

# Sex and Self-Governance

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## I.

In 1993, Justice Ruth Bader Ginsburg offered feminist scholars a parable about their ambition to define the terms on which the debate over sex discrimination will proceed within juridical and popular culture. During a speech she gave at Columbia Law School, Ginsburg explained why, during the 1970's, she started using the word "gender" rather than "sex" in the briefs she was filing in the sex discrimination cases decided ultimately by the United States Supreme Court. As Justice Ginsburg recalled:

"I owe it all to my secretary at Columbia Law School, who said, 'I'm typing all these briefs and articles for you and the word sex, sex, sex, is on every page. . . . Don't you know that those nine men—they hear that word, and their first association is not the way you want them to be thinking? Why don't you use the word gender? It is a grammatical term and it will ward off distracting associations.'"<sup>1</sup>

Public accounts of Justice Ginsburg's lecture do not indicate whether she accepted this advice for the reason her secretary advanced or whether she began using the term "gender" for other reasons of her own. Nor do the accounts mention whether Ginsburg offered an exegesis of her story or whether she left her listeners to rely on their own interpretive devices. Assuming that we are meant to tease out the meaning of the story on our own, more than one signification comes to mind. At perhaps the most obvious level, the story provides ironic insight into the aridity, even futility, of some academic disputes. Thus, the story tends to discredit the scholarly endeavor to assign a distinct meaning to cases that speak of "gender," as opposed to "sex," discrimination (and vice versa),<sup>2</sup> since the story informs us that the word "gender"

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1. Catharine Crocker, *Ginsburg Explains Origin of Sex, Gender*, L.A. TIMES, Nov. 21, 1993, at A28.

2. As Mary Anne Case has explained, feminist theorists usually use the word "sex" to "refer[] to the anatomical and physiological distinctions between men and women; 'gender,' by contrast is used to refer to the cultural overlay on those anatomical and physiological distinctions." Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 10 (1995). By contrast, Catharine MacKinnon offers this explanation for why she "use[s] sex and gender relatively interchangeably":

Much has been made of the distinction between sex and gender. Sex is thought the more biological, gender the more social. The relation of each to sexuality varies. Since I believe sexuality is fundamental to gender and fundamentally social, and that biology is its social meaning in the system of sex inequality, which is a social and political system that does not rest independently on biological

found its way into the judicial canon for reasons having nothing to do with the particular definition that judges associated with that word, as opposed to its synonyms. The word "gender" was adopted not as a result of the courts' careful exercise of dictional authority, let alone in response to academic theorizing about the appropriate scope of the Equal Protection Clause. Rather, the Justices thoughtlessly imitated the nomenclature employed by an influential party who intended thereby not to redefine her cause of action, but merely to eliminate from her pleadings and scholarship connotations that she deemed irrelevant. Moreover, within the confines of Ginsburg's amusing vignette, her decision to sponsor the term "gender" was more serendipitous than calculating, though we would need to know more about her relationship with her secretary, and, indeed, more about the secretary, before deciding on precisely what ground this momentous decision was made.

Despite (or, perhaps, because of) this first lesson about our relative linguistic impotence, the story has piqued the interest of more than one author, some of whom criticize Ginsburg for suggesting that "sex" and "gender" are interchangeable terms<sup>3</sup> and others of whom find her suggestion praiseworthy.<sup>4</sup> (For reasons that are not stated, this commentary ignores altogether the figure of the secretary and attributes to Ginsburg alone authority over the content of her pleadings.) As developed by Mary Anne Case, the feminist critique of Ginsburg's story is compelling. Perhaps, Ginsburg's use of the word "gender" did serve the interests of her cause in the short term. By sparing those nine men the embarrassment of being reminded of sexual matters when adjudicating her cases,<sup>5</sup> we may imagine that she assisted them to consider thoughtfully and respectfully the precise legal questions she presented. However, in the long run, her decision to encourage them to conflate the words "sex" and "gender" has disserved the interests of feminism because it has contributed to widespread "analytic confusion" in the sex discrimination case law.<sup>6</sup> Such criticism is valuable in that it exposes the ways in which terminological imprecision has allowed courts to continue to devalue that which culture associates with the *feminine*, despite contemporary constitutional and statutory guarantees that protect *females* from discrimination. However, this criticism does not go far enough since it ignores the questions that Ginsburg's story raises about the political, cultural, and psychological pressures that induce feminists deliberately to create these terminological lacunae, which then inhibit our efforts to eliminate misogyny from the law. At this level, the story invites us to contemplate the ways of thinking about sexuality that prompt

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differences in any respect, the sex/gender distinction looks like a nature/culture distinction.

Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 636 n.1 (1983).

3. See Case, *supra* note 2, at 10.

4. See Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 325-26 (1995) ("[T]he use of gender, though originally idiosyncratic, is both accurate and proper.")

5. See Case, *supra* note 2, at 10.

6. See *id.*

women to adopt obfuscatory strategies, such as that apparently pursued by Ginsburg, when talking to men, or at least male lawmakers, about sex. According to the account of sexuality that Ginsburg attributes to her secretary's instruction, for example, women have been and should be reluctant to talk to men about sex—indeed, they should not even utter the word “sex” in the presence of men—because the word conjures up images potent enough to divert men from the merits of the cause they must resolve.

With this account in mind, we may find in the story still another, more poignant, lesson, as it directs our attention to the position of women who seek legal redress for injuries caused by sexual intercourse. There is no way for these women to sanitize their lawsuits by scrubbing out the word “sex” and its disturbing connotations—they have no choice but to talk about “sex” in the sense that Ginsburg believed might jeopardize the success of her cause. Thus, we must inquire, precisely what are the “distracting associations” that these women cannot avoid producing? Ginsburg was reluctant to describe explicitly (or at all) the images that she and/or her secretary had in their view, but she elsewhere suggested that they amounted to erotica offensive enough to be deemed obscene under First Amendment standards.<sup>7</sup> Finally, consider the role that these obscene images will play in cases where women seek a remedy for injurious sexual intercourse. For these women, the sexual apparitions that Ginsburg desired to elude will not represent mere “distractions” from which most men presumably will understand that they must wrest their roving attention. Rather, the word “sex” and, more specifically, the images it produces will displace the women's own accounts and come to represent in the lawmakers' minds' eyes the injurious sexual experiences for which the women seek redress. Thus, Ginsburg's story instructs that our language, surely a cultural and not an individual production, has the power to determine the content of personal experiences that individual women desire to define by and for themselves.

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7. When describing for the Columbia Law School audience her secretary's idea that the word “gender” is preferable to the word “sex” because it allows the speaker to avoid certain “distracting associations,” Ginsburg left her listeners to imagine for themselves the content of those associations. In an article she published in 1975, however, Ginsburg identified more precisely the associations she had in mind, namely, erotic materials offensive enough to be deemed obscene for purposes of First Amendment analysis. Yet, even there, she used language that is vague, allusive, and indirect. When describing the meaning that she suggests men attribute to “sex,” Ginsburg remarked, “For impressionable minds, the word ‘sex’ may conjure up improper images of issues like those that the Supreme Court has left to ‘contemporary community standards.’” Ruth Bader Ginsburg, *Gender in the Supreme Court: The 1973 and 1974 Terms*, 1975 SUP. CT. REV. 1, 1 n.1 (citing *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973)). Among other things, the reader must wonder, in what sense is “sex” an “image” of an “issue”? Or, for that matter, in what sense are obscene productions “issues”? It is interesting to remark that, whereas Catharine MacKinnon frequently appears to conflate heterosexual intercourse with pornographic representations of intercourse, *see, e.g.*, CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 197 (1989), Justice Ginsburg here conflates intercourse with its representation within obscene materials.

## II.

We may begin to imagine, then, how little control an individual victim has over the disposition of a rape complaint. Neither the experiential content of her complaint nor the legal standards against which it is judged are subjects of which she is the master. For one thing, by using the word "sex," the complainant unleashes images of the sexual violation that are deeply disturbing, but, if Ginsburg's account is accurate, they probably are not disturbing in the way that the complainant intends. Second, as Ginsburg's allusion to the designation "obscene" implies,<sup>8</sup> these images carry with them cultural judgments about their immoral and, perhaps more importantly, *illegal* status. To be more precise, Ginsburg's story suggests that the woman is forced to provide a representation of her sexual activity that itself qualifies as illegal. Since that is the case, we must further imagine that law enforcement authorities would be inclined to approach the task of adjudicating her complaint with some measure of skepticism, if not hostility.

Significantly, Justice Ginsburg's provocative suggestion about the illegal status of the sexual *images* produced by the rape complainant's language reminds us that, for centuries, the underlying sexual *activity* that she reported also was a crime. Here, I refer not to the familiar criminal character of forced sexual intercourse (i.e., to the rape), but to the guilty status of non-marital sexual intercourse. Up until very recently and continuing in some jurisdictions today, our penal laws forbade not only rape, but also fornication and adultery, which consist of consensual sexual intercourse outside of marriage.<sup>9</sup> As long as fornication and adultery are criminalized, every rape prosecution contains the following peculiar feature: the woman who comes forward to accuse a man of rape necessarily is thereby confessing that she participated in an act of illegal intercourse, though she further charges that her participation was unwilling.<sup>10</sup> Therefore, as a practical matter, by bringing a rape complaint, the woman automatically finds herself confronting a unique dilemma: in order to obtain a favorable judgment on her complaint, she first must persuade the authorities that *she*

8. Ginsburg is not the only judge to associate the word "sex" with obscenity. In the first sentence of *Sex and Reason*, Richard Posner makes the same connection. Thus, Posner commences his investigation of sexuality with this defensive assertion: "Anyone in our society who wants to write about sex without being accused of prurient interest had better explain what the source of his interest in the subject is." RICHARD A. POSNER, *SEX AND REASON* 1 (1992).

9. For a helpful and thorough summary of the contemporary status of this country's fornication and adultery laws, see RICHARD A. POSNER & KATHARINE B. SILBAUGH, *A GUIDE TO AMERICA'S SEX LAWS* 98-110 (1996). For fascinating historical treatments of the enforcement of those laws in the Puritan colonies, see CORNELIA HUGHES DAYTON, *WOMEN BEFORE THE BAR: GENDER, LAW, AND SOCIETY IN CONNECTICUT, 1639-1789* (1995); ROGER THOMPSON, *SEX IN MIDDLESEX: POPULAR MORES IN A MASSACHUSETTS COUNTY, 1649-1699* (1986).

10. As Rollin Perkins and Ronald Boyce remind us, "an essential element" of the traditional rape offense "is that the sex be unlawful." ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 203 (1982). In order to establish this "essential element," the prosecutor must prove that the sex act alleged to constitute a rape was "extra-marital" because "[i]n fact, any act of extra-marital sex is unlawful." *Id.*

should not be blamed, together with the man she has accused, for the act of illegal intercourse.

As it turns out, this observation about the guilty character of non-marital intercourse possesses enormous explanatory power when we attempt to justify the substantive elements of the contemporary rape offense. Of course, I use the word "justify" advisedly since numerous legal scholars have concluded that the only explanation for the content of rape doctrine is the wholly unjustifiable sexism of those who make and enforce the criminal law. The critique appears to enjoy widespread support,<sup>11</sup> and, certainly, I concur in its essential political premises. However, the critique is unsatisfying and, perhaps for some, unpersuasive<sup>12</sup> because its governing value judgment, namely, that the objective of rape law is to protect the right of women to sexual self-governance, appears to be wildly at odds with the values of the culture from which the prohibition emerged. In this essay, I will begin to develop an alternative account of rape doctrine, one that endeavors to be faithful to the ways of thinking about sexuality that supported the prohibitions on fornication and adultery, as well as on rape. My argument applies to the peculiar case of rape the insights found in Justice Ginsburg's story about the signification of "sex." Thus, I will suggest that, when law enforcement authorities hear the word "rape," "their first association is not the way [feminists] want them to be thinking." According to the feminist account, a woman uses the word "rape" to stipulate that a man has violated her right to choose or refuse sexual intercourse for herself.<sup>13</sup> When we examine rape doctrine carefully, however, we discover that the word traditionally has connoted sexual activity over which the woman has no legitimate choice to exercise because the activity is forbidden by the criminal law. For law enforcement authorities who hear the word "rape," therefore, the initial impulse is to determine, not whether the accused man violated a woman's right to sexual self-determination, but whether she who accuses him should be excused for her involvement in the otherwise criminal sexual connection.

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11. At least, Donald Dripps is confident that "the values [rape] law has protected for millennia are not values any legal scholar would defend." Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780, 1783 (1992).

12. A number of commentators have remarked that, although there has been widespread reform of rape statutes in recent years, enforcement of the prohibition continues to be impeded by the same types of attitudes that thwarted prosecutions in prior generations. See, e.g., Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813, 813 (1991) ("In fact, the [rape] laws were changed, in virtually every state. So why wasn't the problem solved?"); Lynne Henderson, *Getting to Know: Honoring Women in Law and in Fact*, 2 TEX. J. WOMEN & L. 41, 41 (1993) ("[T]wo decades of feminist law reform efforts to hold men responsible for raping women have yielded disappointing results."); Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of a Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1014 (1991) ("Despite these reforms, . . . numerous impediments to the successful prosecution of rape remain, hindering the eradication of this form of terrorism against women.").

13. See SUSAN ESTRICH, REAL RAPE 102 (1987) (What rape law "owes us is a celebration of our autonomy.").

## III.

Although the contemporary critique of rape law is voluminous and encompasses numerous procedural, evidentiary, and doctrinal objections, the salient features of the critique may be captured for my purposes by a brief discussion of the critics' assault on the substantive elements of rape. The political premises animating these criticisms are that sexual activity is a good that adult partners should have the authority to pursue without substantial interference by the state and, indeed, that state intervention should be limited to ensuring that sexual exchanges are free from the kinds of coercive pressures found sufficient to invalidate the transfer of other types of goods. Because of their cultural and, perhaps, biological predispositions, men are inclined to be more aggressive than women in initiating and consummating sexual intercourse, and so rape law developed to secure for women the authority to make sexual choices on an equal basis to men. After examining the substantive definition of rape, however, the critics conclude that the law has failed—with a vengeance—to preserve for women a meaningful sphere of sexual self-governance, relegating their sexuality instead to male control.

Momentarily setting aside the sexual intercourse element, the primary ingredients of the rape offense are “force” and victim “nonconsent.” Remarkably, William Blackstone’s concise description of the traditional elements of rape nicely captures the definition that is extant in most jurisdictions in this country today. According to Blackstone, rape is “the carnal knowledge of a woman forcibly and against her will.”<sup>14</sup> The critics interpret the phrase “against her will” as a synonym for “nonconsent,”<sup>15</sup> and their objection to this element focuses on the manner in which it is applied by the courts. As the critics remark, in most jurisdictions today, nonconsent is not established by proof that the woman verbally refused the man’s sexual advances,<sup>16</sup> but requires the prosecution to show that she offered him some “physical” resistance as well.<sup>17</sup> Since they assume that the purpose of rape law is to protect female sexual agency, the critics are understandably distressed by the notion that the law would require the woman to announce her choice through physical rather

14. 4 WILLIAM BLACKSTONE, COMMENTARIES 210 (Oceana Pub. 1966).

15. See Estrich, *supra* note 13, at 29 (“Female nonconsent has long been viewed as the key element in the definition of rape.”); Stephen J. Schulhofer, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 L. & PHIL. 35, 63 (1992) (“[A]nalysts searching for a single organizing principle had to recognize that legally, the gist of rape was . . . nonconsent.”); see also POSNER, *supra* note 8, at 388 (“[A]ll that distinguishes [rape] from ordinary sexual intercourse is lack of consent.”).

16. Indeed, at common law, many courts treated the woman who explicitly, but only, said “no” as if she had consented to the encounter. For example, in *Mills v. United States*, 164 U.S. 644, 648 (1897), the Supreme Court took the position that, though the woman “object verbally, if she make no outcry and no resistance, she, by her conduct, consents, and the act is not rape in the man.”

17. As the author of a treatise on sexual offenses explains, “most courts continue to inquire into the woman’s ‘earnest resistance’ to establish nonconsent,” despite the recent wave of reforms that have transformed the language of most states’ rape statutes. B. ANTHONY MOROSCO, *THE PROSECUTION AND DEFENSE OF SEX CRIMES* § 3.10[3], at 3-9 (1996).

than verbal means. Indeed, the critics wonder, why should the woman be required to do more than utter the word “no” in order to establish her lack of consent to a sexual proposal?<sup>18</sup> The critics’ hostility towards the physical resistance requirement is exacerbated by their discovery that the requirement appears to be unique to rape cases. For example, as Vivian Berger and Susan Estrich have noticed, other crimes, such as robbery, require proof of victim nonconsent, but in those cases, the courts have not imposed on victims any physical resistance requirement.<sup>19</sup> By singling out the victims of rape to bear this special burden, which makes it more difficult to bring their assailants to justice, lawmakers promote, rather than restrain, male domination of female sexuality.

Likewise, the critics object to the traditional construction of the “force” element of rape, which is satisfied only by proof of actual physical violence or threats of grievous bodily harm.<sup>20</sup> Surely, the critics argue, since the purpose of the rape prohibition is to protect female sexual autonomy, the law should recognize a much broader range of practices as being coercive or otherwise as constituting an unlawful invasion of women’s agency. Indeed, some critics argue that the definition of rape should not include a force element at all since nonconsensual sex is the injury that the law seeks to prevent. As Catharine MacKinnon puts it, “In a critique of male supremacy, the elements ‘with force and without consent’ appear redundant. Force is present because consent is absent.”<sup>21</sup> Similarly, Susan Estrich wonders why courts are unable to perceive that sexual intercourse inevitably is forceful when it occurs after the woman has said “no.” In this context, Estrich again draws an analogy between rape and robbery. Thus, she speculates, “Certainly, if a thief stripped his victim, flattened that victim on the floor, lay down on top, and took the victim’s wallet or jewelry, few would pause before concluding forcible robbery.”<sup>22</sup> By limiting rape to only the most egregious intrusions on female sexual autonomy, namely, those involving serious physical violence, the law validates other coercive strategies that men employ to obtain sex from unwilling women and thereby safeguards an expansive domain for aggressive male sexuality.

Now, let us try to imagine what the elements of rape should be if we replace late twentieth-century liberal sexual conventions with the sexual mores of the culture from which we inherited rape law. Contrary to the assumptions animating the

18. See Estrich, *supra* note 13, at 102 (“‘Consent’ should be defined so that no means no.”).

19. See Vivian Berger, *Man’s Trial, Woman’s Tribulation: Rape Cases in the Courtroom*, 77 COLUM. L. REV. 1, 8 (1977) (“By contrast, in a crime like robbery, also ‘a nonconsensual and forcible version of an ordinary human interaction,’ the law imposes no special burden of [physical] opposition.”); Estrich, *supra* note 13, at 29, 40-41 (“Rape is unique . . . in the definition that has been given to nonconsent—one that has required victims of rape, unlike victims of any other crime, to demonstrate their ‘wishes’ through physical resistance.”).

20. Traditionally, the definition of rape has required the prosecution to prove either that the man used physical violence to overcome the woman’s resistance or that he threatened to kill or maim her if she refused to submit. See Morosco, *supra* note 17, §§ 3.01[3], 3.10[3], at 3-9, 3-151.

21. MACKINNON, *supra* note 7, at 172.

22. Estrich, *supra* note 13, at 59.

contemporary critique of rape law, influential institutions within that former world held that sexuality was a force so dangerous that it should be restricted, on pain of criminal punishment, to marital partners. In other words, contrary to our norms, sexual activity formerly was a matter that the state refused to consign to self determination. When a law enforcement official in that former world heard the word "rape," therefore, his first association was that, by definition, the encounter involved activity in which *both* participants were forbidden to engage. For this official, the sexual intercourse reported by the woman amounted, in the first instance, to fornication or adultery, and, only in the second instance, to rape if it appeared that her participation was forced by the man. In the light of this association between intercourse and criminal guilt, we must wonder, how would our hypothetical official go about the task of deciding which kind of intercourse had occurred—was it rape, for which the man alone should be punished, or was it fornication or adultery, for which both the man and the woman should be blamed? Significantly, the latter interpretation presumably could issue on the basis of the rape complaint alone since the complaint necessarily represented an admission by the woman that her body was the site of illegal intercourse. Since that was the case, it would seem both logical and efficient for the official to resolve the matter by treating the woman's guilty participation as a given, unless she were able to identify some reason to allocate the blame for her criminal misconduct to the man, rather than to herself. To frame the inquiry in the terminology familiar to contemporary criminal law theorists, the official would be inclined to punish the woman for committing fornication or adultery, unless she came forward with evidence supporting an excuse to criminal liability.

In order to identify what the woman's potential excuse might be and how that excuse would condition the content of rape doctrine, it is helpful to revise Susan Estrich's robbery analogy. For our hypothetical official, the analogy that Estrich actually proposes would be unpersuasive because, according to his way of thinking about sexuality, the victims of rape and the victims of robbery do not occupy analogous legal positions. Indeed, for this official, the legal status of the underlying activity reported in the two cases was entirely dissimilar. Unlike the victim of a robbery, who did nothing illegal if she gave away her money freely or by force, the victim of a rape herself was guilty of a crime if she freely gave away her sexual favors. Thus, according to this official's way of thinking, a more convincing analogy would be to compare the woman who claimed she was raped to a person who confessed that she had *committed* a robbery but further argued that she should not be blamed for the crime because another person had coerced her participation. With this revised analogy as our guide, then, we may begin to capture the premises that our law enforcement official would have in mind as he approached the adjudication of a rape complaint.

Assuming that he shared our contemporary hostility towards excuse defenses, the official initially would be inclined to blame both the putative robber and the putative fornicator. Certainly, he would not be disposed to relieve either offender from liability merely because she reported that she was reluctant to accede to her



confederate's illegal pecuniary or sexual proposal. Nor would he be moved to spare her if she testified that she had articulated her subjective feeling of reluctance verbally, for example, by telling her confederate "no" when he asked her to participate. Rather, to take only the most obvious defensive route that the offender might be required to pursue,<sup>23</sup> we must imagine that our official would insist that the robber or fornicator demonstrate that she had participated in the crime under circumstances satisfying the duress defense. Indeed, he would refuse to excuse the offender unless she could establish that: (1) she had committed the offense under threats of death or grievous bodily injury; and (2) there was no strategy that she could have adopted, including efforts physically to resist her coercer, to avoid committing the crime.<sup>24</sup> In short, when we take seriously the association between sexual intercourse and criminal guilt, we discover that the elements that define the crime of rape—threats of violence serious enough to overcome physical resistance by the victim—are precisely the same elements that excuse the woman for having sex.

#### IV.

Since the argument sketched herein is one that I intend to develop more fully in future papers, it seems prudent to consider the political implications of my attempt to refocus the law of rape. Whose interests are served by my claim that rape represents a woman's excuse, rather than a man's crime? For what it is worth, my intention is not to rehabilitate the traditional definition of rape. Although my account may suggest that the prohibition was shaped by a congeries of social and legal forces, of which misogyny was only one factor, my intention is to reinforce and extend the criticisms offered by those who would revise rape doctrine so that it is more sensitive to the feminist critique of heterosexuality. As we pursue this law reform project, it seems crucial to know as much as possible about the alternative ways of thinking about sexuality that produced the legal definition we desire to revise. For example, if we discover that the content of rape doctrine was influenced, if not determined, by the prohibitions on fornication and adultery, then liberal and feminist scholars must begin to take those prohibitions much more seriously than they have been inclined to do. To say the least, if the function of the elements of rape is to identify those women who should be excused for committing fornication or adultery, feminists cannot afford to ignore those offenses or to treat them as the quaint artifacts of a bygone era. If my thesis is correct, the fornication and adultery laws constitute "dead letter statutes"<sup>25</sup> only insofar as men are concerned. For women, these laws retain a vital prohibitory power since they have been incorporated into the definition of rape

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23. Depending on the circumstances under which they acted, these hypothetical offenders might also be able to challenge either the *actus reus* or the *mens rea* elements of the crimes for which they were charged.

24. For a helpful description and critique of the traditional elements of duress, see 2 PAUL H. ROBINSON, *CRIMINAL LAW DEFENSES* 348-72 (1984).

25. AMERICAN LAW INSTITUTE, *MODEL PENAL CODE AND COMMENTARIES*, § 213, at 435 (1980).

that is extant today, and, from that location, they continue to require women to prove that they have a legal excuse for engaging in sexual intercourse outside of marriage.

This inclination to demand more knowledge about sexuality constrains me to return to the point where I started. Justice Ginsburg's story suggests that it is naive for feminists to believe that the production of knowledge about our sexual experiences can release women from their subjugated position in our culture. How can we expect that more talk about sex, let alone the investigations undertaken to produce such talk, could serve a liberatory enterprise when merely uttering the word "sex" conjures up images that reproduce the terms of our subjugation? The best we might hope is to produce the spurious "speaker's benefit" identified by Michel Foucault, which attaches to one daring enough to transgress the cultural injunction against talking about sex in public.<sup>26</sup> Indeed, the existence of this speaker's benefit may provide an additional and different reason for obeying Justice Ginsburg's injunction to avoid certain distracting words: some of us might be tempted to choose silence over forms of speech that make us professional traders in the suffering that we ostensibly would relieve.

Yet, those suffering others well may wonder, whose interests are served by such linguistic punctiliousness? Surely if the history of violent sexuality has taught us anything, it is that the interests of rape victims are not served by euphemism, let alone by silence. Therefore, feminists must continue to talk about sex, but, mindful of Justice Ginsburg's warning, they also must be willing to think seriously about the ways in which talk about sex—including that uttered by feminists themselves—exercises dominion over our laws and our lives.

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26. MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* 6 (1978) (Robert Hurley trans.).