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Why Rape Should Be a Federal Crime

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WHY RAPE SHOULD BE A FEDERAL CRIME

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ABSTRACT

Sexual assault remains at high levels despite decades of legal reforms. The recent wave of accusations against public figures signals both the persistence of the problem and a new political climate for addressing it. The Article argues that Congress should make forcible rape a federal crime, to the limits of the Commerce Clause. This would bring federal assets to the fight against rape by redirecting them from enforcement of possessory crimes. The simple statutory proposal might be accompanied by a more ambitious reorganization of the Justice Department to include a Bureau of Violent Crimes. Replies are offered to objections based on federalism, feminism, civil liberties, and systemic feedback loops.

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INTRODUCTION

The year 2017 witnessed an explosion of accusations of sexual assault and harassment against prominent, even celebrated, leaders in journalism, entertainment, athletics, business, politics, and law.[1] Few of those accused have attempted a defense, and many have lost their positions, disgraced.[2] This extraordinary story, however, gives as much cause for pessimism as for optimism about reducing incidents of sexual assault in this country.

The reluctance to come forward until long after the offending behavior shows that fear and shame had the power to silence. They still do. Rape remains the most underreported violent crime.[3] Perhaps even more revealing than the reluctance to report is the direction of the reporting. Typically accusers of high-profile men addressed higher management at work or went to the news media.[4] So far as I can tell, none of them started by reporting to the criminal justice system, despite decades of reforms aimed at encouraging reporting, protecting victim privacy, and facilitating convictions.[5] That makes perfect sense. Police, prosecutors, judges, and juries still receive sexual assault complaints with special skepticism.[6]

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1. *See, e.g.*, Sarah Almukhtar et al., *After Weinstein: 71 Men Accused of Sexual Misconduct and Their Fall from Power*, N.Y. TIMES (Feb. 8, 2018), https://www.nytimes.com/interactive/2017/11/10/us/men-accused-sexual-misconduct-weinstein.html [https://perma.cc/VWX5-7LYY].

2. *See id.*

3. *See* W. David Allen, *The Reporting and Underreporting of Rape*, 73 S. ECON. J. 623, 623 (2007); *see also* Catharine A. MacKinnon, *Rape Redefined*, 10 HARV. L. & POL'Y REV. 431, 439 (2016) ("One out of about ten acts of rape or attempted rape that fit basic legal definitions in the United States is reported to authorities."); *infra* Part I.B.1.

4. *See, e.g.*, Tracy Jan, *Hollywood Manager Who Worked with Halle Berry, Taraji P. Henson Closes Agency After Accusations of Sexual Harassment*, WASH. POST (Feb. 5, 2018), https://www.washingtonpost.com/business/economy/hollywood-manager-who-worked-with-halle-berry-taraji-p-henson-will-close-agency-after-accusations-of-sexual-harassment/2018/02/05/557debd0-0ab8-11e8-8b0d-891602206fb7_story.html?utm_term=.72f56d259d82 [https://perma.cc/C82N-8L86]; April Simpson, *NPR's Daniel Zwerdling Out After Investigation into Harassment*, CURRENT (Feb. 6, 2018), https://current.org/2018/02/nprs-daniel-zwerdling-out-after-investigation-into-harassment/ [https://perma.cc/P2RT-KE6L].

5. *See* sources cited *supra* note 4; *infra* notes 94-100 and accompanying text.

6. *See* MacKinnon, *supra* note 3, at 439 ("Dramatically fewer [cases than reported] are prosecuted or result in convictions or incarceration, a process termed rape attrition.").

If recent accusations really mark the beginning of widespread willingness to report, the legal system is not prepared for it. If the real reporting rate is 10 percent now, bringing it up to 20 percent would mark significant but marginal progress on reporting. It would also *double* the demand for resources committed to sexual assault cases, from the police investigation all the way through to corrections.

A new climate of public opinion condemns sexual predation like never before.[7] Therein lies an important opportunity for reform. Political leaders have fresh incentives to give serious consideration to new policy proposals that offer some hope of improving the legal system's response to sexual assault.[8]

This Article argues that Congress should make forcible rape a federal crime to the limits of the Commerce Clause.[9] Premised on proof of a nexus with interstate commerce, the Hobbs Act makes robbery a federal crime,[10] the Federal Kidnapping Act makes kidnapping a federal crime,[11] and the federal carjacking statute creates a federal crime of forcible theft of vehicles.[12] In addition, Congress took action against forced participation in commercial sex by making human trafficking "in or affecting interstate or foreign commerce" a federal crime.[13]

The Supreme Court's decision in *United States v. Morrison* struck down the civil cause of action authorized by the Violence Against Women Act of 1994.[14] The Act, however, did not require case-specific proof of a commerce nexus.[15] This Article proposes a new offense that is modeled on federal criminal statutes that include such jurisdictional elements.[16] The federal courts have heard thousands

7. *See, e.g.*, Christine Filer, *6 in 10 Have Hope for Lasting Change on Sexual Harassment (POLL)*, ABC NEWS (Jan. 24, 2018, 7:00 AM), https://abcnews.go.com/Politics/ten-hope-lasting-change-sexual-harassment/story?id=52550296 [https://perma.cc/KYN3-VG66].

8. *Cf. id.* (noting that the growth in condemnation crosses party lines).

9. *See* U.S. CONST. art. I, § 8, cl. 3.

10. 18 U.S.C. § 1951 (2012).

11. *Id.* § 1201(a).

12. *Id.* § 2119.

13. *Id.* § 1591(a)(1).

14. 529 U.S. 598, 601-02 (2000).

15. *Id.* at 613.

16. *See, e.g.*, *supra* notes 10-13 and accompanying text.

of these federal prosecutions for robbery, carjacking, kidnapping, and human trafficking since *Morrison*.[17]

How many rapes the commerce power might reach is uncertain. Clearly, the commerce power does not reach all sexual assaults.[18] However, it could reach a very significant number.[19] Some rape victims are themselves interstate or foreign travelers.[20] Many rapes involve use of the "channels" or "instrumentalities" of commerce, such as the Internet or motel rooms.[21] Many rapes occur at the workplace, and are already subject to federal regulation under Title VII.[22] Many others victimize workers in the commercial sex market.[23]

Wherever the courts mark the limit of the commerce power, Congress clearly has constitutional power to make rape a federal crime to the limits of that power, just as with gun possession by felons, robbery, and human trafficking.[24] What good might come of this?

First, deeply embedded social attitudes—"rape myths"—have made enforcement of even traditionally defined forcible rape offenses difficult. Police, prosecutors, and judges embrace these myths only a little less widely than citizens called for jury duty.[25] Effectively enforcing even the narrow definition of rape as penetration by forcible compulsion requires a legal, and thus social, battle of attrition.[26] Victory will be measured not by convictions, but by a

17. During Fiscal Year 2014 alone, federal prosecutors initiated over 939 federal robbery cases, 122 kidnapping cases, and 18 cases of motor vehicle theft in district courts. *See* MARK MOTIVANS, U.S. DEP'T JUST., FEDERAL JUSTICE STATISTICS, 2014—STATISTICAL TABLES 16 tbl.4.1 (2017), https://www.bjs.gov/content/pub/pdf/fjs14st.pdf [https://perma.cc/S32A-3M7G]. During that same year, 423 sex trafficking suspects were referred to and prosecuted by U.S. attorneys. *See* MARK MOTIVANS & HOWARD N. SNYDER, U.S. DEP'T JUST., FEDERAL PROSECUTION OF HUMAN-TRAFFICKING CASES, 2015, at 4 tbl.1 (2018), https://www.bjs.gov/content/pub/pdf/fphtc15.pdf [https://perma.cc/AE95-EKF7].

18. *See infra* Part II.C.

19. *See infra* Part II.B.

20. *See infra* notes 301-04 and accompanying text.

21. *See infra* Parts II.B.1-2.

22. *See infra* Part II.B.4.a.

23. *See infra* Part II.B.4.b.

24. *See supra* notes 10-13 and accompanying text; *see also infra* Part II.B.

25. *See* Meagen M. Hildebrand & Cynthia J. Najdowski, *The Potential Impact of Rape Culture on Juror Decision Making: Implications for Wrongful Acquittals in Sexual Assault Trials*, 78 ALB. L. REV. 1059, 1064 (2015).

26. *See* MacKinnon, *supra* note 3, at 439 ("[M]aybe one reason rape law is so ineffective is its failure to define the legal reality in terms of the social reality.").

change in social norms.[27] In that battle, more righteous prosecutions may be lost than won. Only the federal sovereign has the resources to fight that battle.[28]

Second, mass incarceration, with a dramatic racially disparate impact, is indeed a cause of national concern.[29] Those who see possessory offenses far removed from actual violence as problematic generally see federal criminal law as the paradigmatic example of what is wrong with the overall system.[30] If federal rape prosecutions were simply superimposed on the existing system, and independently financed, all the good that one might hope for would be finally putting enough force into the fight against rape to make some progress.[31] The woes of mass incarceration would be aggravated.[32] In the real world, however, a new commitment, especially if invested in a new bureau with powerful supporters elsewhere in the government,

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27. *See* NAT'L SEXUAL VIOLENCE RES. CTR., ENGAGING BYSTANDERS TO PREVENT SEXUAL VIOLENCE: A GUIDE FOR PREVENTIONISTS 1, 4 (2013) ("A change in social norms that promotes healthy, respectful relationships in place of actions and behaviors that support rape culture is needed to prevent sexual violence."), http://www.nsvrc.org/sites/default/files/publications_nsvrc_guide_engaging-bystanders-prevent-sexual-violence_0.pdf [https://perma.cc/SVJ4-LDUK].

28. *See infra* Part III.A.1.

29. *See, e.g.*, Barack Obama, *The President's Role in Advancing Criminal Justice Reform*, 130 HARV. L. REV. 811, 815 (2017) ("We simply cannot afford to spend $80 billion annually on incarceration, to write off the seventy million Americans—that's almost one in three adults—with some form of criminal record, to release 600,000 inmates each year without a better program to reintegrate them into society, or to ignore the humanity of 2.2 million men and women currently in U.S. jails and prisons and over 11 million men and women moving in and out of U.S. jails every year." (footnotes omitted)).

30. *See, e.g.*, Michael Tonry, *Federal Sentencing "Reform" Since 1984: The Awful as Enemy of the Good*, CRIME & JUST., Sept. 2015, at 99, 99 ("After the federal guidelines took effect, buttressed by a plethora of mandatory minimum sentence laws, the growth of the federal prison population far outpaced that of the states, and the federal system became the extreme example nationally and internationally of the dangers of politicization of crime policy.").

31. *See infra* Part III.A.1.

32. *See* German Lopez, *The Justice System Needs to Take Rape More Seriously. That Doesn't Mean Longer Prison Sentences*, VOX (Sept. 2, 2016, 10:10 AM), https://www.vox.com/2016/9//1/12652758/rape-prison-mass-incarceration [https://perma.cc/UBF6-32NP] (noting the "real concern" that mandating or increasing prison sentences in sexual assault cases conflicts with the policy of reducing mass incarceration). Following the Brock Turner case, the California legislature prohibited suspended sentences for offenders convicted of sexual assault on unconscious victims. CAL. PENAL CODE § 1203.065 (West 2019). By contrast, federal law does not now provide a mandatory minimum term for sexual assault. This Article argues for extending federal rape law under the Commerce Clause, not for mandatory minimum sentences.

could not help but draw resources away from drug and firearms cases.[33]

Federal agents, prosecutors, magistrates, and judges are rightly seen as something of an elite.[34] Federal sentences are generally more severe than their state counterparts.[35] Certain federal procedures give some tactical advantages to prosecutors in rape cases.[36] The dual-sovereign doctrine, which defines conduct offending both state and federal law as two distinct offenses under the Double Jeopardy Clause, would enable limited reconsideration of egregiously irrational acquittals.[37] In real-world rape cases, federal heat has realistic prospects of finally turning the tide.

Part I documents the continued high rate of sexual assault and low rates of reporting, clearance, and conviction. Part II assesses the commerce power's reach over many, but far from all, sexual assaults. Part III makes the case that a federal law against rape would improve rape enforcement *and* federal criminal justice generally. Part IV addresses foreseeable objections premised on federalism, feminism, procedural fairness, and systemic feedback loops.

Appendix I offers model language for a federal law against rape, modeled on the Hobbs Act and the existing federal sexual assault laws applicable to the government's maritime and territorial jurisdiction. Appendix II provides model language for the creation of a Bureau of Violent Crimes that would take its place alongside the Federal Bureau of Investigation (FBI), Drug Enforcement Administration (DEA), and Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) in the Justice Department (DOJ). A separate bureau would not only enforce the new federal rape statute, but other federal laws against violent crime. The two proposals are related but distinct. A federal rape law is doubly justified by the

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33. *See infra* Part III.B.

34. *See, e.g.*, Benjamin Weiser, *A Steppingstone for Law's Best and Brightest*, N.Y. TIMES (Jan. 29, 2009), https://www.nytimes.com/2009/01/30/nyregion/30southern.html [https://perma.cc/D6NT-4QM7] (describing the prestige of being a U.S. Attorney in the Southern District of New York).

35. *See* Ronald F. Wright, *Federal or State? Sorting as a Sentencing Choice*, A.B.A. SEC. CRIM. JUST., Summer 2006, at 16, 17.

36. *See infra* Part III.A.2.

37. *See* United States v. Lanza, 260 U.S. 377, 382 (1922) (holding that the state and federal government may both try and punish a defendant for the same crime); *infra* notes 366-67 and accompanying text.

need for more effective enforcement and by the advantages of reorienting federal criminal law away from contraband offenses and toward violent crimes. A new enforcement agency would both give teeth to the new rape statute and mark a more general turn toward crimes of violence.

I. STATE ENFORCEMENT ALONE HAS MADE LITTLE PROGRESS AGAINST RAPE

Criminal law aims to condemn past offenses and prevent future ones.[38] To convict the guilty, the system needs a reported rape, an arrest by police, a charging decision by prosecutors, and either a guilty plea or a conviction by a jury. If enough offenses are thus punished and denounced, it is plausible to believe that the frequency of the crime will decline.[39] How well have the states been doing the job?

A. Extent and Trend of Victimization

The FBI's Uniform Crime Reports (UCR) provide data on the frequency of crimes reported to law enforcement and the frequency of arrests.[40] Until 2013, the UCR system recorded reports of rape defined as vaginal penetration by force without consent.[41] In 2013,

38. *See, e.g.*, 18 U.S.C. § 3553(a)(2)(A)-(B) (2012) (mentioning these goals, among others, as factors for federal judges to consider in the imposition of a sentence).

39. *See* Michael Tonry, *Learning from the Limitations of Deterrence Research*, 37 CRIME & JUST. 279, 279-80 (2008) ("The state of the art of policy-relevant knowledge about the deterrent effects of the criminal justice system is little different in 2008 than it was 30 years ago when the National Academy of Sciences (NAS) panel on deterrence and incapacitation reported that the existence of a criminal justice system has overall deterrent effects, there is a widely shared intuition that penalty increases have marginal deterrent effects but the available evidence is highly ambiguous and contested.... There is some evidence, as Beccaria and Bentham believed, that certainty and promptness of punishment are more important than severity. Because there are differences in order of magnitude in the abilities of police and courts to alter the promptness of their behavior or affect would-be offenders' perceptions of risk, changes in police practices are more likely to achieve deterrent effects than changes in sentencing policies and practices.").

40. *See Uniform Crime Reporting (UCR) Program*, FED. BUREAU INVESTIGATION, https://www.fbi.gov/services/cjis/ucr [https://perma.cc/CRM6-6DQH].

41. *See* Press Release, Fed. Bureau of Investigation, FBI Releases 2013 Crime Statistics 1 (Nov. 10, 2014), https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/summary-2013/ 2013-cius-summary-_final.pdf [https://perma.cc/CBN4-PCVU].

the FBI redefined rape to include all forms of sexual penetration without consent.[42] This new definition includes oral and anal penetration and drops the force requirement.[43] In the years since, the UCR gives statistics for both the "revised definition" (penetration without consent) and the "legacy definition" (vaginal penetration by force without consent).[44]

From 1996 to 2015, the reported rate of forcible rape declined from 36.3 to 28.1 per 100,000 inhabitants.[45] However, the reported number of 90,185 forcible rapes in 2015 is still disturbing.[46] Because rape is generally and substantially underreported,[47] it is at least as likely that the decline in reports reflects a worsening, rather than an improving situation.[48] The reporting number sheds some light on law enforcement's response to reports, but little if any on the frequency of rape.

The Bureau of Justice Statistics (BJS) annually conducts the National Crime Victimization Survey (NCVS).[49] The 2015 survey found that incidence of rape victimization climbed from 1.1 per one thousand persons in 2014 to 1.6 per one thousand persons in 2015[50]—more than five times as high as the UCR rate.[51] The revised 2016 NCVS reported a victimization rate for rape or sexual assault of 1.1 per one thousand persons.[52]

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42. *See id.*

43. *See id.*

44. *See Table 1: Crime in the United States by Volume and Rate Per 100,000 Inhabitants, 1996-2015*, FED. BUREAU INVESTIGATION [hereinafter *FBI Data, 1996-2015*], https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-1 [https://perma.cc/Y2TN-JEQQ]; *see also supra* notes 41-43 and accompanying text.

45. *See FBI Data, 1996-2015*, *supra* note 44.

46. *See id.*

47. *See supra* note 3 and accompanying text.

48. *Cf.* David A. Fahrenthold, *Statistics Show Drop in U.S. Rape Cases*, WASH. POST (June 19, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/06/18/AR2006061800610.html [https://perma.cc/VY7P-8LUH] (noting that the drop in reported rapes could be a "statistical mirage").

49. *See, e.g.*, JENNIFER L. TRUMAN & RACHEL E. MORGAN, BUREAU JUST. STATS., CRIMINAL VICTIMIZATION, 2015 (rev. ed. 2018), https://www.bjs.gov/content/pub/pdf/cv15.pdf [https://perma.cc/X8BM-CKKY].

50. *See id.* at 2 tbl.1.

51. *See FBI Data, 1996-2015*, *supra* note 44.

52. RACHEL E. MORGAN & GRACE KENA, BUREAU JUST. STATS., CRIMINAL VICTIMIZATION, 2016: REVISED, at 2 tbl. 1 (2018), https://www.bjs.gov/content/pub/pdf/cv16.pdf [https://perma.cc/33RY-V5BU].

The 2016 NCVS surveyed a different set of counties than previous surveys, so any inference of a trend from 2015 to 2016 would be dubious.[53] According to the survey, there was "no statistically significant change in the rate of overall violent crime ... [or] the rate of serious violence" between 2015 and 2016.[54] The 1.1 per one thousand persons incidence rate is close to the rate reported in the 2000 NCVS.[55]

The NCVS, a very valuable source of data on crime in general, substantially undercounts the actual incidence of rape.[56] The BJS recognized this and commissioned a National Research Council (NRC) report.[57] The NRC panel found the NCVS flawed in four ways: (1) "a sample design that is inefficient for measuring these low-incidence events," (2) "the context of 'crime' that defines the survey," (3) "a lack of privacy for respondents in completing the survey," and (4) "the use of words with ambiguous meaning for key measures in the questionnaire."[58] For example, respondents may not recognize their victimization as "crime" or "rape."[59] Further, the same motives for not reporting to the police may influence responses to an official survey.[60] Because the NCVS questions households rather than individuals, respondents may withhold information they do not want other family members to know.[61]

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53. *See id.* at 3 (noting that many of the interviewees in the 2016 survey were "from a somewhat different set of U.S. counties and had a somewhat different composition of demographic characteristics than under the prior sample design"). While the NCVS sought to resolve some data comparability problems with its revised data file, some limitations remain. *See id.* at 4.

54. *Id.* at 2.

55. *See* CALLIE MARIE RENNISON, BUREAU JUST. STATS., CRIMINAL VICTIMIZATION 2000: CHANGES 1999-2000 WITH TRENDS 1993-2000, at 3 tbl.1 (2001), https://www.bjs.gov/content/pub/pdf/cv00.pdf [https://perma.cc/W3CE-VTTP].

56. *See, e.g.*, Kimberly A. Lonsway & Joanne Archambault, *The "Justice Gap" for Sexual Assault Cases: Future Directions for Research and Reform*, 18 VIOLENCE AGAINST WOMEN 145, 146-47 (2012) (summarizing weaknesses in NCVS methodology).

57. *See generally* CANDACE KRUTTSCHNITT ET AL., NAT'L RES. COUNCIL, ESTIMATING THE INCIDENCE OF RAPE AND SEXUAL ASSAULT (2014).

58. *Id.* at 155.

59. *See id.* at 157 ("[V]ictims may not always think of a rape or sexual assault as a crime, particularly if the respondent knows the offender.").

60. *See id.* ("[S]ome victims may fear disclosure to police and may associate a government crime survey too closely with law enforcement.").

61. *See id.* ("Privacy, specifically from other household members, is critical for accurately responding to inquiries about rape and sexual assault, in part because the victim often knows the offender. In fact, the offender may be a household member.").

The NRC panel concluded "it is highly likely that the NCVS is underestimating rape and sexual assault."[62] The panel did not offer an estimate of the size of the undercount, but comparisons with other surveys suggest a vast number of incidents are not picked up by the NCVS.[63] For example, the Centers for Disease Control and Prevention (CDC) 1994 National Violence Against Women survey found more than twice as many estimated rapes as the corresponding NCVS.[64]

The CDC's 2011 National Intimate Partner and Sexual Violence Survey (NISVS) found that "an estimated 1.6 [percent] of women reported that they were raped in the 12 months preceding the survey."[65] That year, the NCVS found a rape victimization rate of 0.9 per one thousand persons of both genders.[66] Halving the CDC's number to correspond, roughly, to the population base in the NCVS, the CDC survey found 8 rape victims per one thousand people—far higher than the NCVS rate of 0.9 per one thousand people.[67]

The NCVS data suggests a long-term decline in the victimization rate.[68] Even if the NCVS undercounts, changes across time might still reflect overall trends. The 1995 NCVS found the incidence of "rape/sexual assault" to be 1.6 per one thousand people.[69] By 2014,

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62. *Id.* at 106.

63. *See id.* tbl.6-5 (reporting estimates of numbers of rapes and attempted rapes from various sources).

64. *See* PATRICIA TJADEN & NANCY THOENNES, FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN 15 (2000) ("NVAW Survey estimates of the number of rapes perpetrated against women and men annually (876,064 and 111,298, respectively) are higher than comparable estimates from the ... BJS ... NCVS. The NCVS estimates for 1994—a year that approximates the timeframe for the NVAW Survey—are 432,100 rapes or sexual assaults of U.S. females age 12 and older and 32,900 rapes or sexual assaults of U.S. males age 12 and older.").

65. Matthew J. Breiding et al., Ctrs. for Disease Control & Prevention, *Prevalence and Characteristics of Sexual Violence, Stalking, and Intimate Partner Violence Victimization—National Intimate Partner and Sexual Violence Survey, United States, 2011*, MORBIDITY & MORTALITY WKLY. REP. SURVEILLANCE SUMMARIES, Sept. 5, 2014, at 1, 1, https://www.cdc.gov/mmwr/pdf/ss/ss6308.pdf [https://perma. cc/YV2C-ETEP].

66. JENNIFER L. TRUMAN & MICHAEL PLANTY, BUREAU JUST. STATS., CRIMINAL VICTIMIZATION, 2011, at 3 tbl.2 (2012), https://www.bjs.gov/content/pub/pdf/cv11.pdf [https://perma.cc/CLA5-CVRZ].

67. *Compare* Breiding et al., *supra* note 65, at 1, *with* TRUMAN & PLANTY, *supra* note 66, at 3 tbl.2.

68. *See infra* Figure 1.

69. BUREAU JUST. STATS., CRIMINAL VICTIMIZATION IN THE UNITED STATES, 1995, at 8 tbl.1 (2000), https://www.bjs.gov/content/pub/pdf/cvus95.pdf [https://perma.cc/XXB3-9Y5H].

that number declined to 1.1 per one thousand people.[70] The 2015 survey found the rate to have climbed to 1.6 per one thousand people—just where it stood in 1995.[71] The authors cautioned that:

> While the change in the rape or sexual assault rate from 2014 to 2015 is significantly different at the 90 [percent] confidence level, care should be taken in interpreting this change because the estimates of rape or sexual assault are based on a small number of cases reported to the survey.[72]

That caveat, however, applies to all editions of the NCVS.[73]

Rape-related emergency room (ER) visits offer another metric for measuring the trend of rape frequency. Victims who go or are taken to emergency rooms have strong medical reasons to seek treatment and can obtain medical care without talking to the police. The CDC monitors ER visits due to sexual assault.[74] In 2001, the earliest data point, the CDC found the age-adjusted rate of sexual assault for the female population to be 42.99 per 100,000 people.[75] That figure was 46.35 in 2005, 43.43 in 2010, and 43.13 in 2014.[76] Unless incidence went down and was precisely offset by increasing willingness to go to the ER,[77] these ER numbers suggest that the frequency of forcible rape has not significantly changed in fifteen years.

Some data suggests that survivors with injuries are both more willing to seek medical care and more likely to seek that care at a

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70. *See* TRUMAN & MORGAN, *supra* note 49, at 2 tbl.1.

71. *Compare id.*, *with* BUREAU OF JUSTICE STATISTICS, *supra* note 69, at 8 tbl.1.

72. *See* TRUMAN & MORGAN, *supra* note 49, at 16.

73. *See id.* ("[S]mall absolute changes and fluctuations in the rates of victimization can result in larger year-to-year change estimates.").

74. *See Sexual Violence: Data Sources*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/violenceprevention/sexualviolence/datasources.html [https://perma.cc/Z2DE-WDBZ] (listing the National Electronic Injury Surveillance System-All Injury Program, which provides data on injuries treated at ERs, as a data source).

75. *See Nonfatal Injury Reports, 2000-2016*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://webappa.cdc.gov/sasweb/ncipc/nfirates.html [https://perma.cc/XL53-JNX6] (select "Assault-Sexual" in question 1; then click the "Sex" menu and select "Females" in question 3; then select "2001" in each of the two menus under "Year(s) of Report" in question 3; then click "Submit Request").

76. *See id.* (follow the same method outlined in note 75, *supra*, but selecting either "2005," "2010," or "2014" instead of "2001" in both of the menus under "Year(s) of Report" in question 3).

77. *Cf. supra* notes 47-48 and accompanying text.

medical clinic. The NCVS data shows the percentage of injured rape victims who sought medical care rose from 26 percent in the years 1994-1998 to 35 percent in the years 2005-2010.[78] The same data shows the percentage of injured victims receiving medical care at hospitals, ERs, or doctor's offices, as opposed to at the scene of the rape or elsewhere, rose from 65 percent to 80 percent.[79]

Figure 1 shows annual incidence according to the UCR legacy definition data from 1995 through 2017,[80] the CDC ER data from 2001 through 2017,[81] and the NCVS data from 1995 through 2017.[82] For consistency with the UCR and NCVS data, I use the CDC rate per total crude population, not the female population.[83] I also include the FBI's UCR rate per 100,000 of murder and non-negligent manslaughter in the UCR-H line.[84] The homicide data enable comparison between the various measures of rape frequency and the rate of another serious violent crime that is not subject to comparable reporting problems.[85]

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78. *See* MICHAEL PLANTY ET AL., BUREAU JUST. STATS., FEMALE VICTIMS OF SEXUAL VIOLENCE, 1994-2010, at 6 tbl.6 (rev. ed. 2016), https://www.bjs.gov/content/pub/pdf/fvsv9410.pdf [https://perma.cc/22JY-FZP7].

79. *Id.*

80. *See Table 1: Crime in the United States by Volume and Rate Per 100,000 Inhabitants, 1997-2016*, FED. BUREAU INVESTIGATION [hereinafter *FBI Data, 1997-2016*], https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/tables/table-1 [https://perma.cc/9JHN-BUJ2]; *Table 1: Crime in the United States by Volume and Rate Per 100,000 Inhabitants, 1995-2014*, FED. BUREAU INVESTIGATION [hereinafter *FBI Data, 1995-2014*], https://ucr.fbi.gov/crime-in-the-u.s/2014/crime-in-the-u.s.-2014/tables/table-1 [https://perma.cc/V8FF-TK8S].

81. *See Nonfatal Injury Reports, 2000-2016*, *supra* note 75 (select "Assault-Sexual" in question 1; then click the "Sex" menu and select "Both Sexes" in question 3; then select "2001" in each of the two menus under "Year(s) of Report" in question 3; then click "Submit Request." Repeat this method for each year from 2001 to 2015).

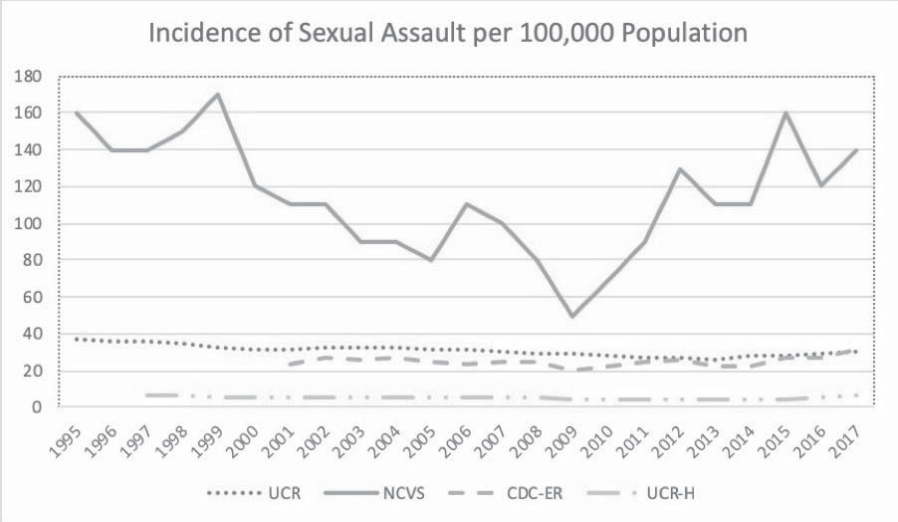
82. *See Publications & Products: Criminal Victimization*, BUREAU JUST. STATS., https://www.bjs.gov/index.cfm?ty=pbse&sid=6 [https://perma.cc/PF2W-2WPF] (click on each of the Criminal Victimization reports from 1995 to 2016, and locate the victimization rate per one thousand persons age 12 or older and the "Rape/sexual assault" column in each report).

83. *See supra* note 81 (including "Both Sexes" in the dataset).

84. *See FBI Data, 1997-2016*, *supra* note 80; *FBI Data, 1995-2014*, *supra* note 80.

85. *Cf. supra* notes 3, 47-48 and accompanying text.

Figure 1



The swings in the NCVS data seem more likely to reflect methodological issues than any genuine change in the incidence rate.[86] The ER data are quite steady, showing, if any change, a slight increase after 2009.[87] In the UCR data, the rape trend resembles the homicide trend, showing a slight decline from the late 1990s through 2014 and a recent slight uptick.[88] If law enforcement's initiatives against rape were achieving real progress, we would expect to see an increase in reporting to police, a decline in victimization survey reports, and a decrease in ER visits.

All three measures of rape frequency underestimate the true number of offenses.[89] The 2011 NISVS finding of 1.6 percent of women victimized annually,[90] halved to roughly approximate the total population base in the Figure 1 measures is 800 per 100,000. The vertical axis in Figure 1 would have to be more than four times higher to even fit that data point on the chart.

86. *See, e.g.*, MORGAN & KENA, *supra* note 52, at 3-4.
87. *See supra* Figure 1.
88. *See supra* Figure 1.
89. *See supra* notes 3, 47-48, 56-62 and accompanying text.
90. *See* Breiding et al., *supra* note 65, at 5 tbl.1.

However one parses the statistics, the situation is grim. The CDC NISVS found a 19.3 percent lifetime prevalence rate of rape among adult women.[91] Not only does the U.S. rape epidemic persist, but the legal system's response to rape is, if anything, getting worse rather than better over time.[92]

B. Reporting, Complaint Processing, Prosecutions, and Convictions

States have shown the political will to attack the rape problem.[93] Spurred by the feminist movement, legislatures began adopting major reforms in the 1970s.[94] These included rape shield laws and the abolition of archaic common-law rules such as the resistance requirement and limiting the offense to vaginal penetration.[95] This period also saw the emergence of new institutions, as activists established rape crisis centers and law enforcement agencies created specialized sexual assault units.[96]

Frustrated by the persistence of underreporting and low conviction rates, legislatures prescribed some very strong medicine, including sex offender registries,[97] civil commitment even of the

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91. *See id.* at 4.

92. *See infra* Part I.B.

93. *See infra* Part I.C.

94. *See* Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U. L. REV. 467, 469-71 (2005).

95. *See, e.g.*, *id.* at 469-70, 469 n.14 ("In the wake of demands for equal rights for women under the law and tighter criminal justice controls during the 1970s, reform of rape laws became a legislative priority. As a result, over the next thirty years, every state in the country and the District of Columbia redrafted their rape statutes in some way. Though the reforms were not identical, they each focused almost exclusively on the victim's role within the criminal justice system. These criminal justice reforms fell into four categories: (1) redefinition of the offense (repealing spousal exemptions and abolishing specific gender roles for the accuser and accused); (2) evidentiary reforms (elimination of corroboration requirements, enactment of rape shield statutes); (3) reforms in statutory age requirements; and (4) reforms in statutory structures (grading of offenses according to severity of force and resulting injuries)." (footnotes omitted)).

96. *See, e.g.*, Suzanne Charlé, *Sex Crimes Units Are Raising Conviction Rates, Consciousness, Costs ... and Questions*, POLICE MAG., Mar. 1980, at 52, 53-56 (describing experience with special police units dedicated to sexual assault cases); *History of the Movement*, WASH. COALITION SEXUAL ASSAULT PROGRAMS, https://www.wcsap.org/advocacy/program-management/new-directors/history/history-movement [https://perma.cc/GA72-DKRX].

97. *See, e.g.*, Wayne A. Logan, *Sex Offender Registration and Community Notification:*

criminally responsible,[98] and admissibility of past bad acts to show propensity.[99] Legislatures skirted the line of unconstitutionality and sometimes crossed it.[100] The results have fallen far short of the proponents' hopes.

1. Rape Remains Significantly Underreported

The analysis in Part I.A suggests that the incidence of rape probably has changed little, if at all, in the last twenty years.[101] According to the FBI, reporting during this period actually declined, from 36.3 rapes per 100,000 people per year in 1996 to 28.1 in 2015.[102] That would represent an increase in reporting only if the incidence of rape fell by more than 25 percent.[103] It seems considerably more

Past, Present, and Future, 34 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 3, 5 (2008) ("In 1990, Washington State enacted the nation's first registration and community notification law, permitting dissemination of identifying information on registrants to communities in which registrants lived. In 1994, New Jersey's rapid adoption of registration and notification, in the wake of Megan Kanka's sexual abuse and murder by a convicted sex offender living nearby, fueled national interest in the social control strategies. The laws quickly swept the nation, with legislatures often adopting in verbatim form one another's legislative findings."); *see also id.* at 5-6 (explaining that Congress conditioned federal funds on state adoption of registration and notification laws).

98. *See, e.g.*, Deirdre M. Smith, *Dangerous Diagnoses, Risky Assumptions, and the Failed Experiment of "Sexually Violent Predator" Commitment*, 67 OKLA. L. REV. 619, 621 (2015) ("In 1990 ... the Washington legislature enacted a statute allowing the state to continue to detain certain sex offenders after they had completed their criminal sentences. The targets of these new laws were dubbed 'Sexually Violent Predators' (SVPs), a label intended to connote a subclass of sex offenders who run a high risk of recidivism after their release due to the presence of a mental abnormality or personality disorder. Soon thereafter, a few other states, including Kansas, enacted their own commitment laws modeled closely after Washington's." (footnotes omitted)).

99. *See, e.g.*, FED. R. EVID. 413-14; Tamara Rice Lave & Aviva Orenstein, *Empirical Fallacies of Evidence Law: A Critical Look at the Admission of Prior Sex Crimes*, 81 U. CIN. L. REV. 795, 800-01 (2013) ("Since 1995, twelve states ... have adopted statutes similar to Rules 413 and 414 [of the Federal Rules of Evidence].").

100. *See* Olden v. Kentucky, 488 U.S. 227, 233 (1988) (per curiam) (striking down the application of state rape shield law to exclude proof of a sexual relationship relevant to show accuser's motive to fabricate); Rice Lave & Orenstein, *supra* note 99, at 801 ("Five states—Delaware, Indiana, Iowa, Missouri and Washington—passed ... legislation [admitting prior crimes evidence for propensity], but their Supreme Courts rejected the rules as unconstitutional.").

101. *See supra* Part I.A.

102. *See FBI Data, 1996-2015*, *supra* note 44.

103. *Cf. id.*

plausible to see the reporting trend as underreporting getting worse, rather than the frequency of the crime getting better.

The NCVS asks whether victims reported to the police.[104] The self-reported reporting rate for rape victims in the NCVS has fluctuated wildly. Between 1995 and 1999, the reporting rate varied only a point or two from 30 percent.[105] Then in 2000, the rate went up to 48.1 percent.[106] It remained near 50 percent until 2011, when it fell to 27 percent.[107] The BJS did not explain the sudden drop in the reporting rate, which has remained around the 30 percent rate that prevailed in the late 1990s.[108] In 2015, the rate fell from 33.6 percent to 32.5 percent.[109] The self-reported reporting rate in the 2016 NCVS was 23.2 percent,[110] with no indication whether continuing counties showed a sharp decline or whether the decline was due to lower reporting rates in the newly included counties.[111]

Evidence from other surveys also shows that "the likelihood of reporting a sexual assault increased from the 1960s to the 1990s but has remained stable since that time."[112] While other surveys are consistent with the NCVS on the reporting rate trend, they find that rate substantially lower than the rate found by the NCVS.[113]

The most recent studies also suggest that a large majority of rapes go unreported. The BJS analyzed the NCVS data from college-age women collected from 1995 to 2013, and found that only 20 percent of students and 32 percent of nonstudents reported the crime to police.[114] The Association of American Universities (AAU)

104. *See* TRUMAN & MORGAN, *supra* note 49, at 14.

105. *See* RENNISON, *supra* note 55, at 10 tbl.7.

106. *Id.*

107. *See* TRUMAN & PLANTY, *supra* note 66, at 8 tbl.8.

108. *See, e.g.*, TRUMAN & MORGAN, *supra* note 49, at 6 tbl.4 (showing percentages for 2014 and 2015 at 33.6 percent and 32.5 percent, respectively).

109. *Id.*

110. MORGAN & KENA, *supra* note 52, at 7 tbl.4.

111. For more information on the redesign of county samples, see *id.* at 3-4.

112. Lonsway & Archambault, *supra* note 56, at 147.

113. *See id.* at 147-48 ("However, estimates for the reporting rate are considerably lower in these social scientific studies (16 [percent]-19 [percent]) than in the NCVS data for the same period (32 [percent]-41 [percent]). As the methods for sampling and interviewing procedures were designed to be comparable, the different estimates were likely due to the screening questions that were used.").

114. SOFI SINOZICH & LYNN LANGTON, BUREAU JUST. STATS., RAPE AND SEXUAL ASSAULT VICTIMIZATION AMONG COLLEGE-AGE FEMALES, 1995-2013, at 9 tbl.8 (2014), https://www.bjs.gov/content/pub/pdf/rsavcaf9513.pdf [https://perma.cc/QR7Q-V984].

commissioned a very large (over 150,000 respondents) survey of college students.[115] Only 25.5 percent of those reporting "physically forced penetration" said they informed *any* response agency, including police, university officials, healthcare providers, and victims' services.[116]

Research also shows that the reasons for not reporting rape have changed little since the early 1990s. Ronet Bachman analyzed the 1987-1990 NCVS data for the most important reason nonreporting victims gave.[117] Thirty-nine percent said it "was a private or personal matter," 20 percent said the police "wouldn't do anything about it," 6 percent said the police "couldn't do anything [to help]," and 13 percent said they were "[a]fraid of reprisal from [the] offender."[118] In the AAU survey released in 2015, 35.9 percent of the victims of forced penetration said they did not report because they were "embarrassed, ashamed[,] or that it would be too emotionally difficult."[119] Twenty-nine percent said they did not report because they "did not think anything would be done about it."[120]

The widespread expectation among survivors that reporting is both painful and pointless continues to have a foundation in fact. Professor Deborah Tuerkheimer summarizes some of the evidence of a nationwide pattern of police not processing rape complaints:

> With regard to both stranger and acquaintance rapes, police failure to investigate sexual assault cases is well documented. Consistent with the nationwide data, close examination of particular jurisdictions, including Los Angeles, Baltimore, St. Louis, New Orleans, New York, Salt Lake County, and Missoula,

115. DAVID CANTOR ET AL., WESTAT, REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT, at vi (2017), https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/AAU-Campus-Climate-Survey-FINAL-10-20-17.pdf [https://perma.cc/8EL7-MWUP].

116. *See id.* at 35.

117. Ronet Bachman, *Predicting the Reporting of Rape Victimizations: Have Rape Reforms Made a Difference?*, 20 CRIM. JUST. & BEHAV. 254, 256, 264 tbl.1 (1993).

118. *Id.* at 264 tbl.1.

119. CANTOR ET AL., *supra* note 115, at 36. Although it is not absolutely clear, these percentages appear to be based on the total number of respondents reporting forced penetration rather than on the number of victims who said they did not report.

120. *Id.*

> Montana, underscores that poor handling of rape cases by police is rampant.[121]

As a recent study by Human Rights Watch (HRW) points out, the implication is that *rising* rates of *reported* rapes are a positive sign of better policing.[122]

The number of complaints stonewalled by the police is uncertain. The problem, however, is clearly substantial.[123] The HRW study noted that:

> [R]eported rapes rose 30 percent in Baltimore after police officers were required to refer all sexual assault cases to detectives for review. And in New Orleans, the number of reported sexual assaults jumped 49 percent following changes requiring the commander of the Sex Crimes section to sign off on the classifications for all sexual assault cases.[124]

Recent social science research, qualitative and quantitative, suggests that the suppression of rape complaints by the police is widespread. Rose Corrigan led a research project that recorded interviews with 167 victim advocates working at 112 rape crisis centers in 6 different states.[125] Corrigan's findings were disheartening: "The sheer number, variety, and similarity of these stories indicates that negative, dismissive, or even abusive practices by police are not unique or unusual, but rather persist in many communities and affect potentially thousands of victims each year who *do* attempt to report a sexual assault to the police."[126]

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121. Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. REV. 1287, 1294-95 (2016) (footnotes omitted).

122. *See* HUM. RTS. WATCH, IMPROVING POLICE RESPONSE TO SEXUAL ASSAULT 1 (2013), https://www.hrw.org/sites/default/files/reports/improvingSAInvest_0.pdf [https://perma.cc/37NM-5KW6] ("[L]ow numbers or very high clearance rates can indicate selective documentation of cases. On the other hand, high numbers of reported rapes can signal increased confidence in police and more accurate data collection and reporting by police departments.").

123. *See, e.g.*, Soraya Chemaly, *How Police Still Fail Rape Victims*, ROLLING STONE (Aug. 16, 2016, 8:29 PM), https://www.rollingstone.com/culture/culture-features/how-police-still-fail-rape-victims-97782/ [https://perma.cc/U4VU-3T4U].

124. HUM. RTS. WATCH, *supra* note 122, at 1 (footnote omitted).

125. *See* ROSE CORRIGAN, UP AGAINST A WALL: RAPE REFORM AND THE FAILURE OF SUCCESS 4 (2013).

126. *Id.* at 94.

Corey Rayburn Yung used a statistical outlier detection technique to obtain a quantitative estimate of police undercounting rape complaints.[127] Using changes in murder rates as a baseline for identifying outliers, Yung found that "796,213 to 1,145,309 rapes were not included in the UCR due to police undercounting from 1995 to 2012."[128] Yung's low estimate of lost complaints, divided by the seventeen years of the study period, would mean that the police, on average, turned away more than 46,000 complaints per year.[129] Between 1996 and 2012, the number of rapes reported each year by the UCR varied, but never exceeded 97,000 or fell below 84,000.[130] In other words, if Yung's estimate is correct, roughly a third of the rape complaints brought to the police are not officially reported.

Evidence that police do not pursue so many complaints reinforces pessimistic interpretations of the incidence and reporting numbers.[131] It also has pessimistic implications for assessing police investigations of those complaints they record.[132]

2. The Clearance-by-Arrest Rate for Rape Remains Low

In 1995, 51.1 percent of rapes reported to the UCR system using the legacy definition were cleared by arrest.[133] Subsequently, the clearance rate has declined dramatically.[134] In 2015, the official clearance rates were 37.1 percent using the revised definition, and 36.4 percent using the legacy definition.[135] In 2016, the official

127. Corey Rayburn Yung, *How to Lie with Rape Statistics: America's Hidden Rape Crisis*, 99 IOWA L. REV. 1197, 1203 (2014).

128. *Id.* at 1239.

129. *Cf. id.*

130. *See FBI Data, 1996-2015*, *supra* note 44.

131. *See* Yung, *supra* note 127, at 1241.

132. *See infra* Part I.B.2.

133. FED. BUREAU INVESTIGATION, U.S. DEP'T JUST., UNIFORM CRIME REPORTS: CRIME IN THE UNITED STATES, 1995, at 199 tbl.25 (1996), https://ucr.fbi.gov/crime-in-the-u.s/1995/95sec3.pdf [https://perma.cc/WE4E-UZQR].

134. *See* Lonsway & Archambault, *supra* note 56, at 150 ("When this computation was made for forcible rape across time, the ratio of reports to arrests was in the 50 [percent] range in the 1970s and decreased steadily to 26 [percent] in 2008.").

135. *Table 27: Percent of Offenses Cleared by Arrest or Exceptional Means, Additional Information About Selected Offenses by Population Group, 2015*, FED. BUREAU INVESTIGATION [hereinafter *Percent of Offenses Cleared by Arrest, 2015*], https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-27 [https://perma. cc/66WJ-S6A6].

clearance rates were 36.5 percent using the revised definition, and 40.9 percent using the legacy definition.[136] The increase in the clearance rate under the legacy definition was not enough to offset a decline in the clearance rate for the revised definition, which includes the legacy cases and therefore offers a better measure of overall trends.[137]

In the "Crime in the United States by Volume and Rate per 100,000 inhabitants" section, the 2016 UCR reports 95,730 forcible rapes using the legacy definition, and 130,603 using the expanded definition that includes any form of penetration—vaginal, oral, or anal—that takes place without the victim's consent (regardless of whether force was used).[138] The section on clearances uses a different data set limited to agencies reporting clearances for at least a six-month period.[139] The 2016 clearance data showed 6822 rapes under the legacy definition, and 111,241 using the expanded definition.[140]

The clearance rate can be substantially higher than the number of arrests in two ways. First, one arrest may clear multiple crimes.[141] While it is unlikely that an arrest on a drug or robbery charge would clear a rape charge, one arrested rapist might be responsible for several reported rapes, and perhaps for other offenses too.[142] Most rapists commit multiple offenses.[143]

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136. *Table 17: Percent of Offenses Cleared by Arrest or Exceptional Means by Population Group, 2016*, FED. BUREAU INVESTIGATION [hereinafter *Percent of Offenses Cleared by Arrest, 2016*], https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/tables/table-17 [https://perma.cc/76G8-9VCE].

137. *See* FED. BUREAU INVESTIGATION, U.S. DEP'T JUST., UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2013, RAPE ADDENDUM 1-2 (2014), https://ucr.fbi.gov/crime-in-the-u.s/2013/crime-in-the-u.s.-2013/rape-addendum/rape_addendum_final.pdf [https://perma.cc/7YLK-98CG]. The revised definition is inclusive of the legacy definition, but adds forcible oral and anal penetration, includes male victims, and counts arrests for penetration without consent but absent force. *See id.* at 1. The revised definition also merges attempts and completed offenses. *See id.*

138. *FBI Data, 1997-2016*, *supra* note 80.

139. *See, e.g.*, *Percent of Offenses Cleared by Arrest, 2016*, *supra* note 136.

140. *See id.*

141. FED. BUREAU INVESTIGATION, U.S. DEP'T JUST., UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2010, OFFENSES CLEARED 1 (2011), https://ucr.fbi.gov/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/clearancetopic.pdf [https://perma.cc/E8S5-AZQL].

142. *See* David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73, 80-81 (2002).

143. *See, e.g.*, *id.* at 78 (stating that authors identified 120 undetected rapists in a sample

Second, the FBI now counts the percentage of cases cleared by arrest *or* exceptional means.[144] The latter category includes reports that turned out not to be crimes, such as when a reported murder is later ruled a suicide.[145] It also includes cases in which the police have identified but cannot charge the offender, such as when the suspect has died.[146]

Exceptional clearances are more common in rape cases than for other crimes.[147] The National Institute of Justice commissioned a detailed study of sexual assault cases investigated by the Los Angeles Police Department (LAPD) and the Los Angeles County Sheriff's Department (LASD).[148] The report by Cassia Spohn and Katharine Tellis included quantitative analysis of case attrition from court records, analysis of case files, and interviews not just with survivors, but also with police and prosecutors.[149] Spohn and Tellis found that:

> Consistent with the findings of prior research, ... there is *substantial attrition in sexual assault cases reported to the LAPD and the LASD*. Among cases reported to the LAPD, only one in nine was cleared by arrest, fewer than one in ten resulted in the

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of 1882 male university students, a majority of the rapists committed multiple rapes, and these repeated rapists averaged 5.8 rapes per rapist). Studies of convicted rapists report even higher numbers. *See id.* at 74.

144. *See* FED. BUREAU INVESTIGATION, U.S. DEP'T JUST., UNIFORM CRIME REPORT: CRIME IN THE UNITED STATES, 2015, DATA DECLARATION 2 (2016), https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/table-43/tab43datadec_final.pdf [https://perma.cc/G9XS-9HJ4] ("The percentage of crimes cleared by arrest is obtained first by dividing the number of offenses cleared by the number of offenses known and then multiplying the resulting figure by 100.").

145. *See* FED. BUREAU INVESTIGATION, *supra* note 141, at 1-2.

146. *See id.*

147. *See* JOANNE ARCHAMBAULT & KIMBERLY A. LONSWAY, END VIOLENCE AGAINST WOMEN INT'L, CLEARANCE METHODS FOR SEXUAL ASSAULT CASES 16, http://www.evawintl.org/library/DocumentLibraryHandler.ashx?id=34 [https://perma.cc/SQC3-9SSB] ("Unfortunately, there is evidence that some law enforcement agencies across the country use exceptional clearance improperly, either because they cannot find the victim or because he/she is viewed as 'uncooperative.' Some agencies also prematurely close their sexual assault cases with exceptional clearance—even before they have been thoroughly investigated—because the local prosecutor has indicated that the case will not be pursued.").

148. *See generally* CASSIA SPOHN & KATHARINE TELLIS, POLICING AND PROSECUTING SEXUAL ASSAULT IN LOS ANGELES CITY AND COUNTY (2012), https://www.ncjrs.gov/pdffiles1/nij/grants/237582.pdf [https://perma.cc/85K7-LW68].

149. *See id.* at I.

> filing of charges, and only one in thirteen resulted in a conviction. For cases reported to the LASD, about one in four reports was cleared by arrest, one in six resulted in the filing of charges, and one in seven resulted in a conviction.[150]

Moreover, the "locus of case attrition is the decision to arrest or not; the overwhelming majority of reports of sexual assault do not result in the arrest of a suspect."[151] "[O]veruse of the exceptional clearance" resulted in the LAPD reporting a clearance rate of 45.7 percent when the rate of clearance by arrest was only 12.2 percent.[152]

Whether other jurisdictions follow the same reporting process as Los Angeles is uncertain. Also uncertain is the extent to which overuse of the exceptional clearance is offset by rape arrests clearing more than one rape. What seems clear is that the clearance rate is low and falling, and may very well be even lower than officially reported.[153]

The data on clearances are even more concerning than they first appear. First, the police do not report a significant number of complaints. The reported offenses number in the clearance rate calculation therefore ought to be considerably higher. Second, the period of dramatic decline in clearance rates for rape coincided with the advent of both polymerase chain reaction (PCR) DNA testing[154] and the establishment of searchable databases containing identifying information for thousands of prior offenders.[155] As solving rape cases became less difficult, the clearance rate should have gone up.[156]

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150. *Id.* at VIII.

151. *Id.*

152. *Id.* at IV. LASD reported a clearance rate of 88.7 percent, but the clearance by arrest rate was only 34.7 percent. *Id.*

153. *See, e.g.*, *supra* notes 133-36, 151-52 and accompanying text.

154. *See History of DNA Testing*, DNA DIAGNOSTICS CTR., https://dnacenter.com/history-dna-testing/ [https://perma.cc/9TUK-9LVG].

155. *See Combined DNA Index System (CODIS)*, FED. BUREAU INVESTIGATION, https://www.fbi.gov/services/laboratory/biometric-analysis/codis [https://perma.cc/4TP4-GZAU]. According to the FBI's website:

> The FBI Laboratory's CODIS began as a pilot software project in 1990, serving 14 state and local laboratories. The DNA Identification Act of 1994 formalized the FBI's authority to establish a National DNA Index System (NDIS) for law enforcement purposes. Today, over 190 public law enforcement laboratories participate in NDIS across the United States.

Id.

156. *See* Joseph L. Giacalone, *In Focus: Investigating and Solving Sexual Assaults*,

3. Justified Rape Prosecutions Remain Hard to Win

When a prosecution is initiated, the attrition rate for rape cases, while high, is not dramatically different than for other serious crimes. The BJS periodically surveys the seventy-five largest counties for data on felony prosecution outcomes.[157] The most recent such study appeared in 2013 and analyzed data from 2009.[158]

In cases that were adjudicated within the one-year study period, sixty-eight of ninety-five accused rapists were convicted, fifty-seven on felony charges and eleven for misdemeanors.[159] The 66 percent overall conviction rate and the 54 percent total felony-conviction rate compares favorably to the 61 percent total rate and 49 percent felony-conviction rate for violent offenses overall.[160] The high conviction rates for rape are possible, however, only because of the extraordinary screening of rape cases before charges are filed.[161]

The same BJS survey shows that rape was the most serious charge in only 1 percent of all felony cases,[162] and the most serious offense of conviction for only 0.5 percent of convicted defendants.[163] The 2009 UCR reported 5.8 times as many rapes as murder,[164] while prosecutors charged rape as the most serious charge only 1.4 times as often as murder in the 2009 survey of felony defendants.[165] Robbery was more likely to be prosecuted than rape, but by a much smaller ratio.[166] For every rape accusation in the survey, there were

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LEXISNEXIS, http://blogs.lexisnexis.com/public-safety/2016/04/sexual-assault-crimes/ [https://perma.cc/WXT8-GEAV].

157. *See, e.g.*, BRIAN A. REAVES, BUREAU JUST. STATS., FELONY DEFENDANTS IN LARGE URBAN COUNTIES, 2009-STATISTICAL TABLES (2013), https://www.bjs.gov/content/pub/pdf/fdluc09.pdf [https://perma.cc/U324-X3TM].

158. *See id.*

159. *Id.* at 24 tbl.21.

160. *Id.*

161. *See* Lonsway & Archambault, *supra* note 56, at 155.

162. REAVES, *supra* note 157, at 3 tbl.1.

163. *Id.* at 25 tbl.22.

164. *FBI Data, 1996-2015*, *supra* note 44 (showing 89,241 reported rapes and 15,399 reported murders in 2009).

165. REAVES, *supra* note 157, at 3 tbl.1 (showing that murder was most serious charge in 0.7 percent of cases and rape in 1 percent).

166. *See id.*, at 3 tbl.1 (finding robbery to be the most serious charge in 6.8 percent of the cases and rape in 1 percent); *FBI Data, 1996-2015*, *supra* note 44, (finding that 408,742 robberies were reported compared to 89,241 rapes, or 4.6 robberies for each rape).

14.8 drug-trafficking charges.[167] Keeping the conviction rate for rape up depends on limiting charges to the strongest cases.[168]

C. Prospects for Reform

The academic literature on rape concentrates on the appropriate scope of the offense. The scholarly mainstream supports extending liability by dropping the force element and making sex without consent the crime.[169] Some thoughtful skeptics propose replacing the sexual autonomy protected by the consent standard with the protection of some other value as the gravamen of rape.[170] The definition of rape fully deserves the intellectual firepower devoted to it.[171] That said, the failure to enforce effectively even current law is a pachyderm in the pavilion if ever there were one.

Scholars have provided an intellectual feast of arguments about the meaning and appropriate roles of consent and force. When it comes to increasing reports, arrests, and convictions, however, the academic cupboard is virtually bare.[172] Decades ago, reformers

167. REAVES, *supra* note 157, at 3 tbl.1.

168. *Cf.* Lonsway & Archambault, *supra* note 56, at 155.

169. *See, e.g.*, David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 322 (2000) ("Virtually all modern rape scholars want to modify or abolish the force requirement as an element of rape."). The most thoroughly considered proposal for a consent-based regime is the draft revision of the American Law Institute's (ALI) Model Penal Code. *See* MODEL PENAL CODE § 213.1(2) statutory commentary (AM. LAW INST., Discussion Draft No. 2 2015). The draft was amended in response to objections. *See* Kevin Cole, *Backpedaling in Place: The ALI's Move from "Affirmative" to "Contextual" Consent*, SAN DIEGO L. REV. (forthcoming) (manuscript at 1) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2714057 [https://perma.cc/KZ5J-CDSN]. The ALI Council rejected the revised draft in the Spring of 2016. *See* Bradford Richardson, *American Law Institute Rejects Affirmative Consent Standard in Defining Sexual Assault*, WASH. TIMES (May 17, 2016), http://www.washingtontimes.com/news/2016/may/17/american-law-institute-rejects-affirmative-consent/ [https://perma.cc/27FJ-PSYV].

170. *See, e.g.*, JOHN GARDNER, *The Wrongness of Rape*, *in* OFFENCES AND DEFENCES 1, 15 (2007) (arguing that rape is wrong because it objectifies the victim); MacKinnon, *supra* note 3 (arguing that equality, not consent, should be the basis of rape law); Jed Rubenfeld, *The Riddle of Rape-by-Deception and the Myth of Sexual Autonomy*, 122 YALE L.J. 1372 (2012) (arguing that "self-possession," not consent, should be the basis of rape law). For a critique of Rubenfeld's argument, see Corey Rayburn Yung, *Rape Law Fundamentals*, 27 YALE J.L. & FEMINISM 1 (2015).

171. For a recent contribution to these debates, see generally, for example, Stephen J. Schulhofer, *Reforming the Law of Rape*, 35 LAW & INEQ. 335 (2017).

172. One promising policy is issuing civil protection orders based on sexual abuse as well as nonsexual batteries. *See* Shawn E. Fields, *Debunking the Stranger-in-the-Bushes Myth: The Case for Sexual Assault Protection Orders*, 2017 WIS. L. REV. 429. Civil remedies, however,

offered two promising proposals to improve enforcement: shield laws and expert testimony on rape trauma syndrome (RTS).[173] Legislatures and courts embraced both.[174]

However, these reforms have failed to overcome systemic skepticism about rape complainants.[175] Police officers and prosecutors who do not share the prevailing stereotypes must account for the fact that ordinary citizens will bring the old rape myths with them into the jury room.[176] Officers and prosecutors who entertain the same stereotypes can rationalize rejecting complaints because "we are only doing what a jury would do anyway."[177]

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like criminal penalties, depend on the willingness of victims to report—and reporting has been going down. *See supra* Part I.B.1.

173. *See* Arthur H. Garrison, *Rape Trauma Syndrome: A Review of a Behavioral Science Theory and Its Admissibility in Criminal Trials*, 23 AM. J. TRIAL ADVOC. 591, 591 (2000) ("In 1974, Drs. Ann Burgess and Lynda Holmstrom coined the term 'Rape Trauma Syndrome' ... to explain the reactions and coping mechanisms that rape victims may use to deal with the violation of a forcible rape."); Cristina Carmody Tilley, *A Feminist Repudiation of the Rape Shield Laws*, 51 DRAKE L. REV. 45, 48-51 (2002) (outlining the history of rape shield laws).

174. *See, e.g.*, Tilley, *supra* note 173, at 46 ("Michigan adopted the nation's first rape shield law in 1974, after an unlikely coalition of feminists and 'law and order' politicians organized a national consciousness-raising about the frequency of rape and the rarity of prosecution and conviction." (footnote omitted)); *see also id.* at 45 ("The federal government and forty-eight states currently enforce some version of a so-called rape shield law."). RTS evidence is generally, but not universally, admissible. *See* Garrison, *supra* note 173, at 629 ("[S]ince the *Marks* case, a total of twenty-five states and the military have ruled expert testimony on RTS syndrome evidence admissible, seven states have ruled expert testimony on RTS evidence inadmissible, and eighteen states and the District of Columbia have not directly ruled on the admissibility of RTS. With the addition of states that (1) allow lay witness testimony on the emotional and psychological effects of a rape on a victim, while prohibiting expert testimony on RTS, and (2) allow expert testimony on the emotional and physical condition of the victim after the immediate incident, a total of twenty-nine (90 [percent]) of the states that have directly addressed the admissibility of testimony on RTS and rape victimology have held that such evidence is admissible." (footnote omitted)).

175. *See, e.g.*, STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 17 (1998) ("Social attitudes are tenacious, and they can easily nullify the theories and doctrines found in the law books. The story of failed reforms is in part a story about the overriding importance of culture, about the seeming irrelevance of law.").

176. *See* Hildebrand & Najdowski, *supra* note 25, at 1061-62.

177. *Cf. id.* Whether internalization or rationalization is the larger cause is uncertain. The prevalence of rape myths among police officers, however, is significant. *See, e.g.*, *id.* at 1064 ("Social science research shows that rape myths are widely and persistently held in American society. For example, Feild's survey of laypeople, police officers, rape crisis counselors, and institutionalized rapists revealed that, on average, participants endorsed fourteen out of thirty-two prejudicial or erroneous beliefs about rape (e.g., 'A woman should feel guilty following a rape'). Attitudes toward rape differed significantly between rapists and the other subgroups of participants, but not necessarily in the direction one might expect. For example,

Legislatures continued the quest for effective enforcement by adopting innovative, arguably sinister, sanctions, such as civil commitment and sex-offender registries.[178] Ironically, the severity of these measures may have added to the reluctance of criminal justice actors to arrest, charge, and convict.[179] Even if these measures have not made things worse, the incidence and reporting statistics show they have not made things better.[180]

Legislators and judges clearly have shown the political will to act against rape.[181] Indeed, in the campaign against rape, they have resorted to expedients thought out of proportion even to the war on drugs.[182] The recent literature betrays a sense of frustration and

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rapists were more likely than other participants to think it is women's responsibility to prevent rape. Yet, community members, police officers, and rape crisis counselors were more likely than rapists to think that women precipitate rape through their appearance or behavior, and that women should try to resist rape during an attack." (footnotes omitted)).

178. *See supra* notes 97-98 and accompanying text.

179. Registration makes it hard for offenders to find work, which increases the risk of recidivism. *See* Adam Shajnfeld & Richard B. Krueger, *Reforming (Purportedly) Non-Punitive Responses to Sexual Offending*, 25 DEV. MENTAL HEALTH L. 81, 91-92 (2006). Some evidence suggests that registration deters offending, but these gains may be offset by increased recidivism. *See* J.J. Prescott & Jonah E. Rockoff, *Do Sex Offender Registration and Notification Laws Affect Criminal Behavior?*, 54 J.L. & ECON. 161 (2011). Moreover, the decline in reported offenses may be the result of deterring reports and arrests rather than deterring offenses. *See* CORRIGAN, *supra* note 125, at 233 ("By further discouraging identification, prosecution, and conviction of sex crimes, SORCN laws contribute to the erasure of sexual assault in local communities and across the country.").

The cost of civil commitment is very high. *See, e.g.*, Shajnfeld & Krueger, *supra*, at 93 (noting that civil commitment in Washington costs $138,000, and that "[o]verall, the cost of operating special facilities for the commitment of sex offenders at the national level is estimated to be $224 million per year"). Whatever benefits are achieved by civil commitment must be balanced against the substantial opportunity cost. *See id.* at 91. The same funds devoted to, for example, police and prosecutors might achieve more. *Cf. id.* at 93.

180. *See, e.g.*, Prescott & Rockoff, *supra* note 179.

181. *See supra* notes 93-100 and accompanying text.

182. The most salient examples are sex offender registries and indefinite commitment under the SVP laws.

even despair.[183] There is, however, one politically feasible and practically promising reform still to be tried: federal heat.

II. CONGRESSIONAL POWER TO MAKE RAPE A FEDERAL CRIME

The academic literature is moving toward a federal solution. The suggestions advanced, however, reflect an understandable focus on gender equality, just as the Violence Against Women Act did.[184] The recent literature suggests involving federal power via the Reconstruction amendments.[185]

In *United States v. Morrison*, the Supreme Court rejected Section 5 of the Fourteenth Amendment as a source of congressional power over individual acts of sexual violence.[186] Equal protection challenges to nonenforcement by state authorities satisfy the state action doctrine.[187] But equal protection claims in the context of rape cases would require proof of subjective gender animus.[188] The Supreme Court's long record of deference to prosecutorial discretion

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183. For example, Corrigan chose "Up Against a Wall" as the title for her book. *See* CORRIGAN, *supra* note 125. To take another example, a recent article notes that:

> Rape myths are so pervasive and commonly accepted that individuals share photos and videos of themselves and their peers committing sexual assaults without fear of repercussions or considerations of culpability. Unfortunately, these assumptions about rapists' de facto immunity from legal prosecution as well as from condemnation in the public sphere are often correct.

Holly Jeanine Boux & Courtenay W. Daum, *At the Intersection of Social Media and Rape Culture: How Facebook Postings, Texting and Other Personal Communications Challenge the "Real" Rape Myth in the Criminal Justice System*, 2015 U. ILL. J.L. TECH. & POL'Y 149, 185.

184. *See* Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1796.

185. *See* Jane Kim, *Taking Rape Seriously: Rape as Slavery*, 35 HARV. J.L. & GENDER 263, 266 (2012) ("[R]ape should be considered a form of slavery prohibited by the Thirteenth Amendment of the Constitution, allowing for the creation of a federal criminal regime to prosecute and prioritize rape in conjunction with state regimes."); *see also* Tuerkheimer, *supra* note 121 (arguing that underenforcement could establish gender discrimination in violation of the Equal Protection Clause).

186. *See* 529 U.S. 598, 617-27 (2000).

187. *See, e.g.*, DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189, 196-97, 197 n.3 (1989) (noting that a State is not violating the Due Process Clause by not providing its citizen with particular services, but that selectively denying services to certain individuals does violate the Equal Protection Clause).

188. *See generally* Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887 (2012).

suggests an uphill fight.[189] Even if a court found gender animus, there is no promising remedy.[190]

The most plausible candidate is structural injunctive relief under 42 U.S.C. § 14141.[191] Since Congress adopted § 14141, dozens of police departments have entered consent decrees with the DOJ to address patterns or practices of racial discrimination and excessive force.[192] In several cases, DOJ has investigated the response to sexual assault.[193] Four of those investigations ended in agreements by the local agencies to adopt structural reforms.[194]

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189. *See, e.g.*, *DeShaney*, 489 U.S. at 191 (holding that state actors' failure to protect a child victim from private violence does not violate due process); Heckler v. Chaney, 470 U.S. 821, 837-38 (1985) (holding that nonenforcement decisions by federal agencies are unreviewable under the Administrative Procedure Act).

190. *See Morrison*, 529 U.S. at 620-27.

191. 42 U.S.C. § 14141 (2012).

192. *See* CIVIL RIGHTS DIV., U.S. DEP'T JUST., THE CIVIL RIGHTS DIVISION'S PATTERN AND PRACTICE POLICE REFORM WORK: 1994-PRESENT 1 (2017), https://www.justice.gov/crt/file/922421/download [https://perma.cc/BW8D-F9JT] (noting that the Division has opened eleven new investigations and negotiated nineteen new reform agreements since 2012).

193. *See* Letter from Michael W. Cotter, U.S. Attorney, Dist. of Mont., to Fred Van Valkenburg, Cty. Attorney, Missoula Cty. 1 n.1 (Feb. 14, 2014), https://www.clearinghouse.net/chDocs/public/PN-MT-0003-0001.pdf [https://perma.cc/AXW3-9Q2Q] ("Previous to this letter, the Division's Special Litigation Section investigated and publicly issued findings regarding the response to sexual assault by five other law enforcement agencies: the New Orleans (LA) Police Department; the Maricopa County (AZ) Sheriff's Office; the Puerto Rico Police Department; and, most recently, the University of Montana's Office of Public Safety and the Missoula Police Department."). The University of Montana Agreement, the Missoula County Attorney's Office Agreement, and the Missoula Police Department Agreement all resulted from the same overall investigation, and the district attorney's office and police department each entered a memorandum of understanding with DOJ. *See* Memorandum of Understanding Between, the Montana Attorney General, the Missoula County Attorney's Office, Missoula County, and the United States Department of Justice (Dec. 13, 2013), https://www.justice.gov/sites/default/files/crt/legacy/2014/06/10/missoula_settle_6-10-14.pdf [https://perma.cc/262H-8BAA]; Press Release, U.S. Dep't of Justice, Justice Department Announces Missoula Police Department Has Fully Implemented Agreement to Improve Response to Reports of Sexual Assault (May 11, 2015), https://www.justice.gov/opa/pr/justice-department-announces-missoula-police-department-has-fully-implemented-agreement [https://perma.cc/4N2V-7KQ3].

194. *See* Letter from Michael W. Cotter, U.S. Attorney, Dist. of Mont. to Fred Van Valkenburg, Cty. Attorney, Missoula Ct., *supra* note 193, at 1 n.1. ("All but one of these law enforcement agencies—the Maricopa County Sheriff's Office—have entered into agreements with DOJ, aimed at cooperatively resolving the issues identified in DOJ's investigations and findings letters.").

These injunctions are undoubtedly valuable, but have limited value, especially as remedies for under- as opposed to over-enforcement. The empirical literature is still in an early stage, but it points in a plausible direction.[195] DOJ intervention makes a significant difference in the short run.[196] After that, positive changes in institutional culture take root in some cases, and in other cases, the old institutional culture reasserts itself.[197]

The DOJ's response to neglect of sexual assault complaints has been admirable.[198] If neglect of rape complaints were an isolated problem, a handful of local interventions would have some chance of success. Local interventions, however, simply cannot make nationwide progress on a national problem.

The Thirteenth Amendment approach is interesting.[199] However, rape is not chattel "slavery" except in trafficking cases where the victims are sometimes literally sold.[200] Rape bears a strong resemblance to "involuntary servitude," although the latter, especially when linked with chattel slavery in the constitutional text, suggests a period of domination longer than the minutes to hours typically involved in committing rape.[201]

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195. *See* Joshua Chanin, *Evaluating Section 14141: An Empirical Review of Pattern or Practice Police Misconduct Reform*, 14 OHIO ST. J. CRIM. L. 67 (2016).

196. *See, e.g.*, *id.* at 111 ("The best evidence on the DOJ's pattern or practice initiative suggests that after implementing mandated reforms, affected departments will likely possess a stronger, more capable accountability infrastructure, more robust training, and a set of policies that reflect national best practices.").

197. *See id.* at 112 ("[O]rganizational change is a long and fragile process. Effectiveness is not guaranteed and early gains do not necessarily equate to institutionalized change.").

198. *See, e.g.*, Press Release, U.S. Dep't of Justice, Justice Department Launches Initiative to Fight Sexual Harassment in the Workplace (Feb. 28, 2018), https://www.justice.gov/opa/pr/justice-department-launches-initiative-fight-sexual-harassment-workplace [https://perma.cc/55U6-MRGX].

199. *See* U.S. CONST. amend. XIII.

200. *Cf.* Kim, *supra* note 185, at 297-98.

201. *Cf. id.* at 296. The core of the original understanding is reflected in the Peonage Abolition Act of 1867, 42 U.S.C. § 1994 (2012). To get an understanding of how the meaning of the Thirteenth Amendment evolved, see, for example, Risa L. Goluboff, *The Thirteenth Amendment in Historical Perspective*, 11 U. PA. J. CONST. L. 1451 (2009). But equating rape with slavery would seem to classify all kidnapping as slavery. *See* Kim, *supra* note 185, at 299. That seems dubious. Rape was a common incident of African slavery in America. *See, e.g.*, Pamela D. Bridgewater, *Un/Re/Dis Covering Slave Breeding in Thirteenth Amendment Jurisprudence*, 7 WASH. & LEE RACE & ETHNIC ANC. L.J. 11, 14-15 (2001) (discussing economic incentive of masters to force slave breeding). It does not follow that slavery is a common incidence of rape. *Cf.* Rubenfeld, *supra* note 170, at 1380 ("Every act of rape may not be an act

The one court decision addressing this theory rejects it as unprecedented.[202] Even if the constitutional argument prevailed, all it would do is authorize Congress to adopt legislation.[203] Congress would be unlikely to hazard a major legislative program on the chance that the courts would agree that the Thirteenth Amendment addresses rape generally, as distinct from rape as an incident of slavery.

In any event, there is a more direct and more practical route to federal prosecutions of sexual assault. An extensive list of statutes imposes federal liability for violent crime.[204] Congressional power to create these offenses generally stems from the Commerce Clause.[205]

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of slavery or torture, but all rape shares core elements of both."). One might go further by noting that the willful dehumanization characteristic of rape is also a characteristic of murder. *See id.* at 1430. It does not follow that rape and murder are either conceptually identical or morally equivalent.

202. *See* Newsome v. Lee County, 431 F. Supp. 2d 1189, 1198 (M.D. Ala. 2006). Newsome, a female jail inmate, alleged that she had been raped by male prisoners and that the jail staff was responsible for the attack. *See id.* at 1192. Her complaint included one count alleging a violation of her rights under the Thirteenth Amendment. *See id.* at 1194, 1198. Chief Judge Fuller did not deny the logic of the plaintiff's argument, but he rejected it for want of authority:

> Newsome contends that Tabb, in collaboration with the three inmates, sexually enslaved her during the course of the rape. This appears to be a novel theory, and Newsome has not cited any decisional authority that would lead the Court to believe otherwise. As mentioned above, the Fourteenth Amendment provides the applicable constitutional standard for the treatment of pretrial detainees, and the Court has not been provided with adequate reason to deviate from that approach here. Therefore, Newsome's claims under the Thirteenth Amendment are dismissed as to all Officer Defendants.

Id. at 1198.

203. *See* Kim, *supra* note 185, at 300-04.

204. *See, e.g.*, *supra* notes 10-13 and accompanying text (mentioning robbery, kidnapping, carjacking, and human trafficking as examples).

205. *See* U.S. CONST. art. I, § 8, cl. 3. Congress occasionally has predicated federal jurisdiction on other Article I powers. For example, in *Sabri v. United States*, the Court upheld a federal anticorruption statute, 18 U.S.C. § 666(a)(2) (2012), based on the spending power. 541 U.S. 600, 604-08 (2004). The Court reasoned that when Congress grants money to state agencies, Congress also has "authority under the Necessary and Proper Clause, Art. I, § 8, cl. 18, to see to it that taxpayer dollars appropriated under that power are in fact spent for the general welfare, and not frittered away in graft." *Id.* at 605. That protective justification does not extend to any private activity that has the effect of increasing federal spending. *See* Samuel R. Bagenstos, *Spending Clause Litigation in the Roberts Court*, 58 DUKE L.J. 345, 349 (2008) (characterizing *Sabri* as "a case that many thought pressed the limits of Congress's spending power"). If the spending power reached so far, Congress could assume jurisdiction over all intrastate crime by funding a federal victims' services agency.

Feminists have teamed with law enforcement interests many times in the past, often successfully.[206] I urge a similar coalition to support making rape a federal crime.

A. Congressional Power Under the Commerce Clause

The basic structure of Commerce Clause jurisprudence is well-settled. The Court laid that structure out in *United States v. Lopez*:

> Consistent with this structure, we have identified three broad categories of activity that Congress may regulate under its commerce power. First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress'[s] commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.[207]

For the first time since the New Deal days, the *Lopez* Court held Congress exceeded its powers under the substantial effects prong.[208]

Controversy and uncertainty have attended the third prong ever since.[209] The jurisprudence of the first prong, at least, is clear. Congress can adopt legislation not just to prevent destruction or obstruction of the means of commerce, such as aircrafts, trains and the Internet;[210] Congress can also prohibit use of those channels to harm innocent people.[211] Longstanding precedent upholding federal

206. *See, e.g.*, Claire Houston, *How Feminist Theory Became (Criminal) Law: Tracing the Path to Mandatory Criminal Intervention in Domestic Violence Cases*, 21 MICH. J. GENDER & L. 217 (2014).

207. 514 U.S. 549, 558-59 (1995) (internal citations omitted).

208. *See id.* at 551.

209. *See generally* Kathleen F. Brickey, *Crime Control and the Commerce Clause: Life After* Lopez, 46 CASE W. RES. L. REV. 801, 817-22 (1996).

210. *See Lopez*, 514 U.S. at 558.

211. *See id.*

regulation of interstate marketing of adulterated food or misbranded drugs is one example.[212] Wire fraud is another.[213]

The second prong is clear in at least one respect. While people or goods are moving across state lines, Congress has power to "regulate and protect."[214] The difficulty has been defining "moving."[215] At any one time, persons and goods are in one state or another. The normative question the doctrine occludes is the temporal one of how long people or goods can stay in one state before they lose their character as "persons or things in interstate commerce."[216]

Suppose a terrorist ships a bomb to an accomplice in another state. The accomplice places the bomb next to the target, say a government building. The terrorist has a transmitter that can detonate the bomb at any time, but only from close proximity. If the terrorist crosses into the state of the target building, and immediately drives by and detonates the bomb, it seems clear that he has used "things in interstate commerce" to cause harm.[217] But what if the terrorist has a conversion on the way to Damascus, embraces local values, and settles down for twenty years—at which point a change in government policy enrages him and he returns to the site of the bomb to detonate it?

The modern doctrine of "jurisdictional elements" takes the view that no matter how long ago an article moved in commerce, Congress can regulate its use to prevent harm.[218] Prior to *Lopez*, in *United States v. Bass*, the Supreme Court held that federal felon-in-possession statutes required proof of a jurisdictional element.[219] Subsequently, in *Scarborough v. United States*, the issue was "whether proof that the possessed firearm previously traveled in interstate commerce is sufficient to satisfy the statutorily required

212. *See, e.g.*, Hipolite Egg Co. v. United States, 220 U.S. 45 (1911).

213. *See, e.g.*, United States v. Jinian, 725 F.3d 954, 958 (9th Cir. 2013) (upholding the federal wire fraud statute as a valid exercise of the Commerce Clause).

214. *Lopez*, 514 U.S. at 558.

215. *See, e.g.*, Houston, E. & W. Tex. Ry. v. United States, 234 U.S. 342, 349 (1914).

216. *See Lopez*, 514 U.S. at 558; United States v. Darby, 312 U.S. 100 (1941) (concerning the regulation of wage and hour standards); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (concerning federal interference in strikes).

217. *Cf. Lopez*, 514 U.S. at 558.

218. *See* Scarborough v. United States, 431 U.S. 563, 568-75 (1977).

219. 404 U.S. 336, 351 (1971) ("[T]hat 'in commerce or affecting commerce' is part of the offense of possessing or receiving a firearm.").

nexus between the possession of a firearm by a convicted felon and commerce."[220] The *Scarborough* Court answered this question in the affirmative, holding that even if the gun moved in commerce before the defendant's felony conviction, liability still attached under the statute.[221]

The issue in *Lopez* was whether Congress had power to adopt the federal statute prohibiting gun possession near schools.[222] Congress did not make legislative findings that guns near schools had effects on commerce.[223] Yet the government refused to allege or prove that the defendant's gun had crossed state lines, although such proof was available.[224] The prosecution relied solely on the third prong—effects—to support the statute.[225]

The Court rejected the government's argument, giving three principal reasons.[226] First, the challenged law was "a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."[227] Second, the statute contained "no jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce."[228] The Court concluded that "[t]o uphold the Government's contentions here, [the Court] would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the

220. 431 U.S. at 564.

221. *See id.* at 577 ("Indeed, it was a close question in *Bass* whether § 1202(a) even required proof of any nexus at all in individual cases. The only reason we concluded it did was because it was not 'plainly and unmistakably' clear that it did not. But there is no question that Congress intended no more than a minimal nexus requirement." (internal citation omitted)).

222. *Lopez*, 514 U.S. at 551.

223. *See id.* at 562-63.

224. *See* United States v. Lopez, 2 F.3d 1342, 1368 (5th Cir. 1993) ("Here, in fact, the parties stipulated that a [ ]ATF agent was prepared to testify that Lopez's gun had been manufactured outside of the State of Texas. Lopez's conviction must still be reversed, however, because his indictment did not allege *any* connection to interstate commerce. An indictment that fails to allege a commerce nexus, where such a nexus is a necessary element of the offense, is defective.").

225. *See Lopez*, 514 U.S. at 563-64.

226. *See id.* at 559-68.

227. *Id.* at 561.

228. *Id.*

States."[229] Third, Congress had not made express legislative findings that guns near schools affect commerce.[230]

The *Lopez* opinion did not refer to several other facts that made the case difficult for the government. The statute intruded not just on one, but two traditional spheres of state authority: criminal justice and education.[231] Lopez himself had no criminal record and had been convicted on a state charge.[232] The prosecution did not involve an organized gang or conditions of employment at a substantial business.[233]

Those commentators who were skeptical about the practical significance of the shift in doctrine turned out to be right.[234] After *Lopez*, the lower federal courts have carried these decisions forward as constitutional, rather than statutory, rulings without exception (although some of the judges have recorded either dissents or misgivings).[235] Congress promptly amended § 922(q) to add a jurisdictional element, and the lower courts generally approve the amended statute as within the commerce power.[236] The decisions likewise uniformly reject *Lopez*-based challenges to § 922(g) (felon in possession).[237]

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229. *Id.* at 567.

230. *Id.* at 563 ("[T]o the extent that congressional findings would enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce, even though no such substantial effect was visible to the naked eye, they are lacking here.").

231. *See id.* at 564-67.

232. *See* Louis H. Pollak, *Foreword*, 94 MICH. L. REV. 533, 541-42 (1995).

233. *Cf. id.* at 541 n.44.

234. *See* Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674, 676 (1995) ("*Lopez* marks a minor constitutional revolution. The practical effect of the revolution in the courts, however, will be small."); Pollak, *supra* note 232, at 553 ("[T]here is less in *Lopez* than meets the eye.").

235. *See* Merritt, *supra* note 234, at 712-28.

236. *See, e.g.*, United States v. Nieves-Castaño, 480 F.3d 597, 602 (1st Cir. 2007) (noting that the current form of § 922(q) "provide[s] necessary connections to interstate commerce"); United States v. Dorsey, 418 F.3d 1038, 1046 (9th Cir. 2005) ("This new version of § 922(q) ... incorporates a 'jurisdictional element which would ensure ... that the firearm possession in question affects interstate commerce.'" (quoting *Lopez*, 514 U.S. at 561)); United States v. Danks, 221 F.3d 1037, 1038-39 (8th Cir. 1999) ("[S]ection 922(q) contains language that ensures ... that the firearm in question affects interstate commerce.").

237. *See* United States v. Hill, 386 F.3d 855, 859 (8th Cir. 2004); United States v. Mitchell, 299 F.3d 632, 634-35 (7th Cir. 2002); United States v. Scott, 263 F.3d 1270, 1272-74 (11th Cir. 2001); United States v. Baer, 235 F.3d 561, 563 (10th Cir. 2000); United States v. Bostic, 168 F.3d 718, 723 (4th Cir. 1999); United States v. Turner, 77 F.3d 887, 888-89 (6th Cir. 1996). The notorious 18 U.S.C. § 924(c) adds mandatory minimum firearms enhancements to drug

The Justices face an unappetizing dilemma. If the Court holds that mere passage of the firearm in commerce is *not* enough to establish federal jurisdiction, enforcement of federal firearms laws would be burdened by the need to prove that the accused in each case acquired or used the weapon near in time to its passage through commerce. In many cases, that would not be possible. Moreover, a new limit on jurisdiction presumably would apply retroactively because the constitutional defect goes to the legality of the primary conduct defined by the firearms laws.[238] Prisoners currently serving sentences predicated on *Scarborough* would have a right to immediate release.[239] In only a few cases would the government have better prospects of proving a greater commerce nexus at a retrial than was proved at the first.

The alternative would be to affirm the constitutionality of the statutory interpretation in *Scarborough*.[240] That would save the gun laws, but at the price of intellectual embarrassment.[241] Under the second prong, when defendants or victims move in interstate commerce, Congress has jurisdiction to punish the former and protect the latter.[242] If *Scarborough* is right to reject any temporal limitation on jurisdictional elements,[243] the reach of the commerce power logically extends to any defendant or any victim who has *ever* traveled across state lines.[244] That seems absurd.

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trafficking or violent offenses "for which the person may be prosecuted in a court of the United States," so federal jurisdiction for the gun offense follows from federal jurisdiction to prosecute the predicate crime. 18 U.S.C. § 924(c)(1)(A) (2012).

238. *See* Teague v. Lane, 489 U.S. 288, 307 (1989) (adopting Justice Harlan's view that new constitutional rules apply retroactively when, inter alia, the rule "places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe'" (quoting Mackey v. United States, 401 U.S. 667, 692 (1971))).

239. *Cf. id.*

240. *See* Craig M. Bradley, *Federalism and the Federal Criminal Law*, 55 HASTINGS L.J. 573, 599 (2004) (noting that lower courts continue to rely on *Scarborough*).

241. *Cf. id.* (referring to *Scarborough* as "bad law").

242. *See, e.g.*, United States v. Jackson, 978 F.2d 903, 910-11 (5th Cir. 1992).

243. *See* Scarborough v. United States, 431 U.S. 563, 577 (1977).

244. *See* Bradley, *supra* note 240, at 578 ("Since almost everything, or some of its components, has moved in interstate commerce at some point, mere past movement in interstate commerce, *unconnected to the instant crime*, would not seem to satisfy the 'non-infinity' principle that *Lopez* was announcing."); Diane McGimsey, *The Commerce Clause and Federalism After* Lopez *and* Morrison*: The Case for Closing the Jurisdictional-Element Loophole*, 90 CALIF. L. REV. 1675, 1679-80 (2002) ("Today, however, with the vastly increased integration of our society, almost every person or good will, at some point, cross a state line.").

In the face of this dilemma, the Court has gone into denial and dodged the issue, despite many opportunities to grant certiorari and clarify the status of jurisdictional elements after *Lopez*.[245] Most prominently, in *United States v. Alderman*, the Ninth Circuit relied on *Scarborough* to uphold a federal statute making it a crime for persons convicted of a violent felony to possess body armor.[246] Two judges voted to uphold the statute, but they voiced some disquiet by quoting two other circuits: "Any doctrinal inconsistency between *Scarborough* and the Supreme Court's more recent decisions is not for this Court to remedy."[247]

Judge Paez filed a stout dissent,[248] then again dissented, joined by three other judges, from the denial of Alderman's petition for rehearing en banc.[249] Alderman, fortified by the arguments of the four dissenters and the equivocation of the panel majority, sought certiorari.[250] The Supreme Court denied the petition over the dissent of Justice Thomas, joined by Justice Scalia.[251] Justice Thomas wrote that with the certiorari denial "the Court tacitly accepts the nullification of our recent Commerce Clause jurisprudence."[252]

The persistence of the jurisdictional-element doctrine meant that *Lopez* had no practical effect on federal firearms prosecutions.[253] *Lopez*, however, had at least one important aftershock. Five years after *Lopez*, the Court, in *United States v. Morrison*, struck down § 13981 of the Violence Against Women Act.[254] Section 13981(c) created a private cause of action to recover damages for any "crim[e] of violence motivated by gender."[255] As in *Lopez*, the government defended the statute based only on the ground that violence against women "substantially affects" commerce.[256]

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245. *See* McGimsey, *supra* note 244, at 1706, 1720.

246. 565 F.3d 641, 645-46 (9th Cir. 2009).

247. *Id.* at 648 (quoting United States v. Patton, 451 F.3d 615, 636 (10th Cir. 2006)).

248. *Id.* (Paez, J., dissenting).

249. United States v. Alderman, 593 F.3d 1141, 1141 (9th Cir. 2010) (O'Scannlain, J., dissenting).

250. *See* Petition for a Writ of Certiorari, Alderman v. United States, 562 U.S. 1163 (2011) (No. 09-1555), 2010 WL 2512739.

251. Alderman v. United States, 562 U.S. 1163, 1163 (2011).

252. *Id.* (Thomas, J., dissenting).

253. *See supra* notes 234-37 and accompanying text.

254. 529 U.S. 598, 601-02 (2000).

255. *Id.* at 605 (alteration in original).

256. *Id.* at 609 ("Petitioners do not contend that these cases fall within either of the first

The Court held that § 13981(c) exceeded congressional power under the Commerce Clause.[257] The majority opinion made the same arguments as in *Lopez*: Rape was not an economic activity, and the statute contained no jurisdictional element.[258] The Court stated that "the noneconomic, criminal nature of the conduct at issue was central" to the decision in *Lopez*.[259] Again, the Court noted that the challenged statute had no jurisdictional element, stating that "[s]uch a jurisdictional element may establish that the enactment is in pursuance of Congress'[s] regulation of interstate commerce."[260] Congress made legislative findings of the effects of violence against women on commerce, but these were of persuasive force only, and the majority was not persuaded.[261]

The prosecution of federal crimes premised on the commerce power continued unabated. Prosecution for robbery, arson, kidnapping, and murder, supported by specific proof of a nexus to facilities or instrumentalities of commerce, rather than grounded solely on congressional assertions of effects, flourish.[262] The courts have not invoked *Lopez* or *Morrison* to block enforcement of new federal offenses, such as carjacking[263] and sex trafficking.[264]

The Court has decided three major Commerce Clause cases since *Morrison*. First, in *Gonzales v. Raich*, the majority veered back toward pre-*Lopez* jurisprudence by upholding the application of the Controlled Substances Act (CSA) to homegrown marijuana, legal under state law.[265] No jurisdictional element was required because growing marijuana was "economic activity" that had substantial

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two of these categories of Commerce Clause regulation. They seek to sustain § 13981 as a regulation of activity that substantially affects interstate commerce.").

257. *Id.* at 617-19.

258. *Id.* at 610-12.

259. *Id.* at 610.

260. *Id.* at 612.

261. *Id.* at 614.

262. *See generally* Brandon L. Bigelow, Note, *The Commerce Clause and Criminal Law*, 41 B.C. L. REV. 913 (2000).

263. *See* United States v. Cobb, 144 F.3d 319, 319, 320-21 (4th Cir. 1998) (citing cases from seven circuits).

264. *See* United States v. Campbell, 111 F. Supp. 3d 340, 341, 345 (W.D.N.Y. 2015) ("Other courts addressing this issue have similarly found that § 1591 is a valid exercise of Congress's power under the commerce clause.").

265. 545 U.S. 1, 25-26 (2005).

effects when aggregated.[266] Second, based on the same logic as *Raich*, *Taylor v. United States* upheld the Hobbs Act conviction of a defendant accused of robbing drug dealers.[267] Third, *NFIB v. Sebelius* held that the Commerce Clause does not authorize Congress to compel people to enter interstate commerce.[268]

In *Jones v. United States*, decided a few months after *Morrison*, the Court dodged the constitutional issue by deciding the case for the defense based on the statute.[269] Section 844 of Title 18 of the U.S. Code makes arson of "any building ... used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce" a federal felony.[270] A pre-*Lopez* precedent, *Russell v. United States*, rejected both statutory and constitutional challenges to the application of the statute to rental property owned, but not occupied, by the defendant.[271] *Jones* rebuffed the government's understandable reliance on *Russell* based on the distinction between owner-occupied and owned-to-rent property.[272] The government's interpretation would leave "hardly a building in the land" outside federal power and thus frustrate the statute's limitation to property "used" in commerce.[273] The *Jones* opinion also invoked the avoidance canon, citing *Lopez*.[274] The *Jones* Court did not discuss the possibility of a defendant who burns down a duplex, one unit rented and the other occupied by the accused.[275]

Court-watchers can read these tea leaves in different ways. The Court let stand the article-moved-in-commerce theory of the firearms cases, but certiorari denials are both opaque and not authoritative.[276] *Raich* read *Lopez* and *Morrison* narrowly, but purported

266. *Id.* at 22, 25-26.
267. 136 S. Ct. 2074, 2077-78 (2016).
268. 567 U.S. 519, 552 (2012).
269. 529 U.S. 848, 858-59 (2000).
270. 18 U.S.C. § 844(i) (2012).
271. 471 U.S. 858, 862 (1985).
272. *See Jones*, 529 U.S. at 857.
273. *Id.* at 857-58 ("Given the concerns brought to the fore in *Lopez,* it is appropriate to avoid the constitutional question that would arise were we to read § 844(i) to render the 'traditionally local criminal conduct' in which petitioner Jones engaged 'a matter for federal enforcement.'" (quoting United States v. Bass, 404 U.S. 336, 350 (1971)).
274. *Id.* at 858.
275. *Cf. id.* at 854.
276. *See generally* Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1228-29 (1979).

to respect them.[277] The *Sebelius* majority said nothing about the scope of commerce power over voluntary actors.[278]

In *Lopez*, the Court classified the mere possession of a firearm as noneconomic just as clearly as the *Morrison* Court characterized rape as noneconomic.[279] If these firearms decisions—numbering in the thousands[280]—are good law, then a jurisdictional element establishes congressional authority over noneconomic as well as economic activity. If a jurisdictional element does not authorize federal prosecution of noneconomic crimes, thousands of people have served hard time for conduct Congress has no power to regulate.[281]

The next Part proceeds on the theory that *Lopez* and *Morrison* control. Even reading those cases fairly, Congress could reach many rapes that make perverse use of "channels" or "facilities."[282] If the Court is committed to sustaining the firearms cases, Congress would also have jurisdiction over rapes involving articles that have moved in commerce, including guns and condoms.[283] Many rapes occur on premises, or against victims, that Congress already regulates under the substantial effects test.[284] Congress, however, still could not reach a great many rapes.[285] Even under a robust view of the commerce power, a significant residuum of exclusive state authority would remain.

B. Congress Could Make Many Rapes Federal Crimes

Notwithstanding *Lopez* and *Morrison*, Congress has power under the Commerce Clause to punish a great many rapes. *Morrison* classified rape as noneconomic activity, but that classification only

277. *See* Gonzales v. Raich, 545 U.S. 1, 23-25 (2005).

278. *See generally* NFIB v. Sebelius, 567 U.S. 519 (2012).

279. *Compare* United States v. Lopez, 514 U.S. 549, 561 (1995) ("Section 922(q) is a criminal statute that by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms."), *with* United States v. Morrison, 529 U.S. 598, 613 (2000).

280. *See* RONALD J. FRANDSEN & MICHAEL N. BOWLING, REG'L JUSTICE INFO. SERV., FEDERAL FIREARMS CASES, FY2007, at 3-4 (2008), https://www.ncjrs.gov/pdffiles1/bjs/grants/224890/pdf [https://perma.cc/BP4C-QHHG].

281. *Cf. id.*

282. *See infra* Part II.B.1.

283. *See infra* notes 310-16 and accompanying text.

284. *See infra* Part II.B.4.

285. *See infra* Part II.C.

matters under the third prong's effects test.[286] As Justice Scalia put it, concurring in *Raich*, the first and second prongs "are self-evident, since they are the ingredients of interstate commerce itself."[287] Congress has clear power to proscribe rapes committed by misusing facilities or instrumentalities.[288] Moreover, many rapes interfere with economic activity that Congress can regulate under the third prong.[289]

1. Channels and Facilities

Courts have held that both cellphone communications and the Internet are channels or facilities of interstate or foreign commerce.[290] Many rapists arrange to meet their victims using these

286. *See* Michele Martinez Campbell, *The Kids Are Online: The Internet, the Commerce Clause, and the Amended Federal Kidnapping Act*, 14 U. PA. J. CONST. L. 215, 234-35 (2011) ("Indisputably, modern Commerce Clause jurisprudence deals only with Lopez Third Category 'substantially affects commerce' statutes. In the years since *Lopez*, the Court has never had occasion to address directly the constitutionality of any First or Second Category statute. Nevertheless, as described above, clear language throughout the *Lopez* line of cases distinguishes First and Second Category statutes and makes clear they are not implicated in the economic/non-economic distinction created to resolve Third Category cases."); *see also* United States v. Morrison, 529 U.S. 589, 610-11 (2000).

287. Gonzales v. Raich, 545 U.S. 1, 34 (2005) (Scalia, J., concurring) ("[U]nlike the channels, instrumentalities, and agents of interstate commerce, activities that substantially affect interstate commerce are not themselves part of interstate commerce, and thus the power to regulate them cannot come from the Commerce Clause alone.").

288. *See infra* Parts II.B.1-3.

289. *See infra* Part II.B.4.

290. *See, e.g.*, United States v. Barlow, 568 F.3d 215, 220-21 (5th Cir. 2009) ("In 2009, it is beyond debate that the internet and email are facilities or means of interstate commerce."); United States v. Evans, 476 F.3d 1176, 1180-81 (11th Cir. 2007) ("Telephones and cellular telephones are instrumentalities of interstate commerce. [Defendant's] use of these instrumentalities of interstate commerce alone, even without evidence that the calls he made were routed through an interstate system, is sufficient to satisfy § 2422(b)'s interstate-commerce element." (internal citation omitted)); United States v. Gilbert, 181 F.3d 152, 158 (1st Cir. 1999) (upholding jurisdiction over bomb threat made by intrastate call (landline) because "a telephone is an instrumentality of interstate commerce"); United States v. Weathers, 169 F.3d 336, 341 (6th Cir. 1999) ("It is well established that telephones, even when used intrastate, constitute instrumentalities of interstate commerce. Similarly, cellular telephones, even in the absence of evidence that they were used to make interstate calls, have been held to be instrumentalities of interstate commerce." (internal citations and emphasis omitted)); United States v. Clayton, 108 F.3d 1114, 1117 (9th Cir. 1997) ("Telephones are instrumentalities of interstate commerce. As such, they fall under category two of *Lopez*, and no further inquiry is necessary to determine that their regulation under 18 U.S.C. § 1029(a) is within the Commerce Clause authority." (internal citation omitted)).

technologies.[291] Congress's power to punish use of these instrumentalities to commit fraud is unquestioned.[292] Congress's power to punish their use to commit rape logically follows.

We have heard about some sensational cases—featuring the "Craigslist rapist,"[293] the "Christian Mingle rapist,"[294] and so on—but have no direct evidence of how many rapes involve misuse of telecommunications. Predators who rape their victims while meeting them for the first time online are of course subject to federal jurisdiction.[295] The met-on-the-net rapes, however, are likely only a small minority of rapes facilitated by emails, text messages, or phone calls.

One durable finding in the literature is that most victims know their rapist.[296] How many people do you know with whom you do not exchange text messages, cell phone calls, or email? A high percentage of meetings that end in rape will be arranged through channels of interstate commerce.[297]

Hotels and motels that cater to interstate travelers have long been held subject to congressional jurisdiction under the third

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291. *See, e.g.*, William Lee, *Match.com Assault Victim: 'I Wasn't Going to Let It Destroy My Life'*, CHI. TRIB. (June 7, 2016, 8:45 AM), http://www.chicagotribune.com/news/ct-match-com-victim-settlement-met-20160606-story.html [https://perma.cc/4G38-P5PM]; Naomi Martin, *Rapists Increasingly Using Dating Apps, Social Media to Lure Victims, Dallas Police Warn*, DALL. MORNING NEWS (Feb. 2016), https://www.dallasnews.com/news/crime/2016/02/01/rapists-increasingly-using-dating-apps-social-media-to-lure-victims-dallas-police-warn [https://perma.cc/FAM3-4ADR]; Rob McMillan, *Barstow Man Suspected of Raping 2 Women Met Through Online Dating Site*, ABC7 NEWS (June 22, 2016), https://abc7.com/news/barstow-man-suspected-of-raping-2-women-met-in-online-dating-site/1396993/ [https://perma.cc/5XV7-PQPS].

292. *See supra* note 290 and accompanying text.

293. *See* Crimesider Staff, *"Craigslist Rapist" Sentenced to 36 Years in Prison*, CBS NEWS (May 9, 2014, 4:11 PM), https://www.cbsnews.com/news/craigslist-rapist-sentenced-to-36-years-in-prison-in-illinois/ [https://perma.cc/LGG5-REP4].

294. *See* Jenny Kutner, *Convicted Christian Mingle Rapist Recites Bible Verse to Victims: "God Intended It for Good,"* SALON (Nov. 10, 2014, 4:29 PM), https://www.salon.com/2014/11/10/convicted_christian_mingle_rapist_recites_bible_verse_to_victims_god_intended_it_for_good/ [https://perma.cc/Z64Y-3CAU].

295. *See, e.g.*, *Barlow*, 568 F.3d at 220-21; sources cited *supra* note 290.

296. *See, e.g.*, ERIKA HARRELL, BUREAU JUSTICE STATISTICS, VIOLENT VICTIMIZATION COMMITTED BY STRANGERS, 1993-2010, at 2 tbl.1 (2012), https://www.bjs.gov/content/pub/pdf/vvcs9310.pdf [https://perma.cc/PLA6-DUPR] (finding that in NCVS data for "rape/sexual assault" for years 2005-2010, the victim was not acquainted with the offender in only 24.1 percent of cases).

297. *See* sources cited *supra* note 290.

prong's effects test.[298] Exploiting these facilities to commit sex crimes also triggers congressional jurisdiction under the second prong.[299] The considerable number of rapes committed in rented rooms could be prosecuted as federal crimes so long as the record showed substantial use of the hotel by interstate travelers.[300]

2. "Instrumentalities"

Instrumentalities include the means of commerce and persons moving in commerce.[301] Any victim engaged in interstate travel can claim the federal government's protection.[302] This includes tourists, whether foreign or domestic, but it also includes many other travelers.[303] Business travelers are obviously in interstate commerce. Business travel covers travelers ranging from investment bankers flying first class, to musicians, migrant farm workers, and urban commuters.

Considerable authority treats vehicles as instrumentalities, even when they are not traveling interstate at the time of the crime.[304] A

298. *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258-61 (1964).

299. *See* United States v. Phea, 755 F.3d 255, 258, 266 (5th Cir. 2014) (holding that in prosecution for violation of 18 U.S.C. § 1591(a), "telephones, the Internet, and hotels that service interstate travelers are all means or facilities of interstate commerce sufficient to establish the requisite interstate nexus"); Madkins v. United States, No. 3:11-cv-949-J-34MCR, 2014 WL 4417849, at *19 (M.D. Fla. Sept. 8, 2014) (finding that in prosecution for violation of 18 U.S.C. § 1591, "the government produced abundant evidence establishing the connection between Madkins's activities and interstate commerce. The managers of several of the hotels from which Madkins prostituted A.L. and M.M. testified that they derived substantial business from interstate travelers.").

300. *See, e.g.*, Isabel Vincent, *Rape and Drug Crimes Are on the Rise in Elite NYC Hotels*, N.Y. POST (Feb. 5, 2017, 1:46 PM), https://nypost.com/2017/02/05/rape-and-drug-crimes-are-on-the-rise-in-elite-nyc-hotels/ [https://perma.cc/VBE5-U5N5]; *see also Heart of Atlanta Motel, Inc.*, 379 U.S. at 258-61.

301. *See* United States v. Lopez, 514 U.S. 549, 558 (1995).

302. *See generally id.*

303. *See Heart of Atlanta Motel, Inc.,* 379 U.S. at 261-62.

304. *See* United States v. Mandel, 647 F.3d 710, 722 (7th Cir. 2011) ("As applied to Mandel's intrastate use of his automobile, the statute does not plainly exceed the scope of Congress's Commerce Clause authority. *Lopez* recognizes that Congress may regulate the facilities and instrumentalities of interstate commerce, 'even though the threat may come only from intrastate activities.'"); *id.* (reasoning that when "Congress elects to regulate under the second prong of *Lopez*, 'federal jurisdiction is supplied by the nature of the instrumentality or facility used, not by separate proof of interstate movement.'" (quoting United States v. Richeson, 338 F.3d 653, 660-61 (7th Cir. 2003)); United States v. Cobb, 144 F.3d 319, 322 (4th Cir. 1998) (upholding a carjacking statute, and stating that "[u]ndoubtedly, if planes and

rapist who exploits the victim's car interferes with an instrumentality.[305] Rapists who use vehicles to reduce the visibility of the offense exploit instrumentalities of commerce for criminal ends.[306]

3. Instrumentalities—Jurisdictional Elements

The firearms cases may be inconsistent with *Lopez* and *Morrison*, because *Lopez* and *Morrison* treated jurisdictional elements as a factor to be considered under the third prong's substantial effects test, rather than as a self-sufficient source of congressional power under the second prong's instrumentalities test.[307] One can only possess what one has acquired, and so regulating present possession might be a way of regulating interstate acquisition. If, however, jurisdictional elements are assimilated in that way into the third prong, the characterization of possession as noneconomic is wrong. Acquisition is quintessential economic activity. Given the millions of Americans with felony records,[308] a felon-in-possession law is

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trains qualify as instrumentalities of interstate commerce, so too do automobiles. The fact that not every car, train, or plane trip has an interstate destination has never been thought to remove these means of transport from the category of an instrumentality of commerce"); United States v. Bishop, 66 F.3d 569, 588 (3d Cir. 1995) (upholding a carjacking statute, and stating that "[i]t would be anomalous ... to recognize these categories of instrumentalities [that is, trains and planes] but to suggest that the similarly mobile automobile is not also an instrumentality of interstate commerce"). For opposing views, see Garcia v. Vanguard Car Rental USA, Inc., 540 F.3d 1242, 1249-50 (11th Cir. 2008) (upholding Graves Amendment giving rental car companies immunity from vicarious liability under the third prong and rejecting the second prong approach because viewing cars as instrumentalities would give Congress "plenary power not only over the commercial rental car market, but over many aspects of automobile use," including traffic laws); *Bishop*, 66 F.3d at 598 (Becker, J., concurring in part and dissenting in part) ("[A]irplanes and trains are, nearly exclusively, used as instrumentalities of interstate commerce—that is, air and rail travel involves, overwhelmingly, the *sale* of both inter- and intra-state transportation services for persons and/or cargo. We do not deal here with the ability of Congress to regulate or protect intra- and inter-state bus or commercial truck travel.... Rather, we deal here with a regulation governing all automobiles in all instances." (footnote omitted)).

305. *Cf. Cobb,* 144 F.3d at 322.

306. *Cf. id.*

307. *See* United States v. Morrison, 529 U.S. 598, 613 (2000); United States v. Lopez, 514 U.S. 549, 559-61 (1995).

308. *See* Alan Flurry, *Study Estimates U.S. Population with Felony Convictions*, UGA TODAY (Oct. 1, 2017), https://news.uga.edu/total-us-population-with-felony-convictions/ [https://perma.cc/Z7ML-DS66].

bound to depress the demand and lower the price of guns in the legal market.[309]

If *Lopez* did not undo *Scarborough*, proof that the crime involved a gun that has moved in interstate commerce at any point in the past justifies federal jurisdiction under the second prong.[310] It would seem to follow that any rape committed with the use of a gun that has crossed state lines is likewise subject to federal jurisdiction. In the NCVS data for 2005-2010, 6 percent of the reported crimes involved a gun and another 4 percent involved a knife.[311]

Of course in rape cases, the police may not recover the weapon.[312] Sometimes they will. However, the logic of the firearms cases extends to any article that has passed through interstate commerce.

Many rapists use condoms,[313] and courts have held that use of condoms shipped interstate can establish a commerce nexus.[314] In many cases, physical evidence would not be required. The Trojan brand dominates the U.S. market,[315] and all Trojan products are manufactured at a single plant in Virginia.[316] Victim testimony to the brand could establish interstate shipment outside Virginia.

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309. *Cf.* Gonzales v. Raich, 545 U.S. 1, 19 (2005) ("Congress had a rational basis for concluding that leaving home-consumed marijuana outside federal control would similarly affect *price* and market conditions." (emphasis added)). The same logic applies if "guns possessed by felons" is substituted for "home-consumed marijuana."

310. *See* Scarborough v. United States, 431 U.S. 563, 575 (1977).

311. *See* PLANTY ET AL., *supra* note 78, at 5 tbl.5.

312. *See* Ira Sommers & Deborah Baskin, *The Influence of Forensic Evidence on the Case Outcomes of Rape Incidents*, 32 JUST. SYS. J. 314, 322-23 (2011) (noting that weapons are rarely recovered in rape cases).

313. *See* Eryn Nicole O'Neal et al., *Condom Use During Sexual Assault*, 20 J. FORENSIC & LEGAL MED. 605 (2013) (finding that condom prevalence rates in sexual assaults range from 11.7 percent to 15.6 percent).

314. *See, e.g.*, United States v. Pipkins, 378 F.3d 1281, 1295 (11th Cir. 2004) (finding the jurisdiction element of the RICO charge satisfied because, inter alia, "the pimps furnished their prostitutes with condoms manufactured out of state, purchased from Atlanta gas stations"), *vacated on other grounds*, 544 U.S. 902 (2005); United States v. Powell, No. 04 CR 885, 2006 WL 1155947, at *3 (N.D. Ill. Apr. 28, 2006) ("According to the government, Powell used telephones to keep in contact with his victims while they worked the streets, and supplied them with out-of-state condoms. Accordingly, his alleged conduct substantially affected interstate commerce.").

315. *See* Robert Klara, *For Trojan, Inventive Packaging Made the Sale When Advertising Wasn't Allowed*, ADWEEK (Dec. 27, 2016), https://www.adweek.com/brand-marketing/trojan-inventive-packaging-made-sale-when-advertising-wasnt-allowed-175213/ [https://perma.cc/2WZB-DWZR] (noting that Trojan may hold over 72 percent of the market share).

316. *Virginia Plant to be Sole Source of Trojan Condoms*, ASSOCIATED PRESS (Feb. 7, 1996), https://apnews.com/02174dd7c6a6a71c0545967582fa2b60 [https://perma.cc/YRM6-U426].

4. Substantial Effects

As helpfully distilled by more than one circuit court, *Morrison* announced a four-factor test for when the government must rely on the third prong to sustain a federal criminal statute:

> In order to determine whether a statute is unconstitutional because it exceeds Congress's Commerce Clause power, we must consider four issues: (1) whether the prohibited activity is commercial or economic in nature; (2) whether there is an express jurisdictional element involving interstate activity which might limit the statute's reach; (3) whether Congress made findings about the effects of the prohibited conduct on interstate commerce; and (4) whether the link between the prohibited activity and the effect on interstate commerce is attenuated.[317]

Morrison itself defined attenuation functionally as a requirement of a significant residuum of exclusive state authority.[318]

Congress need not assert plenary power under the third prong to subject a significant number of rapes to federal liability. Items (2) and (3) are within the control of Congress.[319] In what follows, I shall assume that Congress would include a jurisdictional element and make appropriate legislative findings.

Respecting rapes in two commercial contexts, the law is already clear. First, Congress has power to regulate rape at the workplace under Title VII.[320] Second, coerced participation in commercial sex is subject to Commerce Clause regulation via the third prong, sustaining the Victims of Trafficking and Violence Protection Act of

317. *See* United States v. Ray, 189 F. App'x 436, 447 (6th Cir. 2006).

318. *See* United States v. Morrison, 529 U.S. 598, 612-13 (2000) (deriving attenuation from *Lopez* where the Court rejected the government's cost-of-crime effects arguments "because they would permit Congress to 'regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce'" (quoting United States v. Lopez, 514 U.S. 549, 564 (2000))); Bradley, *supra* note 240, at 578 ("Since almost everything, or some of its components, has moved in interstate commerce at some point, mere past movement in interstate commerce, *unconnected to the instant crime*, would not seem to satisfy the 'non-infinity' principle that *Lopez* was announcing.").

319. *See Ray*, 189 F. App'x at 447.

320. 42 U.S.C. § 2000e-2 (2012) (prohibiting discriminatory practices in the workplace on the basis of sex).

2000 (TUPA) and its predecessors.[321] It follows that rape at the workplace, or of sex workers, is within the commerce power under the third prong.

a. Workplace Rapes

Many federal statutes regulate intrastate employment on the basis of the third prong. Examples include the Occupational Health and Safety Act[322] and the Fair Labor Standards Act.[323] Title VII of the Civil Rights Act is also based on the commerce power.[324] The law is clear that rape in the employment environment can create employer liability.[325] If Congress has power to hold employers accountable for workplace rapes, Congress has power to hold workplace rapists accountable.

The number of these assaults is significant. Working with four years of NCVS data, from 2005 to 2009, the BJS estimated the rate of sexual assault victimization of employees at work at 0.1 percent per one thousand people, 0.6 per one thousand people for employed persons not at work, and 1 per one thousand people for unemployed persons.[326] If that is correct,[327] one in seventeen—more than 5 percent—of all sexual assaults occurs at the workplace.[328] Working

321. Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scattered titles of the United States Code).

322. 29 U.S.C. §§ 651-678 (2012).

323. *Id.* §§ 201-219.

324. 42 U.S.C. § 2000e-2.

325. *See* Lapka v. Chertoff, 517 F.3d 974, 982-83 (7th Cir. 2008) ("It goes without saying that forcible rape is 'unwelcome physical conduct of a sexual nature.' Rape is also, by definition, a form of harassment based on sex." (internal citation omitted)); Ferris v. Delta Air Lines, Inc., 277 F.3d 128, 136 (2d Cir. 2001) ("Although a continuing pattern of hostile or abusive behavior is ordinarily required to establish a hostile environment, a single instance can suffice when it is sufficiently egregious. We have no doubt a single incident of rape can satisfy the first prong of employer liability under a hostile work environment theory."); Little v. Windermere Relocation, Inc., 301 F.3d 958, 967 (9th Cir. 2001) ("Rape is unquestionably among the most severe forms of sexual harassment."); Watkins v. Prof'l Sec. Bureau, Ltd., 201 F.3d 439 (4th Cir. 1999).

326. ERIKA HARRELL, BUREAU JUSTICE STATISTICS, WORKPLACE VIOLENCE, 1993-2009, at 3 tbl.1 (2011), https://www.bjs.gov/content/pub/pdf/wv09.pdf [https://perma.cc/86AS-J8X3].

327. The NCVS data on rape are imperfect: it might be that respondents are more willing to report workplace than household rapes when responding to a household survey. On the other hand, respondents might feel less inclined to protect a coworker as opposed to a family member.

328. *See* HARRELL, *supra* note 326, at 3 tbl.1.

with sixteen years of data, another BJS report estimated that rapes at work account for 9 to 12 percent of all victimizations, depending on the years selected.[329]

Still more rapes occur while the victim is in transit to or from the workplace. The BJS college-age female survey found that 10 percent of student rapes, and 16 percent of nonstudent rapes, occurred while the victim was "[w]orking or traveling to work."[330] The true percentage of rape at work must be substantial, whatever the precise number turns out to be.

b. Rapes of Sex Workers

In *Taylor v. United States*, the Court held that an illegal market still counts as commerce.[331] Lower courts have upheld the TUPA because commercial sex is economic activity with a substantial, direct effect on interstate commerce.[332] Given the aggregate effect on commerce, the commerce nexus required to satisfy the statutory jurisdictional element in any single case need be no more than de minimis, just as under the Hobbs Act.[333]

Sex workers are frequent victims of rape. In one survey of sex workers, 68 percent of the respondents reported being raped.[334] If commercial sex is an economic activity that in the aggregate has substantial effects on commerce,[335] Congress can regulate this subterranean market by protecting sex workers against rape.

c. Use of Date-Rape Drugs

Without requiring proof of a jurisdictional element, the CSA makes simple possession of the date rape drug flunitrazepam a

329. *See* PLANTY ET AL., *supra* note 78, at 4 tbl.2.

330. SINOZICH & LANGTON, *supra* note 114, at 6 tbl.4. The *n* for students raped at work or en route to or from work was at most ten, and the BJS advises interpreting the 10 percent figure with caution. *Id.*

331. 136 S. Ct. 2074, 2081-82 (2016).

332. *See, e.g.*, United States v. Baston, 818 F.3d 651, 665 (11th Cir. 2016); United States v. Evans, 476 F.3d 1176, 1179-80 (11th Cir. 2007).

333. *See Taylor*, 136 S. Ct. at 2077-78, 2081.

334. Melissa Farley & Howard Barkan, *Prostitution, Violence, and Posttraumatic Stress Disorder*, 27 WOMEN & HEALTH, no. 3, 1998, at 37, 45.

335. *See, e.g.*, *Evans*, 476 F.3d at 1179-80.

federal crime.[336] The CSA further provides, again without a jurisdictional element, a maximum twenty-year sentence for the surreptitious administration of any controlled substance with intent to commit, among other things, rape.[337] Congressional power to punish attempted rapes by means of controlled substances logically extends to punishing completed offenses.

C. The Commerce Power Does Not Reach Many Other Rapes

Despite the many rapes the commerce power might reach, it clearly cannot reach a great many other rapes. Where the rapist, without prior communications, attacks the victim in private premises or in public space, the government cannot prove use of a weapon, condom, or other instrumentality of commerce, and neither victim nor rapist is an interstate traveler, there is no plausible basis of Commerce Clause jurisdiction.[338] Infamous examples include the "Central Park jogger" case and the William Kennedy Smith case. In the former, the rapist tackled and viciously beat the victim in Central Park.[339] In the latter, the defendant was accused of attacking the victim during a walk on the beach.[340]

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336. 21 U.S.C. § 844(a) (2012) ("Notwithstanding any penalty provided in this subsection, any person convicted under this subsection for the possession of flunitrazepam shall be imprisoned for not more than 3 years, shall be fined as otherwise provided in this section, or both.").

337. *Id.* § 841(b)(7).

338. *See* United States v. Lopez, 514 U.S. 549, 558 (1995) ("[N]either here nor in *Wickard* has the Court declared that Congress may use a relatively trivial impact on commerce as an excuse for broad general regulation of ... private activities." (quoting Maryland v. Wirtz, 392 U.S. 183, 197 n.27 (1968))).

339. For a summary of the case, including the exoneration of those initially convicted for the attack, see, for example, Jill Filipovic, *The Painful Lessons of the Central Park Five and the Jogger Rape Case*, GUARDIAN (Oct. 5, 2012, 5:32 PM), https://www.theguardian.com/commentisfree/2012/oct/05/central-park-five-rape-case [https://perma.cc/T7M7-RQ44].

340. *See This Day in History: December 02, 1991: Kennedy Cousin Rape Trial Begins*, HIST. CHANNEL, https://www.history.com/this-day-in-history/kennedy-cousin-rape-trial-begins [https://perma.cc/SX4S-RRM5].

The most common location for rapes is the victim's home.[341] Although many rapes involve telecommunications, weapons, or condoms, many others do not.[342] Some examples of charged rape of a housemate, without report of a weapon or condom, are familiar from standard criminal law casebooks. In *Commonwealth v. Berkowitz*, the prosecution charged the defendant, a college student, who raped another student while she was visiting his dorm room.[343] The charge in *Commonwealth v. Mlinarich* was rape of defendant's live-in ward.[344] *In re M.T.S.* involved an alleged rape committed by one juvenile of another juvenile residing at the same house.[345]

The government, moreover, must prove jurisdictional elements beyond a reasonable doubt.[346] The precise scope of exclusive state authority over rape is impossible to quantify. Nonetheless, it seems safe to say that more exclusive state authority would remain over rape than the Hobbs Act leaves the states for robbery.[347]

III. THE DUAL CASE FOR A FEDERAL LAW AGAINST RAPE

A. Improving the Investigation and Prosecution of Rape

1. Logistics: Quantity and Quality

If federal jurisdiction did not improve rape enforcement, its constitutionality would be of only academic interest. The truth is that federal enforcement would bring major advantages to the

341. *See* PLANTY ET AL., *supra* note 78, at 4 ("Over all three periods, between 41 [percent] and 48 [percent] of victims of sexual violence were undertaking activities at or around their homes at the time of the incident."); SINOZICH & LANGTON, *supra* note 114, at 6 tbl.4 (finding that 31 percent of student rapes and 50 percent of nonstudent rapes took place while the victim was sleeping or engaged in other home activities).

342. *See, e.g.*, SINOZICH & LANGTON, *supra* note 114, at 7 (finding that the offender used a weapon in only one in ten rapes and sexual assaults between 1995 and 2013).

343. 641 A.2d 1161, 1163 (Pa. 1994).

344. 542 A.2d 1335, 1336 (Pa. 1988).

345. 609 A.2d 1266, 1267 (N.J. 1992).

346. *See* Margaret H. Lemos, *The Commerce Power and Criminal Punishment: Presumption of Constitutionality or Presumption of Innocence?*, 84 TEX. L. REV. 1203, 1205-06 (2006).

347. *Cf.* United States v. Rivera-Rivera, 555 F.3d 277, 298 (1st Cir. 2009) (Lipez, J., dissenting) (suggesting "we risk turning every routine robbery into a federal offense" under the majority's analysis, under the Hobbs Act because the nexus between the robbery and interstate commerce is too attenuated).

prosecution of sexual assault.[348] The first of these is logistical. Federal officials have discretion over their own caseload[349] and are backed with more resources per case than state and local law enforcement.[350]

As Professor Stuntz put it, "[t]hanks to more generous per-case funding than local governments can afford, the key actors in the federal justice system enjoy a measure of slack."[351] This in turn means that the federal government can offer agents and lawyers better salaries and more upward mobility to work on more promising cases.[352] Economics 101 predicts that more talented, better credentialed, and generally more effective people would gravitate to federal as opposed to state law enforcement. There are many superb state and local law enforcement officers, from cops on the beat to State Attorneys General. It is still fair to say that federal officers are America's law enforcement A Team.[353]

A study released in 2008 of federal prosecutions under the TVPA suggests the potential effectiveness of federal rape prosecutions.[354] TVPA cases present some of the same challenges faced by rape prosecutions. These challenges include obtaining cooperation from victims[355] and overcoming skepticism by law enforcement officers.[356]

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348. *See generally* John C. Jeffries, Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095 (1995) (discussing advantages that federal prosecutors enjoy over state and local prosecutors).

349. *Id.* at 1100 ("Beyond responding to obvious local needs and servicing federal law enforcement, [U.S.] Attorneys have substantial discretion to direct their energies where they see fit.").

350. *See* WILLIAM J. STUNTZ, THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE 66 (2011) ("[L]ocal police and local prosecutors handle fourteen times as many felony cases as does the federal government, and several hundred times the number of misdemeanors. Yet the ratio of local cops to federal officers is only 6 to 1, and the ratio of local prosecutors to their federal counterparts is less than 5 to 1.").

351. *Id.*

352. *See* Jeffries & Gleeson, *supra* note 348, at 1098-1101; *Occupational Outlook Handbook: Lawyers: Pay*, BUREAU LABOR STATISTICS, https://www.bls.gov/ooh/legal/lawyers.htm#tab-5 [https://perma.cc/Z9B9-SVLU] (noting that in May 2017, federal government lawyers earned a median salary of $141,900—higher than the $93,020 earned by local government attorneys and $85,260 earned by state government attorneys).

353. *See, e.g.*, Weiser, *supra* note 34.

354. *See* HEATHER J. CLAWSON ET AL., ICF INT'L, PROSECUTING HUMAN TRAFFICKING CASES: LESSONS LEARNED AND PROMISING PRACTICES, at viii (2008), https://www.ncjrs.gov/pdffiles1/nij/grants/223972.pdf [https://perma.cc/VJT5LCPX].

355. *Id.* at vi ("Prosecutors noted that these cases require a greater concern for victims and their needs by the prosecution than with other cases. While a challenge, this was also viewed

Yet TVPA prosecutions resulted in a high rate of convictions.[357] Only 3 percent were dismissed and 1 percent ended in acquittals.[358] TVPA cases also differ in many ways from rape cases,[359] but the TVPA record suggests the potential power of federal intervention.

2. Tactics: Federal Procedural Advantages in Sexual Assault Cases

Federal law enforcement assets can make a difference wherever they are deployed. Four special features of federal criminal practice make that difference especially promising in sexual assault cases. These are the dual-sovereignty doctrine,[360] grand jury secrecy,[361] admissibility of propensity evidence,[362] and generally more punitive sentences.[363]

Consider, first, cases that arise in the state systems. The ultimate rationalization for not pursuing rape cases is the apprehension that the jury will acquit against the evidence.[364] Today there is no appeal from such a verdict, no matter how irrational.[365] The dual-sovereignty doctrine treats conduct violating both federal and state law

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as critical as these cases were described as victim-dependent."); *id.* ("Half of the prosecutors interviewed indicated that a case is rarely successfully without victim cooperation and testimony.").

356. *Id.* at vii ("Specifically, prosecutors called for greater buy-in and dedicated law enforcement to investigate these crimes. Prosecutors noted an unwillingness at times of law enforcement in dealing with these cases as well as seeing a victim as a human trafficking victim.").

357. *Id.* at iii ("Seventy-seven percent resulted in guilty dispositions.").

358. *Id.* ("Three percent of the cases resulted in dismissals and 8 percent are pending. Less than 1 percent of the cases resulted in acquittals.").

359. *See, e.g.*, SHARED HOPE INT'L, CHILD SEX TRAFFICKING IS DISTINCT FROM STATUTORY RAPE: THE CRITICAL IMPORTANCE OF USING SEX TRAFFICKING LAWS TO COMBAT CHILD SEX TRAFFICKING CRIMES (2017), https://sharedhope.org/wp-content/uploads/2017/08/Importance-of-Using-CST-Laws-over-Stat-Rape-Laws.pdf [https://perma.cc/NW5B-DQH8].

360. *See infra* notes 366-69, 376-79 and accompanying text.

361. *See generally* Richard M. Calkins, *Grand Jury Secrecy*, 63 MICH. L. REV. 455 (1965); *infra* note 368 and accompanying text.

362. *See generally* Rice Lave & Orenstein, *supra* note 99; *infra* notes 365-67 and accompanying text.

363. *See generally* Wright, *supra* note 35; *infra* notes 373-75 and accompanying text.

364. *See* Sherry F. Colb, *A Fresh Look at Jury Nullification*, JUSTIA (May 18, 2017), https://verdict.justia.com/2017/05/18/fresh-look-jury-nullification [https://perma.cc/GC53-V9G3].

365. *See* Andrew D. Leipold, *Rethinking Jury Nullification*, 82 VA. L. REV. 253, 266-68 (1996).

as two offenses rather than "the same offense."[366] This permits federal retrials after state acquittals and vice versa.[367] If rape were a federal crime, state prosecutors who felt the jury had made a grievous error could ask the U.S. Attorney's Office to consider the case. The federal prosecutors would have the transcript of the state trial, and they could call witnesses—including the complaining witness—to testify in secrecy before the grand jury to rebut exculpatory testimony from the defense.[368] At a federal trial, the defendant's testimony at the state trial would be admissible against him at the federal trial as a party-opponent statement.[369]

Under Federal Rule of Evidence 413, the federal prosecutors could introduce proof of prior similar acts of sexual assault, whether proved by conviction or supported only by the testimony of witnesses.[370] Some, but only some, states have the same rule.[371] The empirical evidence suggests that the effect on juries of other crimes evidence is significant, at least in borderline cases.[372]

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366. The seminal case is *United States v. Lanza*, 260 U.S. 377 (1922). *See id.* at 382 ("[A]n act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each.").

367. *See, e.g.*, Koon v. United States, 518 U.S. 81, 87-88 (1996) (concerning a sentencing appeal by police officers acquitted on state charges but convicted on federal charges for the beating of Rodney King).

368. *See* FED. R. CRIM. P. 6(e)(2) (setting forth the federal rule on grand jury secrecy).

369. *See* FED. R. EVID. 801(d)(2)(A).

370. *See* FED. R. EVID. 413(a).

371. *See* Jessica D. Khan, *He Said, She Said, She Said: Why Pennsylvania Should Adopt Federal Rules of Evidence 413 and 414*, 52 VILL. L. REV. 641, 645-46 (2007) ("Since the enactment of these federal rules, ten states have adopted versions of them .... In addition, at least nine states have common law exceptions that admit propensity evidence in sex crimes cases.").

372. *See* Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353, 1382-83 (2009) (finding that, in an empirical study of actual jury trials, controlling for the strength of the case, "[t]he most striking conviction rate is for cases with evidence strength equal to three in which the jury learned about a criminal record. Despite the relatively weak evidence, the conviction rate exceeded 60 [percent], far greater than the rate for cases with evidentiary strength equal to three in which the jury did not learn about a criminal record, and far greater than the conviction rate for evidentiary strength equal to two."). Eisenberg and Hans studied admission of prior convictions to impeach. *See id.* at 1354-57. One would expect to see stronger effects from other acts admitted to show propensity, but also weaker effects for other acts proved by disputed testimony rather than by prior conviction. *Cf. id.* at 1366.

If convicted at a federal retrial, the defendant would be sentenced under the Federal Sentencing Guidelines.[373] For violation of the federal aggravated sexual abuse statute—the federal version of forcible rape—the base offense level is 30, with an automatic increase of 4, for a base offense level of 34.[374] For defendants with no or trivial criminal history, and no adjustments or departures, the Guidelines prescribe a sentence of 151 to 188 months for base offense level 34.[375]

The prospect of federal retrials could also transform plea bargaining in rape cases in the state courts. The defense attorney calculating a likely acquittal in the common forcible-rape-of-an-acquaintance case would have to factor in the prospect that winning a jury verdict in state court might land the defendant in federal prison for fifteen years.[376] It would probably take a few federal trials to convey the message, but federal heat could deliver a lot of bang for the buck. That prospect, in turn, might reenergize state police and prosecutors long frustrated by the difficulty of winning convictions in state court.[377]

The Court is reconsidering the dual sovereigns doctrine in a pending case, *Gamble v. United States*.[378] The Court may reaffirm current doctrine. Even without the dual-sovereigns doctrine, some follow-on federal prosecution might still be possible under the same-elements test of "the same offense."[379] If the Court decides *Gamble*

373. *See* U.S. SENTENCING GUIDELINES MANUAL (U.S. SENTENCING COMM'N 2016).

374. *See id.* § 2A3.1(a)-(b). Section 2A3.1(a)(1) provides a base offense level of 38 for violations of 18 U.S.C. § 2241(c), applicable to underage victims. *Id.* § 2A3.1(a)(1). Guideline § 2A3.1(a)(2) then gives a base offense level of "30, otherwise." *Id.* § 2A3.1(a)(2). But § 2A3.1(b)(1) provides immediately thereafter: "If the offense involved conduct described in 18 U.S.C. § 2241(a) or (b), increase by 4 levels." *Id.* § 2A3.1(b)(1). The circumlocution notwithstanding, it seems clear that a defendant convicted for forcible sexual assault on an adult victim in federal court would start the sentencing process at level 34. *See id.* § 2A3.1(a)-(b).

375. *See id.* ch.5, pt.A, sentencing tbl.

376. *See supra* notes 373-75 and accompanying text.

377. *Cf. supra* notes 175-77 and accompanying text.

378. 694 F. App'x 750 (11th Cir. 2017), *cert. granted*, 138 S. Ct. 2707 (2018).

379. *See* United States v. Hairston, 64 F.3d 491, 496 (9th Cir. 1995) (rejecting *Gibson* because "Congress may have strong interests in treating crimes occurring within the jurisdiction of the United States differently"); United States v. Gibson, 820 F.2d 692, 698 (5th Cir. 1987) (holding that when the only difference between two crimes is a jurisdictional element those crimes are "the same offense"). Even if jurisdictional elements differentiate offenses for double-jeopardy purposes, a follow-on federal charge would be barred unless the

in a way that permits federal prosecutions only when the federal authorities initiate the case, a federal rape statute still would have powerful incentives effects.

Consider the complaints turned away by local police or district attorney's offices.[380] Once rape becomes a federal crime, advocates at rape crisis centers could inform survivors of this additional reporting possibility. Federal prosecutions following state declinations would likely attract publicity, even if unsuccessful. Given the federal advantages in trial procedures and plea bargaining leverage, there is some reason to expect success even in cases state authorities see as unpromising.[381] Further, the prospect of being embarrassed by successful prosecution of declined complaints might motivate the state authorities to take more complaints more seriously.

B. Drawing Federal Resources Away from Fringe Enforcement of Proxy Crimes

Committing federal resources to rape enforcement will draw those resources away from other priorities. That is a feature, not a bug. Counterterrorism, counterespionage, murder-for-hire, and some organized crime cases deserve priority over rape prosecutions.[382] The government, however, devotes only a small percentage of its prosecutional assets to these high priorities.[383]

The U.S. Sentencing Commission keeps statistics on the offenses for which district courts sentence convicted defendants.[384] In fiscal year 2015, the largest single category of federal sentences was for

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state charge included some element that the federal charge does not. *See id.* For example, if the state prosecution was for "aggravated sexual assault" because a gun was used or the victim suffered injuries other than the sexual assault itself, then a federal prosecution under a statute with a jurisdictional element but not required proof of a weapon or additional injuries would be permissible under the *Hairston* approach.

380. *See supra* Part I.B.2-3.

381. *See supra* notes 366-72 and accompanying text.

382. *See What We Investigate,* FED. BUREAU INVESTIGATION, https://www.fbi.gov/investigate [https://perma.cc/3X7F-U7A8] (listing terrorism as the FBI's "top investigative priority").

383. *See* U.S. SENTENCING COMM'N, FIGURE A: OFFENDERS IN EACH PRIMARY OFFENSE CATEGORY, FISCAL YEAR 2015 (2015), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2015/FigureA.pdf [https://perma. cc/Q3S8-EQE5] (showing that the majority of federal prosecution efforts go to drugs and immigration).

384. *See id.*

drug offenses, 31.8 percent of the total.[385] Immigration offenses ran a close second, at 29.3 percent.[386] The remaining categories are fraud (10.5 percent), firearms (10 percent), nonfraud white collar (3.2 percent), child pornography (2.7 percent), and larceny (1.3 percent).[387] The percentage of violent crimes is too small to report independently.[388] Instead, violent crimes are counted under the catchall "other" offenses category, which includes everything from murder-for-hire to obstruction of justice.[389]

The U.S. Immigration and Customs Enforcement (ICE) section of the U.S. Department of Homeland Security (DHS) has primary responsibility for investigating criminal violations of immigration laws.[390] DOJ prosecutes these immigration crimes.[391] So assigning responsibility for rape enforcement to DOJ would not draw investigative assets (for example, agents) away from immigration, but it might draw some prosecutorial resources from all offense categories.

Courts imposed 41.8 percent of all federal sentences for possessory crimes involving drugs or firearms.[392] These laws treat possession as a predictor of future harm.[393] Earlier intervention can prevent more crimes, while prosecutors can prove possessory crimes via the arresting officer's testimony.[394] The downside is that most people who commit possessory crimes will never cause the harms these laws were intended to prevent.[395] A great many ambiguously

385. *Id.*
386. *Id.*
387. *Id.*
388. *See id.*
389. *See id.*
390. *See What We Do*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, https://www.ice.gov/overview [https://perma.cc/8ZL8-TRRS].
391. *See* Jeff Sessions, *Introduction: Prosecuting Criminal Immigration Offenses*, U.S. ATT'YS BULL., July 2017, at 1, 1.
392. *See* U.S. SENTENCING COMM'N, *supra* note 383.
393. *See, e.g.*, New York v. Ferber, 458 U.S. 747, 759-61 (1982).
394. *See* Markus Dirk Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829, 858-62 (2001).
395. *See, e.g.*, Larry Alexander & Kimberly Kessler Ferzan, *Culpable Acts of Risk Creation*, 5 OHIO ST. J. CRIM. L. 375, 391 n.36 (2008) ("Sometimes the criminal law seeks to punish acts that do not risk harm in themselves. These sorts of acts are 'proxy crimes.' There are two types of proxy crimes-crimes that set forth a rule that is overinclusive (e.g., speed limits, ages of consent), and crimes that punish actions that are not culpable for law enforcement reasons (e.g., possession of burglar's tools). The former presents a rules/standards problem. In setting forth the rule, the crime is overinclusive, thereby punishing actions that are not themselves

culpable and contingently dangerous people are punished in the process.[396]

The government's annual National Survey on Drug Use and Health for 2015 estimated that 27.1 million Americans over age twelve were regular users of some illicit drug, including 22.2 million regular marijuana users, 1.9 million cocaine users (inclusive of crack), 900,000 regular meth users, and 300,000 regular heroin users.[397] Even if we focus just on hard drugs (which federal enforcement does not),[398] it must take hundreds of millions of drug deals, wholesale and retail, to satisfy this market.

Federal marijuana cases remain common. In the year ending March 2016, federal prosecutors brought marijuana charges against 5347 defendants.[399] Of these, 2188 prosecutions were for possession and 2671 for distribution.[400] There were only 450 importation prosecutions and 38 manufacturing prosecutions.[401] We can assume that many of the possession cases were plea deals,[402] but we can also assume that not all the distribution or manufacturing charges were brought against major traffickers or producers.[403] Even the largest dealers, moreover, sell marijuana that is no more dangerous than that sold by others. For the year ending in March 2017, the latest statistics show a continuing commitment to marijuana

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culpable. The latter type of proxy crime is even more objectionable because all instances of the conduct are themselves innocent.").

396. *See* Dubber, *supra* note 394, at 836 (arguing that possession offenses "break virtually every law in the book of cherished criminal law principles").

397. *See* U.S. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., KEY SUBSTANCE USE AND MENTAL HEALTH INDICATORS IN THE UNITED STATES: RESULTS FROM THE 2015 NATIONAL SURVEY ON DRUG USE AND HEALTH 7 fig.1 (2016), https://www.samhsa.gov/data/sites/default/files/NSDUH-FFR1-2015/NSDUH-FFR1-2015/NSDUH-FFR1-2015.pdf [https://perma.cc/PY24-ZCQY].

398. *See id.*

399. *See* ADMIN. OFFICE U.S. COURTS, TABLE D-2: U.S. DISTRICT COURTS—CRIMINAL DEFENDANTS COMMENCED, BY OFFENSE, DURING THE 12-MONTH PERIODS ENDING MARCH 31, 2012 THROUGH 2016, at 2 (2016), http://www.uscourts.gov/sites/default/files/data_tables/fjcs_d2_0331.2016.pdf [https://perma.cc/D78A-GVNU].

400. *Id.*

401. *Id.*

402. *See generally* HUMAN RIGHTS WATCH, AN OFFER YOU CAN'T REFUSE: HOW US FEDERAL PROSECUTORS FORCE DRUG DEFENDANTS TO PLEAD GUILTY (2013), https://www.hrw.org/report/2013/12/05/offer-you-cant-refuse/how-us-federal-prosecutors-force-drug-defendants-plead [https://perma.cc/BR5H-CKRJ].

403. *See, e.g.*, *id.* at 4.

cases—resulting in 4580 prosecutions without breaking down the categories of possession, trafficking, and manufacturing cases.[404]

If there are 300,000 regular heroin users, and each buys heroin three times a week (a conservative estimate),[405] there would be more than 46 million sales per year, just to consumers. The CDC reports that in 2016, 15,500 people died from heroin overdoses.[406] Based on those numbers, any given retail heroin sale has a 1 in 2975 chance of leading to a fatal overdose.[407] Moreover, enforcement is likely to have a limited effect on supply. Arrested drug dealers are quickly replaced.[408]

In stark contrast to drug deals, *every* rape inflicts grievous harm.[409] There is no demand for rapists as there is for drug dealers.[410] Recalling that most rapists are serial rapists,[411] the crime control benefits of convicting rapists are demonstrably greater than the benefits of convicting retail drug dealers.

The frequency of illegal gun possession is hard to estimate. The BJS does not even give a figure for the total number of persons with felony convictions, instead offering the proxy that "more than 5.6 million U.S. adult residents, or about 1 in 37 U.S. adults, ha[ve] served time in state or federal prison."[412] A high percentage of

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404. *See* ADMIN. OFFICE U.S. COURTS, TABLE D-3: U.S. DISTRICT COURTS—CRIMINAL DEFENDANTS COMMENCED, BY OFFENSE AND DISTRICT, DURING THE 12-MONTH PERIOD ENDING MARCH 31, 2017, at 2 (2017), http://www.uscourts.gov/statistics/table/d-3/federal-judicial-caseload-statistics/2017/03/31 [https://perma.cc/8H7E-4BEG].

405. *See* Eric E. Sterling, *Drug Policy: A Smorgasbord of Conundrums Spiced by Emotions Around Children and Violence*, 31 VAL. U. L. REV. 597, 610 (1997) ("While a marijuana smoker might buy pot weekly or several times monthly, or a heroin user might buy heroin once or twice a day, a crack user might buy crack five times in a day.").

406. *See Heroin Overdose Data*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/drugoverdose/data/heroin.html [https://perma.cc/7B4Z-YY5P] (last updated Jan. 26, 2017).

407. *Cf. id.*

408. *See* Philip J. Cook, *The Demand and Supply of Criminal Opportunities*, *in* 7 CRIME AND JUSTICE 1, 22 (Michael Tonry & Norval Morris eds., 1986).

409. *See Effects of Sexual Violence*, RAPE, ABUSE & INCEST NAT'L NETWORK, https://www.rainn.org/effects-sexual-violence [https://perma.cc/K5VL-ASXX].

410. *See* Cook, *supra* note 408, at 22 ("My intuition is that there will be little or no replacement if child abusers or drunk drivers are reformed or restrained and that replacement will be near complete in the case of street-level sellers of illicit commodities.").

411. *See* Lisak & Miller, *supra* note 142, at 78.

412. *FAQ Detail: How Many Persons in the U.S. Have Ever Been Convicted of a Felony?*, BUREAU JUST. STAT., https://www.bjs.gov/index.cfm?ty=qa&iid=404 [https://perma.cc/RVC7-P5U8] [hereinafter *FAQ Detail*].

convicted felons, however, are not sentenced to prison (almost one-third, according to one BJS survey),[413] although many of these people will be incarcerated after probation violations.[414] If we add to the felons those convicted of misdemeanor domestic violence, made felons by the Lautenberg Amendment if they possess guns,[415] the number of people subject to federal criminal liability for possessing a gun is still higher.

How many of these ineligible persons obtain guns against the law is a matter of conjecture. In one survey of prison inmates, over half of the respondents reported committing a gun offense other than an armed crime.[416] There are obvious methodological issues, but those could cut in different directions.[417] Given the dangerous milieu in which most violent criminals live, the percentage is likely to be high even among felons with no plans to commit crimes extrinsic to the gun possession.[418]

In 2015, the FBI reported 9616 murders committed with firearms.[419] On the assumption that 50 percent of 5.6 million felons have guns,[420] that would be one gun murder for every 2082 felons in possession. The 5.6 million is a major undercount, as it excludes nonincarcerated felons and misdemeanor violence offenders.[421] Some firearm homicides, moreover, are not committed by adjudicated felons.

The issue is not whether the federal government should punish some possessory crimes, but what priority those crimes deserve

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413. SEAN ROSENMERKEL ET AL., BUREAU JUST. STATISTICS, FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES 2 (rev. ed. 2010), https://www.bjs.gov/content/pub/pdf/fssc06st.pdf [https://perma.cc/5ULM-GJER] (finding that 27 percent of state felony convicts were sentenced to probation and 4 percent were sentenced to neither prison nor probation).

414. *See, e.g.*, Wendy Sawyer & Wanda Bertram, *New Reports Show Probation Is Down, But Still a Major Driver of Incarceration*, PRISON POL'Y INITIATIVE (Apr. 26, 2018), https://www.prisonpolicy.org/blog/2018/04/26/probation_update-2/ [https://perma.cc/7XBK-DL5R].

415. *See* 18 U.S.C. § 922(g)(9) (2012).

416. JAMES D. WRIGHT & PETER H. ROSSI, ARMED AND CONSIDERED DANGEROUS: A SURVEY OF FELONS AND THEIR FIREARMS 87 (1986).

417. *See id.* at 83, 89.

418. *See id.* at 43.

419. *Expanded Homicide Data Table 8: Murder Victims by Weapon, 2011-2015*, FED. BUREAU INVESTIGATION, https://ucr.fbi.gov/crime-in-the-u.s/2015/crime-in-the-u.s.-2015/tables/expanded_homicide_data_table_8_murder_victims_by_weapon_2011-2015.xls [https://perma.cc/4P5A-ZQUL].

420. *See FAQ Detail*, *supra* note 412.

421. *See supra* text accompanying notes 413-15.

relative to forcible rape complaints that may go nowhere in the state systems.[422] Perhaps punishing the worst possessory offenders deserves priority over punishing forcible rapists. It is beyond belief that punishing the least aggravated cases deserves that priority.

C. Compared to Rape?

Susan Klein and Ingrid Grobey aggregated state and federal felony convictions and found that federal courts returned 5 to 6 percent of all felony convictions.[423] The federal share, however, is not evenly distributed across offense categories.[424] For the calendar year 2006, Klein and Grobey found that federal prosecutions accounted for 18.9 percent of all weapons convictions, 11.3 percent of all drug-trafficking convictions, and less than 1 percent of sexual assault convictions.[425]

In 2015, federal prosecutors brought 116 charges of sexual abuse of adults and 804 charges of sexual abuse of minors.[426] The number for marijuana possession was 2487; for marijuana distribution, 2861; and for firearms "Possession by Prohibited Persons," 4317.[427] The chart below conveys a visual impression of these statistics. I have aggregated marijuana possession and distribution as well as sexual abuse of minors and of adults.[428]

422. *See* Tuerkheimer, *supra* note 121, at 1294-95 (discussing the pattern of state police not processing rape complaints).

423. Susan R. Klein & Ingrid B. Grobey, *Debunking Claims of Over-Federalization of Criminal Law*, 62 EMORY L.J. 1, 18 (2012).

424. *See id.* at 18-19.

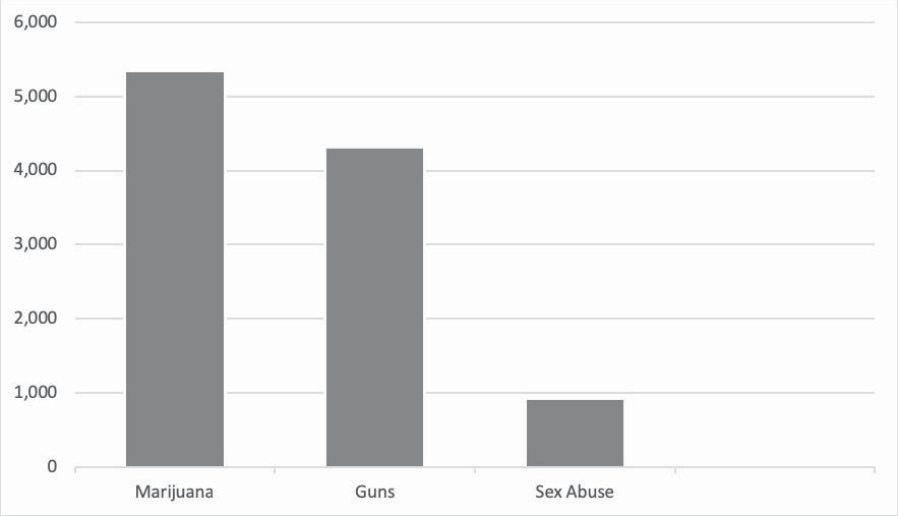
425. *Id.*

426. *See* ADMIN. OFFICE U.S. COURTS, *supra* note 399.

427. *Id.*

428. There is a more recent report from the Administrative Office of the United States Courts, but it does not discriminate among types of firearms or sexual offenses. *See* ADMIN. OFFICE U.S. COURTS, *supra* note 404.

Figure 2. Number of Charges Brought by Federal Prosecutors for Various Offenses in 2015



Granting the need for some enforcement of possessory offenses, the question is how much enforcement is appropriate given competing alternatives. The issue is not legalization, but prioritization. As a group of former U.S. Attorneys wrote to the Attorney General, protesting the recent (and short-lived) policy of prosecuting all illegal entry cases, "there are only a finite number of federal prosecutors to address the broad swath of dangerous and illegal activity that takes place in our country."[429] Assets committed to one type of case are unavailable in other types.[430] Surely the investigation and prosecution of the most meritorious rape cases deserves priority over pursuing the least meritorious cases of proxy crimes.

429. Letter from Alan Bersin et al., Former U.S. Attorneys, to Jefferson B. Sessions, Attorney Gen. (June 18, 2018), https://medium.com/@formerusattorneys/bipartisan-group-of-former-united-states-attorneys-call-on-sessions-to-end-child-detention-e129ae0df0cf [https://perma.cc/PE8F-64TU].

430. *See, e.g.*, *id.*

D. Two Proposals

1. The Simple Proposal

Appendix I offers model statutory language for a general federal rape statute. The jurisdictional language is taken from the Hobbs Act,[431] and the substantive provisions are taken from the federal forcible sexual assault statute respecting adult victims, criminal code § 2241(a) and (b).[432] This statute would simply track the Hobbs Act and leave enforcement to the discretion of the FBI, the U.S. Attorney's Offices, and the Criminal Division of the DOJ.[433]

Different U.S. Attorney's Offices might have different views of the model statute. Some might be impressed enough by the crime control benefits of prosecuting serial rapists, relative to retail drug dealers,[434] to bring many rape prosecutions based on investigations by federal agents.[435] Others might be less enthusiastic, for the same reasons that state law enforcement officials are often reluctant to deal with rape cases.[436] Still others might see political opportunity in becoming known as a successful rape prosecutor.[437]

Even federal offices reluctant to bring their own rape prosecutions would face some pressure to investigate possible federal charges against accused rapists when the state prosecutors either declined to proceed or lost a dubious jury verdict at trial.[438] This backstopping function should not be underestimated. The state authorities would screen cases knowing that the complainants they turn away

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431. *See* 18 U.S.C. § 1951 (2012).

432. *See id.* § 2241(a)-(b). 18 U.S.C. § 2241(c) deals with sexual abuse of children under twelve and ages twelve to sixteen. *Id.* § 2241(c). Consistent with this Article's focus on improving enforcement of forcible sexual assault, those provisions are omitted from the model statute. Any forcible sexual abuse of victims, of any age, is covered by the proposed language.

433. *See 9-131.000—The Hobbs Act—18 U.S.C. § 1951*, U.S. DEP'T JUST., https://www.justice.gov/jm/jm-9-131000-hobbs-act-18-usc-1951 [https://perma.cc/YFB7-TBMY] (last updated May 2011).

434. *See supra* notes 409-11 and accompanying text.

435. The drain on the FBI would be less than the drain on U.S. Attorney's Offices because many rape cases could be prosecuted based on investigations by local police.

436. *See supra* Part I.B.2-3; *supra* notes 123-26 and accompanying text.

437. *See* Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669, 670, 673, 688.

438. *See supra* notes 364-65 and accompanying text.

have another place to seek redress, with attendant publicity if the federal authorities indict.[439]

The state authorities would also know that even if they lost a trial, there would be a significant chance that a successive federal prosecution would succeed, at least so long as the Court continues to approve the dual-sovereignty doctrine[440] that permits successive prosecutions of identically defined offenses, and as long as the cases are brought by prosecutors representing different governments, whether state or federal, without collusion.[441] Collateral estoppel applies to successive prosecutions involving the same parties and thus does not apply to charges brought by separate sovereigns.[442]

The DOJ's "Petite Policy" addresses federalism concerns by imposing special limits on follow-on federal prosecutions.[443] Substantively, in addition to the normal requirement that the charge be provable, the policy requires that the case "involve a substantial federal interest" that the prior proceedings left "demonstrably unvindicated."[444] Procedurally, the policy requires approval by an Assistant Attorney General at main Justice before a U.S. Attorney's Office may proceed.[445]

There is more bark than bite to the Petite Policy. It does require a considered judgment about federalism interests, but it does not impose practical limits on successive federal prosecutions.[446] The

439. *See supra* notes 376-77 and accompanying text.

440. *See supra* notes 378-79 and accompanying text (discussing *Gamble v. United States*, now pending in the Supreme Court).

441. *See, e.g.*, Puerto Rico v. Sanchez Valle, 136 S. Ct. 1863, 1870 (2016) ("[T]wo prosecutions, this Court has long held, are not for the same offense if brought by different sovereigns—even when those actions target the identical criminal conduct through equivalent criminal laws.").

442. *See, e.g.*, United States v. Angleton, 314 F.3d 767, 776 (5th Cir. 2002) (holding that the double-jeopardy estoppel doctrine of Ashe v. Swenson, 397 U.S. 436 (1970) "is inapplicable here, because the United States and Texas, as separate sovereigns, are not the 'same party.'"). This focus on identity of parties implies that even if *Gamble* holds that sovereignty is not an element that can distinguish federal from state offenses with identical elements, the separate-sovereigns doctrine is an essential component of the estoppel doctrine announced in *Ashe*.

443. *See 9-2.031-Dual and Successive Prosecution Policy ("Petite Policy")*, U.S. DEP'T JUST. [hereinafter *Petite Policy*], https://www.justice.gov/jm/jm-9-2000-authority-us-attorney-criminal-division-mattersprior-approvals#9-2.031 [https://perma.cc/YS2A-JGJ9].

444. *Id.*

445. *Id.*

446. *See id.*

cases unanimously hold that defendants may not raise violations of the policy as a defense.[447] Some of the decisions intimate the view that prosecution of serious federal crimes, as such, constitutes a "substantial federal interest."[448]

The policy has a somewhat circular quality because it makes current DOJ enforcement priorities one gauge of the federal interest.[449] The Petite Policy has not prevented successive federal prosecutions for common drug and firearms offenses.[450] The "substantial federal interest" in these cases arises either from the dangerousness of the offense or from the aggregate effect on interstate commerce from crimes of this type.[451] Either way, rape prosecutions serve these interests at least as much as drug or gun cases. There is harm done to the victim in every rape case,[452] and the aggregate economic effect of sexual assault is massive.[453] There is

447. *See* Jean F. Rydstrom, Annotation, *Effect on Federal Criminal Prosecution or Conviction of Prosecutor's Noncompliance with Petite Policy Requiring Prior Authorization of Attorney General for Federal Trial Where Accused Has Been Previously Prosecuted for Same Acts in State Court*, 51 AM. L. REP. FED. 852 § 2[a] (1981).

448. *See* United States v. Stokes, 124 F.3d 39, 45 (1st Cir. 1997) ("The record indicates that Stokes is a dangerous criminal, and the federal government had a perfect right to take a hard look at his case and to determine whether society's interests call for the unusual step of instituting a federal prosecution notwithstanding the prior commencement of a state prosecution for substantially the same conduct."); United States v. Basile, 109 F.3d 1304, 1307 (8th Cir. 1997) ("The independence and importance of the federal interest in protecting the channels of interstate commerce from the taint of crime is unaffected by DeCaro's previous acquittal in state court; it remains just as important and worthy of vindication after the state trial as it was before."); *id.* at 1308 ("We are not convinced that the federal prosecution in this case failed to meet the 'compelling interests' requirement of the *Petite* policy. We need not and do not decide the question, however, because the *Petite* policy is 'not constitutionally mandated.'").

449. *See Petite Policy*, *supra* note 443 ("Matters that come within the national investigative or prosecutorial priorities established by the Department are more likely than others to satisfy this requirement.").

450. *See, e.g.*, United States v. Tirrell, 120 F.3d 670, 676-77 (7th Cir. 1997) (allowing federal prosecution for Tirrell's firearms offenses); United States v. Caldwell, 816 F. Supp. 657, 658 (D. Kan. 1993) (permitting a subsequent federal prosecution for use of firearm in drug trafficking offenses).

451. *See, e.g.*, United States v. Harris, 87 F. App'x 782, 784 (2d Cir. 2004); United States v. Claiborne, 92 F. Supp. 2d 503, 512 (E.D. Va. 2000).

452. *See Effects of Sexual Violence*, *supra* note 409.

453. *See* United States v. Morrison, 529 U.S. 598, 633-34 (2000) (Souter, J., dissenting) (summarizing congressional findings); *id.* at 635-36 ("[G]ender-based violence in the 1990[ ]s was shown to operate in a manner similar to racial discrimination in the 1960[ ]s in reducing the mobility of employees and their production and consumption of goods shipped in interstate commerce.").

more reason to doubt the effectiveness of state enforcement of the sexual assault laws than of the narcotics and firearms laws.[454] The Petite Policy, even unamended, would not stand in the way of successive federal rape prosecutions.[455]

If federal prosecutors picked up the case and won, the state prosecutors could claim victory (with some justification, given the advantages of trying a rape case after knowing the defendant's testimony at a prior trial).[456] If the U.S. Attorney's Office filed a follow-on indictment and lost, the state prosecutors could defend both their decision to try the case and their failure to win a conviction by pointing out that the federal authorities also thought it was a righteous case, and also lost a trial.

The proposal comes with no guarantee that resources devoted to rape would come from the dubious fringe of enforcing proxy crimes.[457] That is the logical place from which to draw them, especially if main Justice made clear that success rates in rape cases would be measured more generously than for possessory offenses. Even if rape cases competed with fraud cases, the former seem more serious than the latter. Many fraud cases can be prosecuted by the states,[458] and many more can be remedied by private law suits, including qui tam suits on behalf of the government.[459]

The proposed legislation does not include a section analogous to 18 U.S.C. § 2244(b), criminalizing unconsented sex even without use of force by the defendant.[460] An intense debate continues over

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454. *See supra* Part I.B.

455. *See Petite Policy*, *supra* note 443.

456. *See supra* note 369 and accompanying text.

457. *See supra* Part III.B.

458. In 2006, nearly 85 percent of felony fraud convictions occurred at the state level. *See* ROSENMERKEL ET AL., *supra* note 413, at 9 tbl.1.6.

459. *See 932. Provisions for the Handling of Qui Tam Suits Filed Under the False Claims Act*, U.S. DEP'T JUST., https://www.justice.gov/jm/criminal-resource-manual-932-provisions-handling-qui-tam-suits-filed-under-false-claims-act [https://perma.cc/D2DJ-AEGS].

460. 18 U.S.C. § 2244(b) (2012) provides:

> Whoever, in the special maritime and territorial jurisdiction of the United States or in a Federal prison, or in any prison, institution, or facility in which persons are held in custody by direction of or pursuant to a contract or agreement with the head of any Federal department or agency, knowingly engages in sexual contact with another person without that other person's permission shall be fined under this title, imprisoned not more than two years, or both.

affirmative consent statutes.[461] Adoption of a federal affirmative consent statute premised on the Commerce Clause would significantly increase the amount of conduct that violates the criminal law in many states.[462]

Adding federal resources to the prosecution of offenses that are universally condemned is a lesser intrusion into traditional state authority than creating new liabilities in the territory of states that have thus far refused to extend the criminal law so far. If a national political consensus comes to support the affirmative consent standard, Congress can incorporate that standard into national law. Until then, the controversy over novel expansions of rape law should not be allowed to stand in the way of effective enforcement of sexual assault as traditionally defined. As the law in this area evolves, and if the proposed federal forcible rape statute proves a success, Congress could revisit the no-force, no-consent cases.

For similar reasons, current federal law's child-abuse and statutory rape provisions are not included. These cases present no issue of consent in the state courts.[463] A federal law would overlay a uniform national standard on the age of consent.[464] That would be an overreach for reforms directed at improving prosecutions of forcible rape.[465] If there is evidence of systematic nonenforcement in the states, Congress could consider sexual assault legislation specific to minors at some future time. It should be noted that the proposed legislation includes no exception for young victims.[466] Forced sex would still be sexual abuse, subject to severe penalties.

2. The More Ambitious Proposal

If we accept the premise that for the foreseeable future the federal government will have a substantial role in enforcing ordinary

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461. *See, e.g.*, *supra* note 169 (discussing debate in the ALI over proposed affirmative-consent standard).

462. *See supra* Part II.B.

463. *See* Sandra Norman-Eady et al., *Statutory Rape Laws by State*, CONN. GEN. ASSEMBLY (April 14, 2003), https://www.cga.ct.gov/2003/olrdata/jud/rpt/2003-R-0376.htm [https://perma.cc/EPW4-UGZ7].

464. *See id.* (stating that the age of consent varies by state).

465. *See id.* (stating that force is not an element in statutory rape cases).

466. *See infra* Appendix I.

criminal law, reorienting federal law away from possessory offenses that badly predict future violence[467] in favor of prosecuting violent crimes as such is an urgent project indeed. The simple federal rape statute modeled on the Hobbs Act would take a small step down this road because Congress could pass that statute without appropriating any funds. Whatever use U.S. Attorneys made of the statute would improve law enforcement's response to sexual assault, simultaneously consuming federal resources that would otherwise go to proxy crimes.[468]

The project of rationalizing federal criminal law, however, invites a more far-reaching proposal. Immigration and Customs Enforcement is now in the DHS,[469] so the DOJ includes three major investigative services: the FBI, DEA, and ATF.[470] It seems odd having two whole bureaus, employing thousands of brave and resourceful agents, and spending billions of dollars, on the enforcement of proxy crimes.[471] At least this seems strange when we remember that FBI has responsibility for such things as the Hobbs Act,[472] the Federal Kidnapping Act,[473] and the murder-for-hire statute.[474] Those crimes of violence justifiably take a back seat in an agency tasked with counterterrorism, counterintelligence, and investigating interstate and international fraud.[475]

The story of the DEA is instructive. President Nixon, after extensive congressional hearings, created the DEA by executive order out of resources already up and running inside the DOJ.[476]

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467. *See, e.g.*, *supra* notes 393-96 and accompanying text.

468. *See supra* Part III.B.

469. *Organizational Chart,* U.S. DEP'T HOMELAND SECURITY (May 19, 2018), https://www.dhs.gov/sites/default/files/publications/18_0519_DHS_Organizational_Chart.pdf [https://perma.cc/F2U4-QHL5].

470. *Organizational Chart*, U.S. DEP'T JUSTICE (Feb. 5, 2018), https://www.justice.gov/agencies/chart [https://perma.cc/K284-7T6F].

471. *See Fact Sheet—Staffing and Budget*, BUREAU ALCOHOL, TOBACCO, FIREARMS & EXPLOSIVES (May 2018), https://www.atf.gov/resource-center/fact-sheet/fact-sheet-staffing-and-budget [https://perma.cc/SG2P-NAF9]; *Who We Are*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, https://www.ice.gov/about [https://perma.cc/XE86-UDFR] (last updated Aug. 24, 2018); *supra* Part III.B. (discussing proxy crimes the bureaus prosecute and suggesting a greater focus on rape prosecutions).

472. 18 U.S.C. § 1951 (2012).

473. *Id.* § 1201(a).

474. *Id.* §1958.

475. *See What We Investigate, supra* note 382.

476. *See* DRUG ENFORCEMENT ADMIN., THE DEA YEARS, https://www.dea.gov/sites/default/

While different theories of bureaucratic behavior attribute different goals to agency leaders, obtaining budget increases is a common goal.[477] Research on bureaucratic behavior predicts that one aim of an agency will be expansion.[478] The DEA was no exception. In 1973, DEA had 1470 special agents and a budget of less than $75 million; as of 2017, the DEA had 5004 special agents and a budget of $2.916 billion.[479]

If the government can devote huge bureaucracies to enforcing proxy crimes, the government can afford to create a bureau inside the DOJ dedicated to enforcing crimes against persons that are punishable under federal law—a Federal Bureau of Violent Crimes, or BVC. Before resigning, Attorney General Jefferson Sessions issued a memorandum to U.S. Attorneys that, unintentionally, makes a powerful case for such a bureau.[480] The memorandum's subject heading is "Commitment to Targeting Violent Crime" and began by stating that "[i]t is the policy of the Department of Justice to reduce crime in America, and addressing violent crime must be a special priority."[481]

The memorandum went on to suggest that federal prosecutors consider bringing charges under federal laws against violent crimes, such as the Hobbs Act.[482] The memo followed this sensible suggestion with a more ominous message:

> Of course, federal prosecutors are not limited to using only these tools, and, in fact, statutes targeting other criminal acts may be equally effective. For example, many violent crimes are driven

files/2018-07/1970-1975%20p%2030-39.pdf [https://perma.cc/7FX8-FRAH]. Congress subsequently ratified the Executive Order. *See* Reorganization Plan No. 2 of 1973, Pub. L. No. 93-253, *reprinted in* 5 U.S.C. app. 2 (Supp. III 1970) (includes text of the order).

477. *See* Jennifer Nou, *Intra-Agency Coordination*, 129 HARV. L. REV. 421, 435 (2015).

478. *See, e.g.*, *id.* ("Prominent theories posit that agency heads attempt to maximize their operating budgets, institutional reputations, or future career prospects. In reality, agency heads are likely to have complex utility functions that take into account many, if not all, of these considerations." (footnotes omitted)).

479. *See Staffing and Budget*, DRUG ENFORCEMENT ADMIN., https://www.dea.gov/ staffing-and-budget [https://perma.cc/37JC-E44J].

480. Memorandum from Attorney General Jefferson Sessions, U.S. Dep't of Justice, to All Federal Prosecutors (Mar. 8, 2017) (available at https://www.justice.gov/opa/press-release/file/946771/download [https://perma.cc/WS5H-H5GE]).

481. *Id.* at 1.

482. *Id.* at 1-2.

> by drug trafficking and drug trafficking organizations. For this reason, disrupting and dismantling those drug organizations through prosecutions under the [CSA] can drive violent crime down.[483]

The former Attorney General's commitment to devoting federal assets to reducing violent crime is well taken. The suggestion of a renewed emphasis on proxy crimes promises a return to the policies that led to mass incarceration.[484] A bureau devoted to punishing violent criminals *for violent crimes* would do much to limit the damage threatened by those policies.[485]

The proposed federal rape statute would be only one of many federal statutes that make violent crime a federal matter. Congress could create a new bureau dedicated to enforcing these statutes by taking a bite out of the DEA and ATF.[486] It would thereafter compete for scarce funds by pleading, with considerable justice, that violent criminals deserve priority over possessory offenders and require more resources to detect and convict.[487] Appendix II offers language based on the executive order creating DEA and provisions of the CSA authorizing DEA investigations and use of force.

IV. REPLIES TO OBJECTIONS

A. Theoretical Purity: Federalism

Constitutional originalists and advocates of state sovereignty might receive my proposals with suspicion, hostility, or even horror. To be clear, I am not proposing spending any more money on federal law enforcement. I am proposing reallocating federal prosecutors, agents, and prison space away from possessory crimes and toward violent crimes. What would change is not the size, but the content, of the federal criminal docket.

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483. *Id.* at 2.

484. *See supra* notes 29-30 and accompanying text. Neither the departure of Mr. Sessions nor the adoption of the aptly-named First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 5194, suggests a diminished commitment to prosecuting proxy crimes.

485. *See supra* Part III.B.

486. *See infra* Appendix II.

487. *See supra* Part III.B.

Consider this hypothetical case. Defendant, with a felony record, abducts V at gunpoint, rapes her, and steals her cash and credit cards. The gun possession is a federal crime under § 922(g),[488] the kidnapping is a federal crime under the Federal Kidnapping Act (because the gun is an instrumentality of commerce),[489] and the theft-by-force is a federal crime under the Hobbs Act.[490] Is it really the case that making the rape—the worst of these offenses—a federal crime would be the straw that breaks the camel's back, some unique and catastrophic step toward a congressional police power?

It may be that reorienting federal criminal law toward violent crimes might make federal criminal law generally more durable.[491] This argument, however, supposes realistic prospects for curtailing federal criminal jurisdiction while admitting that, if federal criminal law is here to stay, it will be better addressed toward violence than to contraband.[492] Federal law now overlaps state law for nearly all robbery, nearly all arson, any murder-for-hire, and any murder or assault by gunfire in the course of drug trafficking.[493] There is no political pressure to repeal any of these measures.[494] The continued expansion of federal criminal law (for example, carjacking and its enforcement, or drugs since the *Lopez* decision) discredits any prediction of a general curtailment, whether led by Congress or the courts.[495]

Block grants to the state authorities might improve rape enforcement,[496] but this would also increase the net prison population

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488. *See* 18 U.S.C. § 922(g) (2012).

489. *See id.* § 1201(a)(1).

490. *See id.* § 1951.

491. Many are generally opposed to the increased federalization of crime. *See* Nora V. Demleitner, *The Federalization of Crime and Sentencing,* 11 FED. SENT'G REP. 123 (1998) (outlining a variety of concerns associated with such federalization).

492. *See supra* Part III.B.

493. *See* Klein & Grobey, *supra* note 423, at 11-12; Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 EMORY L.J. 1, 2 (1996).

494. *See* Klein & Grobey, *supra* note 423, at 2-3 (suggesting that politicians are willing to "mak[e] a federal case out of any conceivable bad behavior" and seek to avoid appearing "soft on crime").

495. *See id.* at 11-12.

496. *See* Nadine M. Neufville, *Measuring the Effectiveness of Grants*, U.S. DEP'T JUST. (Feb. 10, 2017), https://www.justice.gov/ovw/blog/measuring-effectiveness-grants [https://perma.cc/XV4R-BZMC].

without reducing the number of prosecutions for possessory crimes. One reason Congress so often enacts new criminal laws is that no appropriations are required.[497] The criticisms of adopting a federal rape statute, without any further spending, are that enforcing the rape statute would draw resources from the dubious fringes of enforcing contraband crimes.[498]

B. Theoretical Purity: Feminism

Some feminists might question either the Commerce Clause predicate or the focus on autonomy rather than equality.[499] Reliance on the Commerce Clause might suggest commodification, but only to those who focus on jurisdiction and ignore content.[500] The Civil Rights Act is based on the Commerce Clause.[501] Any implication of commodification from the jurisdictional predicate logically but implausibly impugns Title VII.

Rape violates the autonomy of all its victims, and the great majority of those victims are women.[502] We can therefore understand rape as a crime of violence *and* a crime of domination.[503] Addressing rape as a crime of violence, as proposed, neither denies the role of rape in larger patterns of inequality nor precludes other legislation premised on an equality conception. I would regard a proposal to add the Thirteenth Amendment as an additional source of Congressional jurisdiction as a friendly amendment.[504] However,

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497. *See* Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715, 736 (2013).

498. *See supra* Part III.D.2.

499. *See* Judith Resnik, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 YALE L.J. 619, 631-33 (2001) (discussing this view but rejecting it).

500. *See id.*

501. *See* Nicole Huberfeld, *The Commerce Clause Post*-Lopez: *It's Not Dead Yet*, 28 SETON HALL L. REV. 182, 183 (1997).

502. *See, e.g*, MICHELE BLACK ET AL., NAT'L INTIMATE PARTNER & SEXUAL VIOLENCE SURV., 2010 SUMMARY REPORT 18 (2011), https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf [https://perma.cc/4VAJ-U43P] (reporting that for women the lifetime prevalence of rape was one in five, and for men one in seventy-one).

503. *See* Aya Gruber, *Rape, Feminism, and the War on Crime*, 84 WASH. L. REV. 581, 592 (2009).

504. *See* Kim, *supra* note 185, at 289 (arguing that Congress could have rape jurisdiction under the Thirteenth Amendment); *supra* notes 199-201 and accompanying text.

I prefer the Commerce Clause because I want to win in the courts.[505] Regardless, there is no incompatibility here.

C. Theoretical Purity—Procedural Fairness

Civil libertarians may object to wider use of the dual-sovereigns doctrine or admissibility of prior crimes evidence to show propensity. If the dual-sovereignty doctrine is here to stay, there seems no reason not to use it against rapists as compared to, say, arsonists.[506] There are powerful objections to the relevance and potential prejudice of propensity evidence in sexual assault cases.[507] Admissibility can be justified as an antidote to rape myths.[508] Fighting one prejudice with another is at least plausible. If, however, one thought it was desirable and practical to except prosecutions under the new statutes from the scope of Federal Rule of Evidence 413 (or at least to require prior convictions rather than permit mini-trials on allegations of past acts), I would have no objection.

D. State Retrenchment

One might object that committing federal resources to rape enforcement would encourage the states to move assets from sex offenses to other priorities.[509] There are good reasons to doubt this would happen.[510] First, changes in state priorities could not be kept secret, and adverse publicity would attend to any overt retrenchment. Second, the federal authorities have a Missoula-type civil suit at their disposal.[511] State authorities who cut back on rape

505. *See supra* notes 202-05 and accompanying text.

506. *See* United States v. Coker, 433 F.3d 39, 47 (1st Cir. 2005) (holding that in a federal arson prosecution the right to counsel on the federal charge did not attach when state charges based on the same conduct were filed).

507. *See* Jeffrey Waller, Comment, *Federal Rules of Evidence 413-415: "Laws are Like Medicine: They Generally Cure an Evil by a Lesser ... Evil*,*"* 30 TEX. TECH. L. REV. 1503, 1510, 1524, 1530 (1999).

508. *See supra* notes 25-28 and accompanying text.

509. *See* Mark D. Rosen, *The New Governancism?*, 59 ST. LOUIS U. L.J. 1079, 1095 (2015) (suggesting that federal-state overlap could lead to "unhealthy dynamics").

510. *See id.* at 1101-02 (suggesting that concerns about federal-state overlap are likely overblown).

511. *Cf. supra* notes 193-94 and accompanying text.

enforcement might face public awareness of an investigation by the DOJ and actual litigation if the investigation was not resolved to federal satisfaction.[512]

Finally, while it might be plausible to imagine state prosecutors referring more rape cases to their federal counterparts, the other side of that coin is that local police would realize that some cases state prosecutors hitherto would have declined could now be successfully prosecuted.[513] The flow of rape cases to state prosecutors would probably go up, offsetting any speculative decrease in priority by state prosecutors.

CONCLUSION: A WINDOW OF OPPORTUNITY

The wave of accusations against celebrities has created a new political climate, one that offers a chance to take action against the seemingly permanent crisis of sexual assault.[514] Members of Congress face the same change in public opinion.

What action can Congress take? There can be little doubt that the commerce power reaches at least some, and probably many, sexual assaults. The proposed federal rape offense would not be accompanied by new expenditures, but rather it would add resources for the prosecution of rape cases by drawing them away from cases of proxy crimes. One broad consensus agrees that the states are underenforcing rape, and another agrees that the federal government is overenforcing possessory offenses. The Constitution, then, permits what common sense requires. Congress should make rape a federal crime.

512. *Cf. supra* notes 193-94 and accompanying text.

513. *See supra* Part III.A.2.

514. *See* Vicki Schultz, *Reconceptualizing Sexual Harassment, Again*, 128 YALE L.J.F. 22, 23-26 (2018).

APPENDIX I: A PROPOSED FEDERAL SEXUAL ASSAULT ACT OF 2018

18 U.S.C. § 00000 Findings and Definitions
(a) Definitions: As used in this Act,

(1) "The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction."[515]

(2) "[T]he term 'sexual act' means—"[516]

(A) "contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight";[517]

(B) "contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus";[518]

(C) "the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or"[519]

(3) "[T]he term 'sexual contact' means the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person";[520]

(b) Findings: The Congress finds that—

(1) A baby girl born in the United States has a one in five chance of being raped in her lifetime;[521]

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515. 18 U.S.C. § 1951(b)(3) (2012).
516. *Id.* § 2246(2).
517. *Id.* § 2246(2)(A).
518. *Id.* § 2246(2)(B).
519. *Id.* § 2246(2)(C).
520. *Id.* § 2246(3).
521. *Get Statistics*, NAT'L SEXUAL VIOLENCE RESOURCE CTR., https://www.nsvrc.org/statistics [https://perma.cc/Q45X-3R56].

(2) Despite commendable reform efforts at the state level, rape remains the most underreported and underenforced violent crime;[522]

(3) Many rapists exploit facilities of interstate commerce, including telephones, cellular phones, and the Internet, to commit their crimes;[523]

(4) Many rapists employ instrumentalities of commerce to commit their crimes, including weapons and condoms passed through interstate commerce;[524]

(5) Sexual assault at the workplace has a substantial effect on interstate commerce;[525]

(6) Sexual assault on commercial sex workers has a substantial effect on interstate commerce;[526]

(7) Sexual assault committed with date-rape drugs has a substantial effect on interstate commerce.[527]

18 U.S.C. § 00001 Aggravated Sexual Abuse in or Affecting Interstate or Foreign Commerce

(a) "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any [person,] article or commodity in commerce, by"[528] "knowingly caus[ing] another person to engage in a sexual act—"[529]

(1) "by using force against that other person; or"[530]

(2) "by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping; or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both."[531]

(b) "BY OTHER MEANS.—"[532]

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522. *Id.*
523. *See, e.g.*, Lee, *supra* note 291; Martin, *supra* note 291; McMillan, *supra* note 291.
524. *See supra* notes 311-16 and accompanying text.
525. *See supra* Part II.B.4.a.
526. *See supra* Part II.B.4.b.
527. *See supra* Part II.B.4.c.
528. 18 U.S.C. § 1951(a) (2012).
529. *Id.* § 2241(a).
530. *Id.* § 2241(a)(1).
531. *Id.* § 2241(a)(2).
532. *Id.* § 2241(b).

"Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, [by knowingly—]"[533]

(1) "[R]endering [another] person unconscious [and thereby engages in a sexual act with that other person]; or"[534]

(2) "administering to [another] person by force or threat of force, or without the knowledge or [permission] of that person, a drug, intoxicant, or other similar substance and thereby[—]"

(A) "substantially impair[s] the ability of that other person to appraise or control conduct; [and]"[535]

(B) "engages in a sexual act with that other person; or attempts to do so, shall be fined under this title, imprisoned for any term of years or life, or both."[536]

18 U.S.C. § 00002 Sexual Abuse in or Affecting Interstate or Foreign Commerce

(a) "Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any [person,] article or commodity in commerce,"[537]

(1) by "knowingly caus[ing] another person to engage in a sexual act"[538] "by threatening or placing that other person in fear that any person will be subjected to death, serious bodily injury, or kidnapping";[539] or

(2) "engages in a sexual act with another person if that other person is—"[540]

(A) "incapable of appraising the nature of the conduct; or"[541]

(B) "physically incapable of declining participation in, or communicating unwillingness to engage in, that sexual act; or attempts to do so, shall be fined under this title and imprisoned for any term of years or for life."[542]

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533. *Id.* § 1951(a).
534. 10 U.S.C. § 920(a)(4).
535. *Id.* § 920(a)(5).
536. 18 U.S.C. § 2241(b)(2)(B).
537. *Id.* § 1951(a).
538. *Id.* § 2241(a).
539. *Id.* § 2241(a)(2).
540. *Id.* § 2242(2).
541. *Id.* § 2242(2)(A).
542. *Id.* § 2242(2)(B).

Proposed 18 U.S.C. § 00003 Sexually Abusive Contact in or Affecting Interstate or Foreign Commerce

"Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any [person,] article or commodity in commerce, by"[543] knowingly engaging in or causing sexual contact with or by another person, if so doing would violate—

(a) subsection (a) or (b) of section 00001 of this act had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than ten years, or both;

(b) section 00002 of this Act had the sexual contact been a sexual act, shall be fined under this title, imprisoned not more than three years, or both.

543. *Id.* § 1951(a).

APPENDIX II: AN ACT TO CREATE A BUREAU OF VIOLENT CRIMES IN THE DEPARTMENT OF JUSTICE

§ 1 Bureau of Violent Crimes. "There is established in the Department of Justice an agency which shall be known as the [Bureau of Violent Crimes], hereinafter referred to as 'the [Bureau].'"[544]

§ 2 Officers of the Bureau.

(a) "There shall be at the head of the [Bureau the Director of the Bureau of Violent Crimes], hereinafter referred to as ["the Director."] The [Director] shall be appointed by the President by and with the advice and consent of the Senate, and shall receive compensation at the rate now or hereafter prescribed by law for positions of level III of the Executive Schedule Pay Rates (5 U.S.C. 5314). He shall perform such functions as the Attorney General shall from time to time direct."[545]

(b) "There shall be in the [Bureau] a Deputy [Director of the Bureau], hereinafter referred to as 'the Deputy [Director],' who shall be appointed by the President by and with the advice and consent of the Senate, shall perform such functions as the Attorney General may from time to time direct, and shall receive compensation at the rate now or hereafter prescribed by law for positions of level V of the Executive Schedule Pay Rates (5 U.S.C. 5316)."[546]

(c) "The Deputy [Director] or such other official of the Department of Justice as the Attorney General shall from time to time designate shall act as [Director] during the absence or disability of the [Director] or in the event of a vacancy in the office of [Director]."[547]

§ 3 Mission and authority. The Bureau may investigate any violent crime against the United States, including 18 U.S.C. § 1958 (murder for hire), 28 U.S.C. § 540B (assisting state authorities in investigating serial killing), 18 U.S.C. § 924(c) & (h) (firearm in furtherance of crime of violence, exclusive of drug trafficking; additional penalties if death results); 18 U.S.C. § 1201 (kidnapping), 18 U.S.C.

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544. Reorganization Plan No. 2 of 1973, Pub. L. No. 93-253, *reprinted in* 5 U.S.C. app. 2 (Supp. III 1970).

545. *Id.*

546. *Id.*

547. *Id.*

§ 1951 (Hobbs Act), any crime of violence under 18 U.S.C. § 1952 (Travel Act), 18 U.S.C. § 844(f) (arson of property belonging to the United States or any organization receiving federal financial support), 18 U.S.C. § 2119 (carjacking) and the Federal Sexual Assault Act of 2018.

§ 4. Coordination. "The Attorney General, acting through the [Director] and such other officials of the Department of Justice as he may designate, shall provide for the coordination of all [enforcement of crimes of violence] vested in the Attorney General so as to assure maximum cooperation between and among the [Bureau], the Federal Bureau of Investigation, and other units of the Department involved in the performance of these and related functions."[548]

§ 5. Powers of enforcement personnel.

> "(a) Any officer or employee of the [Bureau] or any State ... or local law enforcement officer designated by the Attorney General may—
> (1) carry firearms; (2) execute and serve search warrants, arrest warrants, administrative inspection warrants, subpoenas, and summonses issued under the authority of the United States; (3) make arrests without warrant (A) for any offense against the United States committed in his presence, or (B) for any felony, cognizable under the laws of the United States, if he has probable cause to believe that the person to be arrested has committed or is committing a felony;(4) make seizures of property pursuant to the provisions of this subchapter; and (5) perform such other law enforcement duties as the Attorney General may designate.
> (b) State and local law enforcement officers performing functions under this section shall not be deemed Federal employees and shall not be subject to provisions of law relating to Federal employees, except that such officers shall be subject to section 3374(c) of title 5."[549]

548. *Id.*
549. 21 U.S.C. § 878 (2012).