAL OBSERVATIONS (PART 1 OF 2) (2023) (noting that, in line with nearly four decades of cases from lower courts (including the District of Columbia, Second, Eighth, and Tenth Circuits), "current Department of Health and Human Services (HHS) regulations . . . prohibit[] Title X projects from requiring parental consent and notification for services provided to minors").

249. *See Deanda*, 645 F. Supp. 3d at 638 (holding that "the right of parents to consent to their minor children's use of contraceptives is deeply rooted in this Nation's history and tradition" and, further, that "no compelling governmental interest justifies Defendants' disregard of Plaintiff's parental rights").

250. *See US Adolescents' Receipt of Formal Sex Education*, *supra* note 232. These deficiencies are likely to worsen in the coming years. *See, e.g.*, Brenna Flanagan, *NHCS Changes Sex Ed Offerings to Comply with Trump Order*, PORT CITY DAILY (Mar. 5, 2025), https://portcitydaily.com/latest-news/2025/03/05/nhcs-changes-sex-ed-offerings-to-comply-with-trump-orders-parents-now-must-opt-in [https://perma.cc/R6QZ-YFJY]; Molly Gibbs, *Trump Administration Targets California Sex Ed Program*, MERCURY NEWS (Mar. 31, 2025), https://www.mercurynews.com/2025/03/31/trump-targets-california-sex-ed [https://perma.cc/5MYW-TGGW].

251. *See* Mollie Fairbanks, *Sex Education and HIV Education*, GUTTMACHER INST. (2025), https://www.guttmacher.org/state-policy/explore/sex-and-hiv-education [https://perma.cc/8LGP-VBTM] (reporting that twenty-two states and D.C. require information on contraception to be provided; forty-three states and DC require information on abstinence to be provided; and thirty states require abstinence to be stressed); *see also* Kelli Stidham Hall et al., *The State of Sex Education in the United States*, 58 J. ADOLESCENT HEALTH 595, 595 (2016) (observing that, "[w]ithout cohesive or consistent implementation processes, a highly diverse 'patchwork' of sex education laws and practices exists" and only about a dozen states mandate instruction be medically accurate). *See generally* Sarah Shapiro & Catherine Brown, *Sex Education Standards Across the States*, CTR. FOR AM. PROGRESS (2018), https://www.americanprogress.org/article/sex-education-standards-across-states [https://perma.cc/QR26-52X9]. On the popularity across the political spectrum of comprehensive sex education, see generally Leslie Kantor & Nicole Levitz, *Parents' Views on Sex Education in Schools: How Much Do Democrats and Republicans Agree?*, PLOS ONE, July 3, 2017, at 1.

information on contraception be provided.[252] The upshot is that less than half of adolescents in a nationally representative sample received instruction on where to obtain contraception before their first sexual encounter; just over half were instructed on condom use.[253] Simply put, "[y]oung people are not getting the sex education they need."[254]

This pervasive information deficit corresponds to higher rates of teen pregnancy.[255] Research consistently suggests that abstinence-only programs are ineffective at reducing teen births.[256] Comprehensive sex education is far more successful in this regard,[257] as most recently evidenced by a large population-

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252. *See* Fairbanks, *supra* note 251.

253. *See* Laura D. Lindberg & Leslie M. Kantor, *Adolescents' Receipt of Sex Education in a Nationally Representative Sample, 2011–2019*, 70 J. ADOLESCENT HEALTH 290, 295 (2021). These findings varied by respondent race: 30% of non-Hispanic Black females reportedly learned about where to get birth control before having sex for the first time, while this was true for 45% of non-Hispanic White females and 49% of Hispanic females. *Id.* at 294.

254. *U.S. Adolescents' Receipt of Formal Sex Education*, GUTTMACHER INST. (Feb. 2022), https://www.guttmacher.org/fact-sheet/adolescents-teens-receipt-sex-education-united-states [https://perma.cc/YZ72-H5ZN]; Hall et al., *supra* note 251, at 596 (noting disparities in sex education along lines of gender, race, and class, while further observing that "critical gaps exist in the types of information (practical tips on 'where to get birth control' and 'how to use condoms' were lowest) and the mistiming of information (most adolescents received instruction after sexual debut) received").

255. Norms surrounding teen contraceptive use may exacerbate the effects of information deficits. *See, e.g.*, Ellie Ruos & Violet Guzman-Robles, *Birth Control Stigma Casts Shadow on Other Reasons for Use*, GLENBROOK S. HIGH SCH. ORACLE (Nov. 12, 2018), https://theoracle.glenbrook225.org/features/2018/11/12/birth-control-stigma-casts-shadow-on-other-reasons-for-use [https://perma.cc/8B7H-PJK7] (describing high schoolers' feelings of shame around using birth control for non-contraceptive purposes); *see* Sara A. Vasilenko et al., *Gender, Contraceptive Attitudes, and Condom Use in Adolescent Romantic Relationships: A Dyadic Approach*, 25 J RSCH. ADOLESCENCE 51, 51 (2015) (examining how partners' attitudes about contraceptive use change over time).

256. *See, e.g.*, Nicholas D.E. Mark & Lawrence L. Wu, *More Comprehensive Sex Education Reduced Teen Births: Quasi-Experimental Evidence*, PROCS. NAT'L ACAD. SCI. U.S. AM., Feb. 14, 2022, at 1 (citing a "broad research base" and providing new evidence of the connection between comprehensive sex education and the reduction of teen births). On continued federal funding for abstinence-only education despite its proven ineffectiveness, see *Fact Sheet: Federally Funded Abstinence-Only Programs: Harmful and Ineffective*, GUTTMACHER INST. (2021), https://www.guttmacher.org/sites/default/files/factsheet/abstinence-only-programs-fact-sheet.pdf [https://perma.cc/B626-97TQ]; see also ORENSTEIN, *supra* note 240, at 210–12 (describing federal expenditures on abstinence-only education during the Bush and Obama administrations).

257. "Studies have demonstrated that comprehensive sexuality education programs reduce the rates of sexual activity, sexual risk behaviors ([e.g.],

level study finding a causal relationship between federal funding for comprehensive sex education and a decrease in adolescent births.[258] Because most girls are not provided with critical information about contraception, they remain at a distinct disadvantage when it comes to reproductive decision making.[259]

The lack of comprehensive sex education harms adolescents in yet another way, by enabling ignorance and misconceptions around consent.[260] In *Sexual Citizens*, their groundbreaking multi-year study of sexual assault on a college campus, sociologists Jennifer Hirsch and Shamus Khan link deficient sex education in high school to the sexual violence that occurs with alarming frequency in young populations.[261] Without absolving perpetrators of responsibility for abusive conduct,[262] Hirsch and Khan decry the persistence of conditions

> in which many young people come of age without a language to talk about their sexual desires, overcome with shame, unaccustomed to considering how their relative social power may silence a peer, highly attentive to their personal wants but deaf to those of others, or socialized

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number of partners and unprotected intercourse), sexually transmitted infections, and adolescent pregnancy." *Committee Opinion No. 678: Comprehensive Sexual Education*, AM. COLL. OBSTETRICIANS & GYNECOLOGISTS (Nov. 2016), https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2016/11/comprehensive-sexuality-education [https://perma.cc/8FT6-GA9A].

258. *See* Mark & Wu, *supra* note 256, at 5.

259. *See* Erin Blakemore, *Teens Aren't Receiving Enough Sex Education, Study Says*, WASH. POST (Nov. 28, 2021), https://www.washingtonpost.com/health/sex-education-teens/2021/11/26/c005d154-4c98-11ec-b73b-a00d6e559a6e_story.html [https://perma.cc/U3MG-YMBM] ("Most adolescents are not receiving sex education that will enable them to manage their sexual lives." (quoting Kantor & Levitz, *supra* note 251)).

260. Faulty sex education also leaves intact—and, at times, contributes to—the construction of gendered sexual norms. *See* JENNIFER S. HIRSCH & SHAMUS KHAN, SEXUAL CITIZENS: A LANDMARK STUDY OF SEX, POWER, AND ASSAULT ON CAMPUS 172 (2020) (describing the prevalent sexual script "in which men's job is to move the ball down the field . . . fram[ing] sex as a game people play against an opponent . . . [with] winners and losers"); ORENSTEIN, *supra* note 240, at 195 ("Despite changing roles in other realms, boys continue to be seen as the proper initiators of sexual contact" while girls "remain the gatekeepers of sex"). On the relationship between sexual norms and conventional sex education, see generally Michelle Fine, *Sexuality, Schooling, and Adolescent Females: The Missing Discourse of Desire*, 58 HARV. EDUC. REV. 29 (1988).

261. HIRSCH & KHAN, *supra* note 260 *passim*.

262. *See id.* at 256 (emphasizing that "individuals bear responsibility for their own actions," as evidenced in part by "the many instances in which one person said no or otherwise managed to convey that they were not into what was happening, and the other person noticed and stopped").

> to feel unable to tell someone "no" or to give a clear and unambiguous "yes."[263]

The state's failure to educate teens about consent is clearly not the only factor contributing to sexual violence,[264] but the neglect is nevertheless significant.[265] For adolescents, the same pressures that induce unwanted sex[266] also constrain contraceptive usage.[267]

C. ABUSE[268]

Like sexual coercion,[269] *reproductive coercion* operates as a routine component of intimate partner violence.[270] The American College of Obstetricians and Gynecologists (ACOG) defines the term as "behavior intended to maintain power and control in a relationship related to reproductive health," including "explicit attempts to impregnate a partner against her will, control outcomes of a pregnancy, coerce a partner to have unprotected sex, and interfere with contraceptive methods."[271] Reproductive

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263. *Id.* at 255–56.

264. In addition to urging improvements in sex education, Hirsch and Khan make several recommendations around what they call "diversity, power, and inequality." *Id.* at 262.

265. As Hirsch and Khan conclude, "[t]he patchy, imperfect, and worsening landscape of sex education produces vulnerability to sexual assault . . . ." *Id.* at 267.

266. *See supra* notes 172–80 and accompanying text.

267. *See supra* notes 231–32 and accompanying text; *see also* Elizabeth Miller et al., *Male Partner Pregnancy-Promoting Behaviors and Adolescent Partner Violence: Findings from a Qualitative Study with Adolescent Females*, 7 AMBULATORY PEDIATRICS 360, 362 (2007) (finding, in a study of adolescent females who experienced intimate partner violence, that a quarter reported that their abusive male partners had interfered with planned contraception—forcing the female partners to hide their contraceptive methods). *See generally* Nemeth et al., *supra* note 177; Timothy A. Roberts et al., *Intimate Partner Abuse and the Reproductive Health of Sexually Active Female Adolescents*, 36 J. ADOLESCENT HEALTH 380 (2005) (studying the associations between verbal and physical abuse and reproductive health behaviors). For more extensive discussion of reproductive coercion, see *infra* notes 270–79 and accompanying text.

268. Unless otherwise specified, the terms "abuse," "domestic violence," "intimate partner violence," and "domestic abuse" are used interchangeably throughout this Article.

269. *See supra* notes 157–87 and accompanying text.

270. Under some definitions, sexual coercion is considered a form of reproductive coercion. *See, e.g.*, Kathleen C. Basile et al., *Prevalence of Intimate Partner Reproductive Coercion in the United States: Racial and Ethnic Differences*, J. INTERPERSONAL VIOLENCE, Nov. 2021, at 1.

271. *Committee Opinion No. 554: Reproductive and Sexual Coercion*, 121 AM. COLL. OBSTETRICIANS & GYNECOLOGISTS 411, 411 (2013); *see* Sam

coercion commonly entails birth control sabotage,[272] as well as efforts to pressure and coerce pregnancy.[273]

Researchers have established a close reciprocal relationship between all manner of abusive control[274] and diminished reproductive options.[275] Intimate partner violence leads to poor reproductive outcomes,[276] unwanted pregnancy chief among them.[277]

Rowlands & Susan Walker, *Reproductive Control by Others: Means, Perpetrators and Effects*, 45 BMJ SEXUAL & REPROD. HEALTH 61, 61 (2019) (reviewing the relevant medical and social science literature).

272. Birth control sabotage has been defined as:

> Birth control sabotage is active interference with a partner's contraceptive methods in an attempt to promote pregnancy. Examples include hiding, withholding, or destroying a partner's oral contraceptives; breaking or poking holes in a condom on purpose or removing a condom during sex in an attempt to promote pregnancy; not withdrawing when that was the agreed upon method of contraception; and removing vaginal rings, contraceptive patches, or intrauterine devices (IUDs).

Committee Opinion No. 554, *supra* note 271, at 411.

273. "Pregnancy pressure involves behavior intended to pressure a female partner to become pregnant when she does not wish to become pregnant. Pregnancy coercion involves coercive behavior such as threats or acts of violence if a partner does not comply with the perpetrator's wishes regarding the decision to terminate or continue a pregnancy." *Id.* After *Dobbs*, reports of domestic abuse involving reproductive coercion nearly doubled. Jennifer Gerson, *Domestic Violence Calls About "Reproductive Coercion" Doubled After the Overturn of Roe*, 19TH NEWS (Oct. 18, 2023), https://19thnews.org/2023/10/domestic-violence-calls-reproductive-coercion-dobbs-decision [https://perma.cc/J6KA-WLXL]; *see also* Carter Sherman, *Domestic Abusers are Using Abortion Bans to Control Their Victims*, VICE (July 13, 2023), https://www.vice.com/en/article/dy3yny/abortion-bans-domestic-abusers [https://perma.cc/5KQ6-PV9T] (describing concerns about increased reproductive coercion in the wake of recent Supreme Court decisions).

274. "Many women who experience reproductive and sexual coercion also experience physical or sexual violence." *Committee Opinion No. 554*, *supra* note 271, at 412.

275. *See, e.g.*, Cara Nikolajski et al., *Race and Reproductive Coercion: A Qualitative Assessment*, 25 WOMEN'S HEALTH ISSUES J. 216, 221 (2015) (studying male partner reproductive coercion as a factor in contraceptive nonadherence among "low-income A[frican] A[merican] and White women").

276. *See, e.g.*, Ann M. Moore et al., *Male Reproductive Control of Women Who Have Experienced Intimate Partner Violence in the United States*, 70 SOC. SCI. & MED. 1737, 1737 (2010) (finding that seventy-four percent of respondents experienced male reproductive control).

277. *See, e.g.*, Elizabeth Miller et al., *Pregnancy Coercion, Intimate Partner Violence and Unintended Pregnancy*, 81 CONTRACEPTION 316, 316 (2010) ("Pregnancy coercion and birth control sabotage . . . are associated with increased risk for unintended pregnancy."); *Committee Opinion No. 554*, *supra* note 271, at 412 (concluding that "[e]xperiencing violence increases a woman's risk of unintended pregnancies," and discussing research findings that "women

At the same time, pregnancy enhances vulnerability to abuse;[278] homicide is the leading cause of death of pregnant women.[279]

In recent years, these dangers have become only more acute.[280] Since *Roe*'s demise, the criminalization of abortion has given abusers new "points of leverage,"[281] while making it even more difficult for domestic violence victims to escape the abuse.[282] The nucleus of domestic violence is a power dynamic that diminishes and even eliminates women's choices about their

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with unintended pregnancies were four times more likely to experience [intimate partner violence] than women whose pregnancies were intended;" one study found that male perpetrators of intimate partner violence "were more likely to report inconsistent or no condom use during vaginal and anal intercourse as well as forced sexual intercourse without a condom, increasing the likelihood of unintended pregnancy").

278. *Intimate Partner Violence and Reproductive Coercion*, PLANNED PARENTHOOD (2012), https://www.plannedparenthood.org/files/3613/9611/7697/IPV_and_Reproductive_Coercion_Fact_Sheet_2012_FINAL.pdf [https://perma.cc/B48M-F4YQ] ("Unplanned pregnancies increase women's risk for violence and violence increases women's risk for unplanned pregnancies."); *see* Deborah Tuerkheimer, *Conceptualizing Violence Against Pregnant Women*, 81 IND. L.J. 667, 670–73 (2006) (summarizing social scientific understandings of pregnancy battering).

279. Maeve Wallace et al., *Homicide During Pregnancy and the Postpartum Period in the United States, 2018–2019*, 138 OBSTETRICS & GYNECOLOGY 762, 762 (2021). A 2022 study found that being pregnant or postpartum increases a person's risk of homicide by thirty-five percent compared to those of reproductive age who are not pregnant or postpartum. *See* Maeve E. Wallace, *Trends in Pregnancy-Associated Homicide, United States, 2020*, 112 AM. J. PUB. HEALTH 1333, 1333 (2022). A disproportionate number of pregnant homicide victims are Black or young (or both). *Id.* at 1334.

280. *See* Gerson, *supra* note 273; Sherman, *supra* note 273.

281. Gerson, *supra* note 273. This dynamic is experienced most intensely by Black women and pregnant people from other marginalized backgrounds. *See id.* ("When anything is criminalized, it can serve as a tool of leverage against a survivor. It could now open a warrant, threaten your immigration status, impact your child support you receive for your kids, even your access to food and water. Nothing is more powerful than the criminal legal system because nothing is scarier." (quoting one expert's observations)).

282. Melissa Gira Grant, Dobbs *Was a Gift to Domestic Abusers*, NEW REPUBLIC (May 9, 2024), https://newrepublic.com/article/181412/domestic-violence-abortion-ban-dobbs-abusers [https://perma.cc/2S45-4FLP]. *See generally* Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991) (detailing the dynamics of power and control that define abusive relationships and introducing the concept of "separation assault" to help explain challenges facing victims). Escaping an abusive relationship during pregnancy is often especially dangerous, making abortion access "nothing short of a lifeline for those in domestic violence situations." Gerson, *supra* note 273.

bodies and their lives.[283] Under these circumstances, pregnancy is—at best—fraught.

D. DISABILITY

Women who are disabled[284] encounter a host of structural impediments that result in a greater risk of unintended pregnancy.[285] Disabled women of color, and particularly Black disabled women, also face a set of distinct obstacles.[286]

Research shows that disabled women generally have limited access to contraceptive care.[287] A first-of-its kind qualitative

283. *See supra* note 182 and accompanying text.

284. As Robyn Powell has observed, "[o]pinions within the disability community vary about whether person-first ('person with a disability') or identity-first ('disabled person') language is more empowering and respectful." Robyn M. Powell, *Including Disabled People in the Battle to Protect Abortion Rights: A Call-to-Action*, 70 UCLA L. REV. 774, 778 n.23 (2023) (citation omitted). Following Powell, I use person-first and identity-first language interchangeably in this discussion.

285. *See* Willi Horner-Johnson et al., *Pregnancy Intendedness by Maternal Disability Status and Type in the United States*, 52 PERSPS. ON SEXUAL & REPROD. HEALTH 31, 31 (2020) (finding a higher proportion of unintended pregnancies among women with disabilities than among women without disabilities (fifty-three percent versus thirty-six percent), and "significantly higher odds of [unintended] pregnancies among women with hearing disability, cognitive disability[,] and independent living disability than for pregnancies among women without disabilities"); *see also* Jeanne L. Alhusen et al., *Perceptions of Barriers to Effective Family Planning Services Among Women with Disabilities*, 14 DISABILITY & HEALTH J., 2021, at 1, 2 (citing studies).

286. *See* Emily DiMatteo et al., *Reproductive Justice for Disabled Women: Ending Systemic Discrimination*, CTR. FOR AM. PROGRESS (Apr. 13, 2022), https://www.americanprogress.org/article/reproductive-justice-for-disabled-women-ending-systemic-discrimination [https://perma.cc/JP34-KGDY] (observing that "[r]acism, anti-Blackness, and misogynoir affect both the quality of life and actual lives of disabled people of color in the United States, particularly Black disabled women;" also noting a "lack of data and research on the intersection of disability, gender, and race" due in part to "distrust, whitewashing, and racism within the disability community").

287. *See e.g.*, Alhusen et al., *supra* note 285, at 2 ("[W]omen with disabilities were less likely to receive any family planning services than women without disabilities, and these disparities were most pronounced in women reporting low education, low income, and unemployment."); William Mosher et al., *Contraceptive Use by Disability Status: New National Estimates from the National Survey of Family Growth*, 97 CONTRACEPTION 552, 552 (2018) (reporting reduced odds of oral contraceptive usage among women with physical disabilities and increased odds of contraceptive non-use overall among women with cognitive disabilities).

study of women with diverse disabilities[288] found that nearly all participants reported roadblocks to obtaining family planning services.[289] Widespread "physical or system-level barriers" that are especially salient in this context include a lack of accessible exam tables, poorly skilled or unavailable interpreters for Deaf patients, and dependence on caregivers for transportation and transfer support.[290] The need for caregiver assistance can be especially vexing for younger women whose caregivers are parents.[291] Women who are unable to have a private conversation with a health care provider may find, as a practical matter, that contraceptive care is out of reach.

Cost is also a factor for many disabled women.[292] Compared to people without disabilities, people with disabilities are twice as likely to be poor.[293] In addition to the insurance-related challenges already discussed,[294] disabled women who are covered by

288. Alhusen et al., *supra* note 285, at 3 (exploring perceived barriers among women with diverse disabilities, including hearing, vision, cognition, mobility, self-care, and independent living).

289. *See id.* at 3–5 (describing reported barriers to accessing family planning services and associating these barriers with an increased risk of unintended pregnancy).

290. *See* DiMatteo et al., *supra* note 286 (explaining that, despite federal laws protecting disabled people from discrimination, health facilities and transportation remain inaccessible to many patients seeking reproductive health care).

291. *See* Alhusen et al., *supra* note 285, at 3 (noting that study participants repeatedly mentioned difficulties accessing contraceptive information because "conversations around sexual activity and the potential for family planning options could not freely be discussed" with caregivers present in the health care setting).

292. *See id.* at 4 (reporting that more than half the study participants experienced significant financial challenges that made it difficult to obtain recommended reproductive health care).

293. *See Highlighting Disability/Poverty Connection, NCD Urges Congress to Alter Federal Policies that Disadvantage People with Disabilities*, NAT'L COUNCIL ON DISABILITY (Oct. 26, 2017), https://ncd.gov/newsroom/2017/disability-poverty-connection-2017-progress-report-release [https://perma.cc/TK6U-85KU]. For discussion of the extreme economic disadvantages suffered by disabled people, see Powell, *supra* note 284, at 800–01 (documenting steep disparities in employment rates and income levels, along with higher costs of living, and emphasizing that these inequities are even more pronounced for disabled people who also belong to other marginalized groups).

294. *See supra* notes 208–14 and accompanying text.

Medicaid may find the co-pays unaffordable,[295] and some providers are unwilling to accept this form of insurance.[296]

Even when these hurdles are overcome, disabled women often receive subpar reproductive services. Common stereotypes of people with disabilities as asexual[297] can lead providers to dismiss or overlook disabled women's contraceptive needs.[298] Many women with diverse disabilities report that the subject of contraception is avoided entirely during health care appointments.[299]

Outside the health care setting, stereotyping and misconceptions about disabled women's sexuality amplify sex education's extensive shortcomings.[300] Students with disabilities receive little to no information about reproduction, including facts about contraception and pregnancy prevention.[301] About half the population of disabled students are provided no sex education whatsoever.[302] Those who do participate in sex education classes are typically presented with information that fails to

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295. *See* Alhusen et al., *supra* note 285, at 4 (describing one study participant's observation that "when it comes to choosing groceries or co-pays, I have to choose food"); *see also supra* notes 200–24 and accompanying text.

296. *See* Janna Wisniewski et al., *Mediators of Discrimination in Primary Care Appointment Access*, ECON. LETTERS, Jan. 21, 2021, at 1, 2 (discussing the ways in which Medicaid patients are disadvantaged in obtaining primary care).

297. *See Shifting the Frame on Disability Rights for the U.S. Reproductive Rights Movement*, CTR. FOR REPROD. RTS. 13–14 (2017), https://www.reproductiverights.org/sites/crr.civicactions.net/files/documents/Disability-Briefing-Paper-FINAL.pdf [https://perma.cc/4VTG-T66M] (debunking myths and "common stereotypes concerning the sexuality of people with disabilities," including that people with disabilities are asexual or that they are hypersexual with "an out-of-control libido that may endanger themselves or others").

298. *See* DiMatteo et al., *supra* note 286 ("Disabled people have reported having their contraceptive needs dismissed or overlooked by health care providers."); Powell, *supra* note 284, at 805–06 ("Women with disabilities are significantly less likely to receive contraception or contraception counseling than nondisabled women.").

299. *See* Alhusen et al., *supra* note 285.

300. *See supra* note 297 and accompanying text.

301. *See* Powell, *supra* note 284, at 807–08 ("The high rates of unintended pregnancies among disabled people may also result from scant access to information about reproduction. Many people with disabilities do not receive reproductive health information, including sexual education.").

302. *See* DiMatteo et al., *supra* note 286 (observing that "access to sexual education varies greatly by state and continues to be under attack," and finding that, despite the federal statutory guarantee of free and appropriate public education that includes sexual education for disabled people, only about half of students who receive services receive any reproductive health education).

account for disability.[303] These deficits appear to have tangible effects on behaviors associated with unwanted pregnancy, as demonstrated by a recent study[304] of the relationship between young women's disability status[305] and their contraceptive use at first voluntary intercourse.[306] The analysis suggests that "differences in the reported receipt of formal sex education"[307] are among the many factors that contribute to lower rates of contraceptive use among disabled women.[308]

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303. *See id.* ("In practice, sexual education is often not comprehensive and rarely includes disabled people of color, LGBTQI+ people, and people at the intersection of multiple identities."); *see also* Powell, *supra* note 284, at 808 ("[O]nly three states explicitly include disabled students in their sexual education requirements, and only six states and the District of Columbia provide optional resources for an accessible sexual education curriculum for students with disabilities. . . . LGBTQ+ people with disabilities are often denied appropriate sexual education that is inclusive of different gender identities and sexual orientations."). A separate but related problem is that "most sexual education curricula intended for students with disabilities, especially students with intellectual and developmental disabilities, are not evidence-based, suggesting that they may not be effective." *Id.*

304. *See* Eun Ha Namkung et al., *Contraceptive Use at First Sexual Intercourse Among Adolescent and Young Adult Women with Disabilities: The Role of Formal Sex Education*, 103 CONTRACEPTION 178, 179, 181 (2021) (analyzing data from a nationally representative sample of 2,861 women aged eighteen to twenty-four years who experienced voluntary first sexual intercourse with a male partner).

305. *See id.* at 179 (surveying respondents with a range of disabilities including difficulty hearing; seeing; concentrating, remembering, or making decisions; walking or using stairs; dressing or bathing; and doing errands without assistance).

306. *See id.* at 181. Of note, women whose "first intercourse was involuntary" were excluded from the sample; this group comprised seven percent of women who reported intercourse. *Id.* at 178.

307. *See id.* at 183. Researchers found that women with cognitive disabilities were less likely than nondisabled women "to report receipt of instruction in each of six discrete formal sex education topics," including methods of birth control, where to get birth control, how to use a condom, and "how to say no to sex." *Id.* at 178–79. In addition, among women with cognitive disabilities, "the greater number of topics received predicted an increased likelihood of contraceptive use at first voluntary intercourse." *Id.* at 178.

308. *See id.* at 183 ("[B]arriers other than poor access to formal sex education, such as access to contraceptives, may be critical mechanisms linking disability to contraceptive nonuse. Women with cognitive disabilities may be unable to afford contraceptives, need assistance from others to obtain contraceptives, and not be expected to engage in sexual activity by healthcare professionals."); *see also supra* notes 287–96 and accompanying text.

Disparities in contraceptive use may be further explained by women's distrust of health care providers.[309] In particular, the social meaning of contraception is deeply embedded in a dark history of state-sanctioned sterilization abuse.[310] Disabled women's attitudes toward contraception cannot be disentangled from this past,[311] especially given persisting patterns of reproductive oppression.[312]

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309. *See* Paul Hudson & Michelle A. Williams, *People Are Much Less Likely to Trust the Medical System If They Are From an Ethnic Minority, Have Disabilities, or Identify as LGBTQ+, According to a First-of-its-Kind Study by Sanofi*, FORTUNE (Jan. 31, 2023), https://fortune.com/2023/01/31/people-trust-health-medical-system-ethnic-minority-disabilities-identify-lgbtq-study-sanofi-hudson-williams [https://perma.cc/3LUY-3AQ9] ("In the U.S., 77% of people with disabilities . . . say they have had experiences that damaged their trust in the healthcare system. Women, ethnic minorities, people with disabilities, and individuals who identify as LGBTQ+ are far more likely to distrust their healthcare providers–and the healthcare system as a whole."). The survey also found that apart from understanding the impact of historical abuses of power against their communities, people from marginalized populations often "report personal experiences that eroded their trust: experiences where providers did not listen to them, and made them feel unwelcome, judged, and even unsafe." *Id.* For full survey results, see *A Million Conversations: How We're Bridging the Healthcare 'Trust Gap' with Marginalized Communities*, SANOFI (Jan. 1, 2023), https://www.sanofi.com/en/magazine/social-impact/global-poll [https://perma.cc/VTS9-H2GH]. *See generally* Ivy K. Ho et al., *Medical Mistrust Among Women with Intersecting Marginalized Identities: A Scoping Review*, 27 ETHNICITY & HEALTH 1733 (2022) (synthesizing research on medical mistrust among marginalized women).

310. For one account, see Samuel R. Bagenstos, *Disability and Reproductive Justice*, 14 HARV. L. & POL'Y REV. 273, 287–92 (2020); see also Powell, *supra* note 284, at 783–94.

311. *See, e.g.*, Lauren Mitchell et al., *Contraceptive Provision to Women With Intellectual and Developmental Disabilities Enrolled in Medicaid*, 142 OBSTETRICS & GYNECOLOGY 1477, 1477 (2023) (finding, in a retrospective cohort study using 2019 North Carolina Medicaid claim data, that compared with nondisabled women, "a significantly smaller proportion with intellectual and developmental disabilities received most or moderately effective contraception," and positing a connection to the state's "shameful history of eugenics-based, forced sterilization that included a focus on people with intellectual and developmental disabilities, which may continually affect clinician and patient interactions around contraceptive use"). For context, see Alfred L. Brophy & Elizabeth Troutman, *The Eugenics Movement in North Carolina*, 94 N.C. L. REV. 1871, 1877 (2016) ("Between 1929 and 1974, North Carolina authorized the sterilization of nearly 7,600 people under the state's 1929 sterilization law and subsequent North Carolina Eugenics Board program.").

312. *See, e.g.*, *Forced Sterilization of Disabled People in the United States*, NAT'L WOMEN'S L. CTR. 28 (2021), https://nwlc.org/wp-content/uploads/2022/01/*f*.NWLC_SterilizationReport_2021.pdf [https://perma.cc/VPH8-47MA] (describing recent legislative initiatives to curtail reproductive capacity that include the 2019 passage of forced sterilization laws in two states); Bagenstos,

These myriad constraints on contraceptive use are accentuated by the prevalence of sexual coercion in the lives of disabled women. Women with disabilities are at greater risk of unwanted pregnancy in part because they are at greater risk of unwanted sex.[313] So too are women with disabilities more vulnerable to intimate partner violence[314]—another risk factor for unintended pregnancy.[315] In the lives of disabled women, as with other

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supra note 310, at 289 ("As a matter of informal practice, people with some disabilities—particularly intellectual disabilities—continue to be routinely sterilized without their making a meaningful choice."); Powell, *supra* note 284, at 794 ("[P]eople with disabilities continue to endure reproductive oppression, including forced sterilization or abortion, denial of parental rights once their children are born, and laws prohibiting them from marrying.").

313. *See* Kathleen C. Basile et al., *Disability and Risk of Recent Sexual Violence in the United States*, 106 AM. J. PUB. HEALTH 928, 932 (2016) (finding, in a first-of-its-kind nationally representative study, that having a disability was associated with an increased risk of sexual coercion, and thirty-nine percent of the women who had been raped within the twelve months preceding the survey had a disability when they were raped). These results are "consistent with previous literature suggest[ing] that women and men with a disability are at greater risk for recent sexual violence victimization compared to those without a disability." *Id.* at 932 (citations omitted); *see* Amylee Mailhot Amborski et al., *Sexual Violence Against Persons With Disabilities: A Meta-Analysis*, 23 TRAUMA, VIOLENCE & ABUSE 1330, 1336 (2022) (finding that individuals with disabilities of all ages are twice as likely to be victims of sexual violence during their lifetime than nondisabled individuals). On the legal treatment of sexual consent, sexual violence, and mental disability, see Jasmine E. Harris, *Sexual Consent and Disability*, 93 N.Y.U. L. REV. 480, 480 (2018).

314. *See*, *e.g.*, Douglas A. Brownridge, *Partner Violence against Women with Disabilities: Prevalence, Risk, and Explanations*, 12 VIOLENCE AGAINST WOMEN 805, 805 (2006) (finding that women with disabilities were forty percent more likely than nondisabled women to have experienced intimate partner violence in the preceding five years). Research suggests that among disabled populations, people of color are disproportionately victimized by domestic violence. Elizabeth P. Cramer & Sara-Beth Plummer, *People of Color with Disabilities: Intersectionality as a Framework for Analyzing Intimate Partner Violence in Social, Historical, and Political Contexts*, 18 J. AGGRESSION, MALTREATMENT & TRAUMA 162, 172–77 (2009).

315. *See, e.g.*, Jeanne L. Alhusen et al., *Intimate Partner Violence, Reproductive Coercion, and Unintended Pregnancy in Women with Disabilities*, DISABILITY & HEALTH J., Apr. 2020, at 1, 6 (describing the varied ways study participants felt their disability "elevated their risk of violence," including that a majority recounted "being pressured into sex when they did not want to with partners explicitly discussing their own desires to have them become pregnant").

marginalized women,[316] reproductive and sexual pressures are intertwined.[317]

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All told, social science evinces a range of structural impediments to avoiding unwanted pregnancy. These barriers, ignored by law, challenge the dominant paradigm of reproductive choice.

IV. FROM CHOICE TO REPRODUCTIVE AGENCY[318]

Unwanted pregnancy is best situated against a continuum of coercion[319] that remains outside the purview of law. While legal indifference to unwanted pregnancy is epitomized by abortion bans and their crabbed exception for rape, law's failure reaches much farther, to liberal understandings of consent and the underlying ideal of autonomy.

An alternative, which emerges from accurately describing the conditions of women's lives, is a norm I call *reproductive*

316. *See supra* notes 167–86 and accompanying text (discussing empirical evidence of unwanted sex in the lives of poor women, young women, and women in abusive relationships).

317. *See, e.g.*, Matthew J. Breiding & Brian S. Armour, *The Association between Disability and Intimate Partner Violence in the United States*, 25 ANNALS EPIDEMIOLOGY 455, 456 (2015) ("Compared to women without a disability, women with a disability were significantly more likely to report experiencing rape, sexual violence other than rape, physical violence, stalking, psychological aggression and control of reproductive or sexual health by an intimate partner, after controlling for age, family income, race or ethnicity, and education.").

318. The heading is inspired by an article in which Robin West argued for de-constitutionalizing the right to abortion—a right that remained, until its undoing in *Dobbs*, negative. *See* Robin West, *From Choice to Reproductive Justice,* 118 YALE L.J. 1394, 1403 (2009). While abortion remained the focus of West's critique, her opposition to a negative right hinged on the view that justice requires the state to provide "a network of support for the processes of reproduction: protection against rape and access to affordable and effective birth control, healthcare, including but not limited to abortion services" and a full range of support for parenting. *Id.* at 1425. Apart from how this vision resonates with the theory of reproductive agency that I develop in these pages, West's observations about the legitimation costs of consent bear closely on my discussion of the limits of individual choice. *See id.* at 1406–12. For an earlier iteration of a similar concern, see CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 94–102 (1987).

319. *See supra* note 41 and accompanying text (expanding on "continuum of coercion").

agency.[320] Reproductive agency is premised on the idea that "social inequalities constitute the self";[321] these inequalities may, at times, so limit the available options as to render any resulting choice suspect, if not altogether meaningless. Unlike the traditional norm of autonomy,[322] agency makes constraint central to its theoretical foundation.[323] As I have previously written: "What distinguishes agency from autonomy is grounding in the recognition that social inequalities constitute the self. By taking structural hierarchies into account, agency inflects the traditional ideal of autonomy with equality norms."[324] When social conditions allow for the fulfillment of reproductive desires—including whether and when to bear children—reproductive agency flourishes. By contrast, reproductive agency dissolves as nominal choices around reproduction reflect subordination rather than wantedness. Agency need not be either fully realized or wholly absent: Between these extremes lie varying degrees of diminishment.

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320. The term has rarely been mentioned in legal literature and never conceptualized as a meaningful departure from the more familiar ideal of reproductive autonomy.

321. *See* Deborah Tuerkheimer, *Sexual Agency and the Unfinished Work of Rape Law Reform*, *in* RESEARCH HANDBOOK ON FEMINIST JURISPRUDENCE 168–75 (Cynthia Grant Bowman & Robin West eds., 2019).

322. At times autonomy has been theorized in context. *See, e.g.*, Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1606–09 (1990); *see also* JENNIFER NEDELSKY, LAW'S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY, AND LAW 9 (2011) (observing that while "[m]ost egalitarian liberals do pay attention to the complex consequences of economic inequality . . . tensions between a long-standing individualism and attempts to acknowledge social context will continue until some of the core puzzles of relational autonomy are resolved"). Nevertheless, "agency" carries a distinctive meaning, as Kathy Abrams explains:

> [D]ifferences in assumptions, including the insistence on a closer fit between the conceptual and the empirical in defining autonomy, the acknowledgment of myriad ways in which social construction alters the conceptualization of autonomy, and the recognition of a context of unequal power relationships that animates and gives collective character to many forms of self-direction, give "autonomy" a different meaning than it has had in liberal philosophy. I will acknowledge this difference by using the term "agency" to characterize self-definition and self-direction under this distinct conceptual framework.

Kathryn Abrams, *From Autonomy to Agency: Feminist Perspectives on Self-Direction*, 40 WM. & MARY L. REV. 805, 823–24 (1999).

323. For seminal work on agency's departures from autonomy, see generally Abrams, *supra* note 322.

324. *See* Tuerkheimer, *supra* note 321, at 170.

Reproductive agency—like sexual agency[325]—transcends the limits of consent, shifting the inquiry from whether a nominal choice was made to what was, in fact, desired.[326] This move, in turn, raises a set of distinct possibilities that an exclusive preoccupation with consent obscures. Sex may have been consensual but not wanted.[327] Sex may have been wanted, but the pregnancy that resulted unwanted.[328] A pregnancy may have been wanted at one time and later become unwanted. None of these scenarios are legible in a legal regime where consent is paramount.

Reproductive agency not only maps the space between wanting and choosing; it makes a normative claim for contracting this space.[329] In this regard, reproductive agency closely aligns with the movement for reproductive justice,[330] which for decades has taken aim at dominant choice-based ideology and jurisprudence.[331] Apart from crystalizing deficiencies that inhere in the

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325. *See id.*; *see also* Tuerkheimer, *Sexual Violation Without Law*, *supra* note 148, at 635.

326. *See supra* note 21 and accompanying text.

327. *See supra* notes 159–87 and accompanying text.

328. In the preceding discussion of unwanted pregnancy, I detailed abundant empirical evidence that women—particularly, women who are marginalized—lack access to contraception and to information relevant to preventing pregnancy. For a conceptual analysis of women's limited contraceptive usage, see CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 185 (1989) ("[W]omen often do not use birth control because of its social meaning, a meaning women did not create. Using contraception means acknowledging and planning the possibility of intercourse, accepting one's sexual availability, and appearing non-spontaneous. It means appearing available to male incursions. It also means that one must want to have sex.").

329. *See* West, *supra* note 121, at 105 (explaining that "women's sexual and reproductive desires, women's sexual and reproductive pleasures, and to a stunning degree, women's sexual and reproductive interests are simply irrelevant" to dominant legal discourses around sex and reproduction). Where women's desires depart from gendered norms and expectations—in this context, an assumed preference for motherhood—attention to wanting becomes especially crucial.

330. Reproductive justice embodies three "interconnected values"—the right not to have children, the right to have children, and the right to parent children in safe and healthy environments. *See* Loretta Ross, *Conceptualizing Reproductive Justice Theory: A Manifesto for Activism*, *in* RADICAL REPRODUCTIVE JUSTICE 171 (Loretta J. Ross et al. eds., 2017).

331. *See*, *e.g.*, *id.* at 190 (critiquing "conceptual practices of the pro-choice movement" in part because they "offer[] no radical alternatives to neoliberal capitalism and its emphasis on rights and choices"); *id.* at 174 (noting that reproductive justice theory rejects the "individualistic, atomized worldview of liberals"); *id.* at 172 (highlighting "intersecting issues that actually determine how

legal standard of consent, the frameworks of reproductive agency and reproductive justice each emphasize the state's complicity in a litany of constraints on sex, contraceptive usage, and abortion care.[332] Both agency and justice require the removal of these constraints. Reproductive justice and reproductive agency thus work hand in glove; individuals with reproductive agency live in a society where there is reproductive justice, and a reproductively just society is populated by individuals with reproductive agency.

Theorists and activists within the reproductive justice movement have long recognized the importance of grassroots organizing, coalition building, and political mobilization.[333] These strategies have taken on new importance after *Dobbs*, which validated an enduring critique of negative rights, or rights that mandate state non-intervention.[334] Judicially created rights of this nature do not provide a ready means for challenging barriers to exercising them,[335] and jurisprudential zones of privacy

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a pregnant woman makes the decision to have a baby," including "available healthcare, housing, violence, age, finances, her partner, education, immigration status"); *see also* Rickie Solinger, *Making Art for Reproductive Justice*, *in* RADICAL REPRODUCTIVE JUSTICE, *supra* note 330, at 397 ("[Reproductive Justice] proclaims the limits of choice. It points out the hostile or friendly social and political contexts in which choices are made."); Andrea Smith, *Beyond Pro-Choice versus Pro-Life: Women of Color and Reproductive Justice*, *in* RADICAL REPRODUCTIVE JUSTICE, *supra* note 330, at 160 (observing that the conventional privileging of rights means "women are viewed as only having reproductive choices if they can afford them or if they are deemed legitimate choice-makers").

332. For a historical overview, see SARA MATTHIESEN, REPRODUCTION RECONCEIVED: FAMILY MAKING AND THE LIMITS OF CHOICE AFTER ROE V. WADE (2021) (uncovering a history of state "neglect" of reproductive and parenting supports, particularly for marginalized women).

333. *See, e.g.*, Dorothy Roberts, *Reproductive Justice, Not Just Rights*, DISSENT (Fall 2015), https://www.dissentmagazine.org/article/reproductive-justice-not-just-rights [https://perma.cc/X4PV-GQYQ] (discussing "mobilization and coalition-building strategies" as contributing to the "galvanizing impact of reproductive justice").

334. *See, e.g.*, MACKINNON, *supra* note 328, at 185–94. As Catharine MacKinnon writes: "Freedom from public intervention coexists uneasily with any right that requires social preconditions to be meaningfully delivered. For example, if inequality is socially pervasive and enforced, equality will require intervention, not abdication, to be meaningful." *Id.* at 191–92.

335. For application of the progressive critique of rights as applied to *Roe*, see West, *supra* note 318, at 1415–16. To this account, West adds that the right to choose an abortion codified by *Roe* "undercuts the arguments for the development of . . . 'caregiver rights,'" in part by "legitimat[ing] the parental burden to which [the woman who opts not to terminate her pregnancy] has consented." *Id.*

only exacerbate these barriers.[336] Although the progressive rights critique is often directed at constitutional interpretation, a constraining ideology of choice reaches well beyond constitutional law to rape law, to abortion bans, to rape exceptions, to parental consent requirements, to health insurance law, to welfare benefits, to the regulation of sex education, and more. Wherever social inequalities generate a sharp divergence between wanting and choosing, reproductive agency is undermined in ways that a negative right cannot remedy.

Because the state is deeply implicated in structures that give rise to unwanted pregnancy, the undoing of these structures requires affirmative state intervention: the provision of comprehensive sex education, access to contraception, and access to abortion care. Reproductive agency makes these demands of law despite its obvious limitations.[337] We are already seeing moves in this direction. Even as law is being relentlessly deployed to set back sexual and reproductive equality,[338] reproductive justice advocates have managed to advance promising local initiatives, state-level ballot measures, and other legislative reforms.[339]

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at 1411. For an alternative to the standard reproductive rights critique, see Mary Ziegler, *Reproducing Rights: Reconsidering the Costs of Constitutional Discourse*, 28 YALE J.L. & FEMINISM 103, 103 (2016).

336. In the context of abortion, Catharine MacKinnon has observed that the Court's jurisprudence, crafted on the presumption that "government nonintervention in the private sphere promotes a woman's freedom of choice," subordinates all but the most privileged of women. MACKINNON, *supra* note 328, at 192.

337. For a summary of extralegal efforts to advance reproductive justice after *Dobbs*, see Sarita Gupta & Silvia Henriquez, *In the Wake of* Roe*, A Resurgent Fight for Reproductive Justice*, FORD FOUND. (Jan. 19, 2023), https://www.fordfoundation.org/news-and-stories/stories/in-the-wake-of-roe-a-resurgent-fight-for-reproductive-justice [https://perma.cc/T4XC-HL7P] (describing education, advocacy, outreach, and activism).

338. *See* Kimya Forouzan et al., *State Policy Trends 2024: Anti-Abortion Policymakers Redouble Attacks on Bodily Autonomy*, GUTTMACHER INST. (Dec. 16, 2024) https://www.guttmacher.org/2024/12/state-policy-trends-2024-anti-abortion-policymakers-redouble-attacks-bodily-autonomy [https://perma.cc/2S9B-ZXXN]; *One Month of Trump 2.0: Amidst All the Chaos, Attacks on Reproductive Health and Rights*, CTR. FOR REPROD. RTS. (Feb. 21, 2025), https://reproductiverights.org/trump-first-month-reproductive-rights [https://perma.cc/X9RG-9SVB]; *see also* Annette Choi, *State Lawmakers Have Targeted Restricting Sex Education Since the Dobbs Ruling, Especially in States Banning Abortion*, CNN (May 16, 2024), https://www.cnn.com/2024/05/16/politics/sex-education-bills-united-states-dg/index.html [https://perma.cc/3E3E-YWPB].

339. *See* Kimya Forouzan et al., *supra* note 338 (describing state reforms that increase access to reproductive care). For recent statewide efforts to expand

Outside the judicial realm, the politics around reproductive agency raise intriguing possibilities for developing common ground among constituencies with competing attitudes toward sex, contraception, and abortion. Over time, similar arguments for coalition building have been made in support of reproductive justice.[340] By making visible the panoply of structural impediments that give rise to unwanted pregnancy, reproductive agency frames an agenda with widespread appeal, including perhaps to those invested mainly in reducing the number of abortions.[341] And for those who care about women—their desires, their well-being, their equal citizenship—the end of *Roe* offers an opening to mobilize around removing the constraints that

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sex education, see, for example, Therese Boudreax, *Legislation Would Update How Sex Education is Taught in Michigan Schools*, CTR. SQUARE (Nov. 20, 2024), https://www.thecentersquare.com/michigan/article_61973606a769-11ef-8906-df0bc41e4f37.html [https://perma.cc/2ZJR-CKTB]; Austin Fisher, *Advocates Will Back Legislation to Expand NM Sex Ed Curriculum*, SOURCE N.M. (Jan. 17, 2025), https://sourcenm.com/2025/01/17/new-mexico-lawmakers-plan-to-introduce-comprehensive-sexual-education-bill [https://perma.cc/KN46-EVYM].

340. *See* West, *supra* note 318, at 1431 (explaining that the "pro-choice" and "pro-life" movements both "have an interest in minimizing the demand for abortion through minimizing the cost of mothering, enforcing and strengthening the rights of pregnant women, advocating the responsible use of birth control, insisting upon sensible anti-rape policies, and discouraging unwanted sex"); *see also* MACKINNON, *supra* note 328, at 184 (quoting Adrienne Rich's observation that "[i]n a society where women entered sexual intercourse willingly, where adequate contraception was a genuine social priority, there would be no 'abortion issue'"). *See generally* Reva B. Siegel, *ProChoiceLife: Asking Who Protects Life and How—and Why it Matters in Law and Politics*, 93 IND. L.J. 207 (2018).

341. For evidence that abortion bans do not reduce the number of abortions, see Claire Cain Miller & Margot Sanger-Katz, *Abortions Have Increased, Even in States with Rigid Bans, Study Says*, N.Y. TIMES (Oct. 22, 2024), https://www.nytimes.com/2024/10/22/upshot/abortions-rising-state-bans.html [https://perma.cc/97G3-USZN] (analyzing #WeCount study of post-*Dobbs* data from thirteen states with near-total abortion bans). However, evidence also shows that abortion bans disproportionately affect marginalized women, including Black and Hispanic women, women without a college degree, and women living farthest from a clinic; a detailed analysis of local birth patterns after *Dobbs* finds that, among those marginalized populations, "state bans appear to have prevented some women from having abortions they would have sought if they were legal." *See* Claire Cain Miller & Margot Sanger-Katz, *The Women Most Affected by Abortion Bans*, N.Y. TIMES (Mar. 17, 2025) (citing Caitlin Myers et al., *The Road Not Taken: How Driving Distance and Appointment Availability Shape the Effects of Abortion Bans* (Nat'l Bureau of Econ. Rsch., Working Paper No. 33548, 2025)), https://www.nytimes.com/2025/03/17/upshot/abortion-bans-births-study.html [https://perma.cc/PGJ2-U5BR]. To be clear, the inability to access abortion care is fundamentally incompatible with reproductive agency.

hobble some women far more than others.[342] If there were any doubt, *Dobbs* proved that the abortion right was never enough. In its stead, a call for reproductive agency can help shape the law, policies, and politics unfolding in *Dobbs*'s wake.

CONCLUSION

Unwanted pregnancy brings into vivid relief the limits of consent. Consent to sex assumes too little importance in rape law, where the force requirement endures, and outsized importance in abortion law, where bans presume that consent to sex is consent to pregnancy. Outside law, choosing becomes a proxy for wanting regardless of how dramatically the two diverge, and desire altogether disappears as an independent locus of inquiry.

Theorizing reproductive agency foregrounds the space between wanting and choosing—whether around sex, contraception, or abortion. Now is an opportune moment for this theoretical turn. *Dobbs* upended the law of abortion and lent new urgency to questions of access. #MeToo laid bare a full spectrum of sexual violation and the inadequacy of rape law to redress it. Among the many possibilities for legal and cultural transformation in the wake of these disruptions, one has gone unremarked: The consent paradigm is becoming unstable.

Rape exceptions epitomize the folly of this paradigm, particularly when their logic is superimposed on the empirical realities of unwanted pregnancy. A grounded account of constraints on sex and contraception exposes choice ideology as exceedingly harmful to vulnerable women. What emerges is a theory of reproductive agency that spotlights the state's role in upholding these constraints—and so too a collective obligation to dismantle them.

342. *See* Rachel Rebouché & Mary Ziegler, *Fracture: Abortion Law and Politics After* Dobbs, 76 SMU L. REV. 27, 73–75 (2023) (describing political obstacles facing the movement for reproductive justice and stressing that the movement's success is integrally bound up in a functioning democracy).