PUTTING SEX TO WORK

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I. INTRODUCTION

When I was living in New Haven a number of years ago, a miracle happened that drew people by the thousands to witness evidence of the Divine. A crucifix had been found to appear in the body of an oak tree in the middle of Worchester Square. I went—after all, how often do you get to see that kind of thing? Not surprisingly, at first I couldn't see anything but the usual trunk and limbs of a tree. Yet a believer took the time to show me what was *really* there, something that my untrained eye could not at first see: the cross upon which Jesus Christ had been crucified. Well, maybe there was something there.[1]

To the believers, the shape of the oak tree was evidence of something that was really there—a corporeal manifestation of an omnipresent Divine Being. For them, once you've seen the crucifix, you really can't not see it, you can't un-see it.

For most people, sex is like the Divine Being: It is an obscure and powerful domain that reveals itself in expected and unexpected places, and which is immediately visible to the trained eye. Indeed, once you see it, it's hard to look away. Like the tree in Worchester Square, the human body is an "inscribed surface"[2] which is discursively marked in such a way that renders certain body parts and particular behaviors essentially sexual.

What are we seeing when we recognize something as sexual? How do we know what makes a practice sexual in nature? That is, how do we distinguish a practice which is fundamentally sexual from one which is

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1. The Blessed Virgin Mary seems to appear all the time in Queens. In fact, there are ads in the subway announcing a phone number you can call, for only $1.50 a minute, to receive information about the most recent sightings of the BVM. Of course, I have always wondered, why Queens of all places? Carol Rose recently answered this question for me: Lots of Catholics, of course.

2. MICHEL FOUCAULT, LANGUAGE, COUNTER-MEMORY, PRACTICE: SELECTED ESSAYS AND INTERVIEWS 148 (Donald F. Bouchard ed. & Donald F. Bouchard & Sherry Simon trans., 1977) [hereinafter FOUCAULT, LANGUAGE].

not? I ask these questions in order to beg two more normative questions: Why do we do so, and what happens to what we "know" once we have done so? My curiosity derives from a concern that to call something sexual is at once to say too much and not enough about the meaning of a practice so named.

When men in a workplace make life intolerable for their female coworkers by calling them sexual names, putting up pictures of naked women, and touching their breasts and behinds, their conduct—unwelcome conduct of a sexual nature—is legally described as sexual harassment. When a group of male police officers viciously assault a man in their custody by shoving a toilet plunger up his anus, those cops are charged with aggravated sexual abuse. When an adult male forces a ten-year-old boy to fellate him, this man is arrested for having sexually molested a minor. These offenses receive special legal regulation by our civil and criminal laws as sexual misconduct. Yet the use of excessive violence when placing handcuffs on a suspect, the aggressive use of choke-holds, or chaining a stranger to a pipe in the basement—whatever crimes these are, they are not sex crimes.

By focusing, often exclusively, on what we regard to be the sexual aspect of conduct of this kind, we tend to ignore or eclipse the ways in which sex operates "as an especially dense transfer point for relations of power"[3]—often gender, race, or sexual orientation-based power. For a complex set of reasons, we almost intuitively label some behavior as sexual—take workplace sexual harassment for instance. Yet, if pressed, most people would not be able to either identify or defend a set of criteria they apply in such nominalist moments. To uncover a satisfactory and stable definition of sex is, to borrow an expression from Abraham Lincoln, like undertaking to shovel fleas: "You take up a shovelful, but before you can dump them anywhere they are gone."[4] It is the initial regulatory move, the marking of behavior as fundamentally sexual, that I want to interrogate. If it is in fact true that "there is not some ahistorical *Stoff* of sexuality, some sexual charge that can be simply added to a social relationship to 'sexualize' it in a constant and predictable direction, or that splits off from it unchanged,"[5] then it is worth asking what we are doing and what we are missing when we assume that such *Stoff* exists.

The questions I ask directly here are ones I first considered in my earlier work on sexual harassment. In *What's Wrong With Sexual Harassment?*, I explored how workplace sexual harassment could be a spe-

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3. MICHEL FOUCAULT, THE HISTORY OF SEXUALITY 103 (Robert Hurley trans., Vintage Books 1990) (1976) [hereinafter FOUCAULT, THE HISTORY OF SEXUALITY].

4. DAVID HERBERT DONALD, LINCOLN 389 (1995). To be sure, in using this phrase, Lincoln was not referring to sex but to the difficulty he was having in filling out the ranks of the Union Army in 1862.

5. EVE KOSOFSKY SEDGWICK, BETWEEN MEN: ENGLISH LITERATURE AND MALE HOMOSOCIAL DESIRE 6 (1985).

cies of sex discrimination.[6] I criticized both courts and commentators who identified the wrong of sexual harassment to lie in the sexual nature of the conduct.[7] Rather, I argued, sexual harassment must be understood as a technology of sexism, that is, as a tool or instrument of gender regulation which feminizes women as sexual objects and masculinizes men as sexual subjects.[8]

In this article, I will push these insights about the use of sex as a technology of sexism one step further by probing two more fundamental questions: first, why certain practices get labeled as sexual, and second, what flows from their being so designated. I will explore the ostensibly denotative practice of naming particular behavior as primarily sexual in nature by examining two contexts in which the label "sexual," understood as erotic, occludes the way in which sex mediates other social relations of power. In each setting, I argue that we make a grave mistake when we interpret certain behavior as primarily erotic in nature. This mistake, I will argue, is amplified in the legal treatment of these practices as sex crimes, or sexual offenses. In Part II, I will look to ritualized practices in the Highlands of Papua New Guinea where boys as young as seven are forced to fellate older men for a period of up to eight years as part of the process of becoming a man. At first impression, most non-native interpreters of ritualized man/boy fellatio conclude, without hesitation, that this conduct is fundamentally erotic in nature[9]—how can it not be so? In fact, Western anthropological readings of these practices first described them as sodomy,[10] while today the behavior is most commonly referred to as ritualized or institutionalized homosexuality.[11] I will provide an alternative reading of the ritualized semen practices of the Sambia that illustrates the way in which ingestion of semen is undertaken primarily in the service of teaching and reinforcing the cultural power and supremacy of both men and masculinity, while at the same time teaching and reinforcing the cultural subordinancy and inferiority of women and femininity. In this regard, semen practices play a role in Sambia culture similar to that played by workplace sexual harassment in ours.

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6. *See* Katherine M. Franke, *What's Wrong With Sexual Harassment?*, 49 STAN. L. REV. 691 (1997).

7. *Id.* at 730–47.

8. *Id.* at 762–72.

9. *See infra* notes 49–59 and accompanying text.

10. *See, e.g.*, F.E. WILLIAMS, PAPUANS OF THE TRANS-FLY 158 (1936).

11. *See, e.g.*, GILBERT H. HERDT, GUARDIANS OF THE FLUTES 1 (1981) [hereinafter HERDT, GUARDIANS OF THE FLUTES] ("Why should a society of manly warriors believe that a boy must be orally inseminated to become masculine? What happens when this conviction is implemented through prolonged ritualized homosexuality?"); Gilbert H. Herdt, *Ritualized Homosexual Behavior in the Male Cults of Melanesia, 1862–1983: An Introduction*, *in* RITUALIZED HOMOSEXUALITY IN MELANESIA 1 (Gilbert H. Herdt ed., 1984) [hereinafter Herdt, *Ritualized Homosexual Behavior*]; Gerald W. Creed, *Sexual Subordination: Institutionalized Homosexuality and Social Control in Melanesia*, 23 ETHNOLOGY 157, 158 (1984).

Next, in Part III, I examine the assault of Abner Louima, a black man who was attacked by white New York City police officers in August 1997. Louima sustained serious injuries after several police officers severely beat him, then forced the wooden handle of a toilet plunger into his rectum, and then removed it and forced the soiled handle into Louima's mouth.[12] The sexual nature of the police conduct animated much of the outrage expressed by the public, the press and legal authorities in the weeks following the assault. Prosecutors initially charged the white police officers arrested in connection with the assault of Louima with sex crimes.[13] Two aspects of this case are worthy of examination. First, why should we consider this assault to be a sex crime? Secondly, by reading the assault as being primarily sexual, important insights about the way that sex is used as an instrument of gender- and race-based humiliation and injury are elided or at least minimized.

Do these examples instruct that we best desexualize crimes like rape and forced sex with children? There are compelling arguments in favor of such a reformation of the laws regulating behavior traditionally treated as sex crimes. Indeed, Michel Foucault made such an argument in the mid-1970s.[14] Surely, the problems that inhere in the project of differentiating sexual assault from a punch in the face suggest that one should give serious consideration to the position that "there is no difference, in principle, between sticking one's fist into someone's face or one's penis into their sex."[15] Ultimately, however, I reject such a wholesale move given that the material experience of sexual assault by its victims instructs that "they cannot afford to jump into the realm of the ideal and pretend that . . . sex (the genitals) is the same as other parts of the body."[16] Rather, I suggest a solution more retail in nature drawn from the experience of the prosecution of sex-related violence by the International Criminal Tribunal for the Former Yugoslavia. The Tribunal has exercised jurisdiction over the individual and mass rapes and sexual assaults of women and men in the former Yugoslavia as violations of international humanitarian law. Due in part to the provisions of international law within the enforcement authority of the Tribunal, as well as to the way in which sex-related violence was used to torture, humiliate, and degrade civilians in Bosnia, the Tribunal has chosen not to focus exclusively upon the sexual nature of these crimes.[17] Instead, it treats sex-

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12. *E.g.*, Merrill Goozner, *NYC Cut in Crime Has a Brutish Side*, CHI. TRIB., Aug. 16, 1997, at 1.

13. *See id.*

14. *See* discussion *infra* Part IV.

15. MICHEL FOUCAULT, POLITICS, PHILOSOPHY, CULTURE: INTERVIEWS AND OTHER WRITINGS 1977–1984, at 200 (Lawrence D. Kritzman ed. & Alan Sheridan et al. trans., 1988) [hereinafter FOUCAULT, POLITICS].

16. Vikki Bell, *"Beyond the 'Thorny Question'": Feminism, Foucault and the Desexualisation of Rape*, 19 INT'L J. SOC. L. 83, 89 (1991).

17. *See* discussion *infra* Part V.

related violence as the *actus reus* of torture, genocide, and crimes against humanity. Thus, the Tribunal prosecutors have the ability, on a case-by-case basis, to fashion their arguments in such a way that highlights the gendered nature of these crimes, where appropriate, without perpetuating the essentialization of certain body parts and human behaviors as fundamentally sexual. In this way, the Prosecutor has resisted the pull to characterize the wrong of these violent acts as predominantly sexual in nature, but rather, has demonstrated how sex can be used as a tool in the service of race, ethnicity, or religion-based war crimes.

Through these examples, I hope to illustrate the productivity of sex; that is, how sex gets put to work in the service of myriad power relations. Sometimes sex is used to satisfy erotic desire. Sometimes sex accomplishes reproduction. Sometimes it does both. But, as Robin West recently pointed out to me in conversations about this topic, "much reproductive hetero-sex is non-erotic." Sometimes sex pays the rent. Sometimes it sells cars, cigarettes, alcohol, or vacations in Mexico. Sometimes sex is used to subordinate, or has the effect of subordinating, another person on the basis of gender or race, or both.

To understand sex as a fundamentally erotic drive, and as a "natural given which power tries to hold in check [e.g., the prosecution of sex crimes], or as an obscure domain which knowledge tries gradually to uncover"[18] (e.g., anthropological discoveries of primitive homosexuality), is to risk two grave errors. First, once something is classified as sexual we understand its meaning primarily in erotic terms and lose sight of the ways in which sex is easily deployed as an instrumentality of multiple relations of power. Second, we are likely to understand the erotic to be present in too few human behaviors insofar as we deny or ignore the role of the erotic in behavior less susceptible to being read as "sexual."

II. SEMINAL/SEXUAL PRACTICES

In *Guardians of the Flutes*,[19] anthropologist Gilbert Herdt provided an initial monograph of what he terms "ritualized homosexuality" among the Sambia, a tribe in the Eastern Highlands of Papua New Guinea.[20] For the Sambia, the process of becoming a man is not one that may be left to nature, as is the case with girls, but must be accomplished by the ritualized intervention of culture.[21] Thus, beginning at around age seven, boys

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18. FOUCAULT, THE HISTORY OF SEXUALITY, *supra* note 3, at 105.

19. HERDT, GUARDIANS OF THE FLUTES, *supra* note 11.

20. Herdt provides the name "Sambia" as a pseudonym for the tribe's true name, in order to "protect the identities of those who trusted [him] and to guard the community's ritual cult, which still remains a secretive way of life in the strict sense of the term. Sambia men explicitly stipulated that no part of [his] original material be allowed to circulate within Papua New Guinea." *Id.* at xvi.

21. Herdt summarized the Sambia beliefs as follows:

> Femininity is thought to be an inherent development in a girl's continuous association with her mother. Masculinity, on the other hand, is not an intrinsic result of maleness; it is an achievement distinct from the mere endowment of male genitals. Masculine

commence a process of ritualized masculinization that is completed only when a young man fathers a child.[22] This process begins with a series of ritualized practices designed to purge the polluting and feminizing effects of contact with women from the male body. Herdt terms these "egestive rites" designed to "remove internal, essentially 'foreign' material believed acquired through intimate, prolonged contact with one's mother (and other females)."[23]

Boys are first required to undergo cane-swallowing,[24] whereby canes are forced down their throats so as to induce vomiting and defecation, thereby purging food belonging to the mother from the male body—a necessary prerequisite for masculinization.[25] Secondly, nose-bleeding is undertaken to remove the pollution of menstrual blood remaining in the male body. Stiff, sharp grasses are thrust into the boy's nose until blood flows, thereby removing the "bad blood" from his body.[26] It is a matter of "urgent concern that the mother's contaminated blood be removed from boys; otherwise male biological development is impeded."[27] Men alone conduct these rituals, keeping them hidden from women in the community; to effectuate this, the boys are sworn to secrecy.[28]

Next follow the "ingestive rites";[29] this is where all the attention is paid by those intrigued by the practices of this culture. "The most important early ingestive rite of all," according to Herdt, is that of fellatio.[30] Sambia men believe that without the daily ingestion of semen, a boy's body will not mature into that of a man, and he may likely wither and die.[31] Thus,

> [r]epeated inseminations create a pool of maleness: the boy, it is believed, gradually acquires a reservoir of sperm inside his semen organ. . . . The semen organ changes from being dry and hard to fleshy, moist, and then firm. . . . Semen gradually transforms the initiate's body too. It internally strengthens his bones and builds muscles.[32]

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reproductive maturity must be artificially induced, by means of strict adherence to ritual techniques.

Id. at 160.

22. *Id.* at 204–05.

23. *Id.* at 223.

24. Herdt observes that cane-swallowing was abandoned sometime around 1964 because it was too painful. *See id.* at 223 & n.29.

25. *See id.* at 224.

26. *Id.* at 224–25.

27. *Id.* at 226.

28. *Id.* at 262–65.

29. "Ingestive rites" involve the practice of swallowing and absorbing substances believed essential in effectuating masculine growth. *See id.* at 227.

30. *Id.* at 232.

31. *Id.* at 234.

32. *Id.* at 236.

According to these beliefs, boys must avoid all interaction with women, including their mothers, and must fellate older men on a daily basis until they reach adolescence, about the age of fifteen, at which time they switch roles and are fellated by younger boys.[33] These bachelors, as Herdt calls them, are fellated by initiates until the woman they marry begins menstruation.[34] At that point, Sambia culture dictates that they cease same-sex seminal practices and engage only in heterosexual coitus.[35] Again, males closely hold these ingestive rites as secret; indeed, the men threaten the boys with death should they reveal any of this information to women.[36]

Thus you have what Herdt describes as "ritualized homosexuality." Herdt is careful not to describe the Sambia as homosexual.[37] In fact, it is the distinction between homosexual practices and homosexual identity that constitutes the central conundrum of Sambia culture for Herdt. How is it that "[s]even-to-ten-year-old Sambia boys are taken from their mothers when first initiated into the male cult, and thereafter experience the most powerful and seductive homosexual fellatio activities," yet "they emerge as competent, exclusively heterosexual adults, not homosexuals"?[38] The boys "experience [ritualized fellatio] as pleasurable and erotically exciting. Yet, in spite of this formidable background, the final outcome is exclusive heterosexuality . . . ."[39] It is precisely because "homosexual behavior" amongst the Sambia men can be explained neither by genetic determinism nor social learning theory, that Herdt finds the Sambia so fascinating.[40] According to what theory of sexual identity acquisition can "normal" adult heterosexuality evolve out of ritualized childhood same-sex sex?

Initial accounts of Sambia culture by Western anthropologists simply failed to mention the same-sex seminal practices described above.[41] Herdt, among other anthropologists, attributed this omission to a larger refusal within anthropology to regard sexuality as a legitimate subject of ethnographic inquiry.[42] In Papua New Guinea, this oversight quickly

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33. *Id.* at 252; *see also id.* at 281–82 (noting an interim stage when boys approaching puberty take an active role in motivating younger boys to join them as fellators).

34. *Id.* at 252.

35. *Id.*

36. *Id.* at 233.

37. *See id.* at 3 n.2 ("It is crucial that we distinguish from the start between homosexual *identity* and *behavior*.").

38. *Id.* at 2–3.

39. *Id.*

40. *See id.* at 8.

41. *See* Herdt, *Ritualized Homosexual Behavior*, *supra* note 11, at 2 (citing a number of early Melanesian studies that ignored same-sex seminal practices).

42. *See id.* at 3 (recognizing that, as of 1984, "sex remains one of the 'taboo' subjects in anthropology"); Kath Weston, *Lesbian/Gay Studies in the House of Anthropology*, 22 ANN. REV. ANTHROPOLOGY 339, 339 (1993) ("Throughout the first half of the century, most allusions by anthropologists to homosexual behavior remained as veiled in ambiguity and as couched in judgment as were references to homosexuality in the dominant discourse of the surrounding

yielded to revulsion and condemnation by Western anthropologists, accompanied by aggressive efforts by missionaries to dissuade the locals from such perversion.[43] Indeed, many of the practices Herdt observed in his early field work no longer persist in Sambia culture.[44] Herdt, however, was one of the first Western observers to encounter the Sambia practices and declare: Look, homosexuality. Hallelujah, we are everywhere! Thus, with *The Guardians of the Flutes*,[45] his edited collections,[46] and subsequent writings on the Sambia,[47] Herdt has "established a framework for the study of homosexualities cross-culturally."[48] Through the scientific lens of anthropology, Herdt has, therefore, undertaken the task of shedding light upon the "obscure domain" of the homo-sex drive in New Guinea.

From virtually all vantage points, commentators have interpreted Sambia semen practices as both erotic and homosexual, that is, as homoerotic.[49] How could one deny the sexual nature of fellatio? Or the homoerotic nature of fellatio between men? It is this way of knowing these practices that I want to contest. From the perspective of the fellated, fellatio involves arousal, penile erection, ejaculation—surely this practice is about the bachelors "getting off." Herdt's field work documents the fact that the bachelors truly enjoy and seek out sex with boys.[50] Similarly, the boys seem to enjoy, to varying degrees, their "erotic relationships" with

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society."). Herdt attributed three additional factors to this failure: (1) a lack of data; (2) "the tendency for writers still to view homosexual behavior as universally deviant, unnatural, or perverse;" and (3) the use of authorities viewing only heterosexuality as "normal." Herdt, *Ritualized Homosexual Behavior*, *supra* note 11, at 3.

43. *See* Gilbert Herdt, *Representations of Homosexuality: An Essay on Cultural Ontology and Historical Comparison Part II*, 1 J. HIST. SEXUALITY 603, 607 (1991) [hereinafter Herdt, *Representations of Homosexuality*] (addressing the negative response of white missionaries, government officers, and Western agents to the "boy-inseminating man").

44. *See id.* at 607–08 (1991). One must wonder how Herdt's published work may have contributed to the extinction of the very practices he set out to document.

45. HERDT, GUARDIANS OF THE FLUTES, *supra* note 11.

46. RITUALIZED HOMOSEXUALITY IN MELANESIA, *supra* note 11 (collection of articles addressing same-sex sexual practices within different societies in the South Pacific region); RITUALS OF MANHOOD: MALE INITIATION IN PAPUA NEW GUINEA (Gilbert Herdt ed., 1982) (analyzing male maturation rites in Papua New Guinea).

47. GILBERT HERDT, SAME SEX, DIFFERENT CULTURES: GAYS AND LESBIANS ACROSS CULTURES 81–88, 112–23 (1997) [hereinafter HERDT, SAME SEX, DIFFERENT CULTURES].

48. Deborah A. Elliston, *Erotic Anthropology: "Ritualized Homosexuality" in Melanesia and Beyond*, 22 AM. ETHNOLOGIST 848, 848 (1995).

49. *See, e.g.*, Herdt, *Representations of Homosexuality*, *supra* note 43, at 606–07.

50. Herdt observes: "[M]en are not simply biding time by fooling around with initiates. Boys were their first erotic partners. For this reason, and other personality factors, bachelors are sometimes passionately fond of particular boys." HERDT, GUARDIANS OF THE FLUTES, *supra* note 11, at 288.

the bachelors.[51] For this reason, Herdt is willing to characterize some of these unions as "lover relationships."[52]

Herdt finds Sambia culture an interesting subject of ethnographic study because of its exotic manifestation of the erotic, while others would, no doubt, be aghast at the way in which adult men sexually exploit young boys. The ritualized nature of the practice merely compounds the sexual violation. Just as I have cautioned against understanding workplace sexual harassment as a fundamentally sexual activity,[53] so too there is danger in interpreting Sambia semen practices as fundamentally erotic. Deborah Elliston has argued that "[t]o identify the man-boy 'homosexual' practices as 'ritualized homosexuality' imputes a Western model of sexuality to these Melanesian practices, one that relies on Western ideas about gender, erotics, and personhood, and that ultimately obscures the meanings that hold for these practices in Melanesia."[54]

Among the interesting questions to be posed in analyzing semen practices among the Sambia are those regarding the purpose of these practices. Is the fellatio undertaken in the service of satisfying individual erotic desire, or in the service of advancing broader cultural norms which have, no doubt, a sexual component? Herdt poses this question,[55] and ultimately determines to maintain the centrality of the erotic in his interpretation of Sambia initiation rituals.[56] He expresses concern about ethnographies that tend to "ignore, dismiss, trivialize, or even invalidate the actor's homoerotic meanings and desires."[57] He is determined not to "deodorize the erotic and peripheralize the homoerotic ontology."[58] Herdt is not alone in this concern. Gerald Creed, while expressing some criticisms with respect to Herdt's interpretations of Sambia culture, echoes a commitment to keep a focus on the erotic: "[T]he actual physical and erotic aspects of homosexuality . . . are often overlooked when it is treated as institutionalized behavior. Institutionalized homosexuality is still sex and it may still serve a pleasurable function. Analyses that neglect this fact are incomplete."[59]

It is exactly this "homoerotic ontology" that concerns me. Why should we assume that the central meaning of Sambia initiation practices

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51. *See id.* at 282, 319; Herdt, *Representations of Homosexuality*, *supra* note 43, at 611 (discussing the protections and bonds that may develop between bachelors and boys).

52. Herdt, *Representations of Homosexuality*, *supra* note 43, at 611.

53. *See* Franke, *supra* note 6, at 729–47.

54. Elliston, *supra* note 48, at 849.

55. *See* Herdt, *Representations of Homosexuality*, *supra* note 43, at 603 ("[D]o boy-inseminating relationships, one must wonder, express erotic desire?").

56. Herdt recognizes and rejects two interpretative trends which largely dismiss the erotic nature of Melanesian homosexuality. The first trend treats such practices as "purely customary ritual practice." *Id.* at 606. The second approach acknowledges the erotic element, but interprets it as a form of bisexuality. *Id.* at 607.

57. *Id.* at 606–07.

58. *Id.* at 607.

59. Creed, *supra* note 11, at 160.

is sexual, that is, erotic? To ask this question thoughtfully requires the category "sexual" to be broken down into constitutive parts. To describe the semen practices as homoerotic, as Herdt and Creed insist, is to collapse several important concepts that deserve disaggregation. For Herdt, one must understand the male erection as the product of arousal, and arousal must be defined in erotic terms.[60] Yet men can become aroused such that they achieve penile erections for a spectrum of reasons independent of an erotic response to another person or situation.[61] It has been well documented that men can have erections associated with non-sexual fear, sleep, full bladders, violence, and power.[62] Alfred Kinsey observed that for boys, erection and ejaculation are easily induced by "non-sexual" sources such as carnival rides, fast bicycle rides, sitting in warm sand, setting a field afire, war motion pictures, being chased by police, hearing the national anthem, and my personal favorite, seeing one's name in print.[63] Kinsey concluded, however, that by the late teens males have been conditioned to respond primarily to "direct physical stimulation of the genitalia, or to psychic situations that are specifically sexual."[64] Notwithstanding this general conditioning, "a romantic context is not a necessary condition for sexual arousal, in either men or women."[65]

Therefore, there is reason to question interpretive strategies that tend to essentialize certain bodily responses, such as the male erection, as fundamentally erotic or romantic in nature. To the extent that "Herdt posits a tautologous ordering of eroticism that makes penile erection contingent on a kind of arousal that is by definition erotic,"[66] he is making just this mistake in interpreting Sambia culture.

Similarly, I want to resist the inclination to essentialize certain sexual practices as undertaken principally to satisfy erotic desire. Of course,

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60. *See* Herdt, *Representations of Homosexuality*, *supra* note 43, at 613 ("It is a necessary redundancy to say that without sexual excitement—as signified by erections in the inspirer and bawdy enthusiasm in the inspired boy—these social practices would not only lie beyond the erotic but, more elementarily, would not exist.").

61. As noted by Thorkil Vanggaard:

> It appears, then, that emotions and impulses other than erotic ones may cause erection and genital activity in men; just as, in the baboon, mounting and penetrating to show superiority, or sitting on guard with legs apart and penis threateningly exposed show erection of an asexual origin. . . . The same will probably have been the case with the Bronze Age people of Scandanavia—or of northern Italy for that matter—since they equated phallic power with the power of the spear, the sword and the axe, as we can see from their petroglyphs.

THORKIL VANGGAARD, PHALLÓS: A SYMBOL AND ITS HISTORY IN THE MALE WORLD 102 (Thorkil Vanggaard trans., Int'l Univs. Press, Inc. 1972).

62. *See, e.g.*, RON LANGEVIN, SEXUAL STRANDS: UNDERSTANDING AND TREATING SEXUAL ANOMOLIES IN MEN 8 (1983); Joost Dekker & Walter Everaerd, *Psychological Determinants of Sexual Arousal: A Review*, 27 BEHAV. RES. & THERAPY 353, 361 (1989).

63. ALFRED C. KINSEY ET AL., SEXUAL BEHAVIOR IN THE HUMAN MALE 164–65 (1948).

64. *Id.* at 165.

65. Dekker & Everaerd, *supra* note 62, at 361.

66. Elliston, *supra* note 48, at 854.

this issue arises in what I have elsewhere described as "the ongoing intramural debate within feminism about whether rape should be understood as a crime of violence or sex."[67] Rather than consider the question of sex and power in relation to rape in antinomous terms, consider the following examples. In ancient Rome, when a husband caught another man in bed with his wife, it was acceptable punishment for the husband and/or his male slaves to orally or anally rape the male offender.[68] So too, oral and anal rape were used as a punishment in medieval Persia for various crimes.[69] While it is possible that the person administering the punishment in these circumstances derived some erotic satisfaction from these practices, to characterize them as fundamentally erotic in nature is to radically pervert their meaning. Of course, I don't mean to imply that practices of this kind are subject to "correct" interpretations, since they do not possess meaning independent of interpretation. However, I do think some interpretations better reflect the ways in which the practices are understood by the participants, the significance they hold in the cultures in which they take place, and the unique ways in which sex can be a powerful tool to inflict myriad forms of harm.[70]

Thus, I want to challenge the inclination to declare man/boy fellatio in Melanesia a principally homoerotic practice. Rather, I prefer that we understand these activities not as homoerotic or homosexual, but as *homosocial*. Like Eve Sedgwick, I believe that the descriptor homosocial provides better purchase on the relation between and among men in Sambia society.[71] Rather than reduce that relation to the erotic, to describe it as homosocial leaves room for the role of the erotic while recognizing the "range of ways in which sexuality functions as a signifier"[72] for and instrument in the enforcement of power relations. The work that sex does can be and often is at once symbolic and material, productive and reproductive, pleasurable and dangerous. Close examination of the Sambia male initiation rituals reveals that semen practices function symbolically, metonymically, and literally in the transmission of an ideology of gendered power.

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67. Franke, *supra* note 6, at 740.

68. *See* AMY RICHLIN, THE GARDEN OF PRIAPUS: SEXUALITY AND AGGRESSION IN ROMAN HUMOR 215, 256 (rev. ed., Oxford Univ. Press 1992) (1983).

69. *See* VANGGAARD, *supra* note 61, at 101 ("'A favourite Persian punishment for strangers caught in the *Harem* or *Gynæceum* is to strip and throw them and expose them to the embraces of the grooms and Negro slaves.'" (quoting RICHARD BURTON, THOUSAND NIGHTS AND A NIGHT, Terminal Essay X, at 235 (1885))).

70. As Michel Foucault noted: "Sexuality is not the most intractable element in power relations, but rather one of these endowed with the greatest instrumentality: useful for the greatest number of maneuvers and capable of serving as a point of support, as a linchpin, for the most varied strategies." FOUCAULT, THE HISTORY OF SEXUALITY, *supra* note 3, at 103.

71. *See* SEDGWICK, *supra* note 5, at 5 (recognizing that aspects of the Sambia culture fit within her "homosocial continuum").

72. *Id.* at 7.

Rather than evidencing the expression of man-boy love or desire, ritualized semen practices amongst the Sambia must be understood relative to their location to larger gender norms in their society. Sambia culture is fundamentally sexually polarized and sexually segregated.[73] Strict divisions of labor and ritual taboos regulating physical contact between the sexes are in evidence throughout the culture.[74] From the time when boys are first isolated from all women at about seven years old, they are taught to disparage women as dangerous creatures whose body fluids can pollute men and deplete their masculine substance.[75] Women are frequently referred to as "dirty polluter,"[76] and men engage in purification rites after coitus, such as nose-bleeding, so as to rid their bodies of female contamination.[77] So dangerous is the threat of pollution from women that public[78] and private[79] spaces are strictly sex-segregated. During the initiation process, men teach boys the reality of the threat that women pose to both maleness and masculinity.

Accompanying the notions of female danger for Sambia are concomitant beliefs about the tremendous material and symbolic power and value of semen. According to Herdt and Stoller, "[s]emen is the most precious human fluid[,] . . . more precious than even mother's milk."[80] Semen is related to human reproduction and growth in several ways. First, men orally inseminate their wives prior to conception, believing that the semen prepares the wife's body for making babies, as well as for lactation when the semen is converted into milk.[81] After oral insemination, the couple engages in repeated vaginal insemination, depositing semen into the woman's womb where it is transformed into a fetus. Mul-

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73. One clear example of this polarization is found in the many spatial segregations evidenced by the Sambia culture. The male "clubhouse," site of many of the masculinization rites, is off limits to women. *See* HERDT, GUARDIANS OF THE FLUTES, *supra* note 11, at 74–75. Similarly, female "menstrual huts" are strictly avoided by men. *See id.* at 75. This spatial segregation operates in many other areas including domiciles and footpaths. *See id.* at 75–76.

74. *See id.* at 28–29.

75. HERDT, SAME SEX, DIFFERENT CULTURES, *supra* note 47, at 113.

76. HERDT, GUARDIANS OF THE FLUTES, *supra* note 11, at 162.

77. *Id.* at 244–45.

78. Herdt observed that, in the Sambia culture:

> Men hold that women may pollute them by simply "stepping over" . . ., above, or beside them, or by touching persons, food, or possessions. During their menstrual periods women leave their houses and retire to the menstrual hut, which is situated slightly below the hamlet. Men and initiates completely avoid the area of the hut. Likewise, women must not walk near the men's clubhouse or look inside.

Id. at 75.

79. Domestic arrangements are also organized around the danger of male pollution by women. Upon entering a house, women immediately must squat near the doorway to the house, thereby reducing the possibility of transferring her polluting fluids to men in the house. *See id.* at 75–76.

80. GILBERT HERDT & ROBERT J. STOLLER, INTIMATE COMMUNICATIONS: EROTICS AND THE STUDY OF CULTURE 60 (1990).

81. *Id.* at 62.

tiple inseminations are necessary for this evolution to come off since the creation of a baby requires a critical mass of semen.[82]

Semen is also necessary for human growth. Thus, "[i]nitial growth for every fetus occurs through semen accumulation."[83] Babies grow from the ingestion of breast milk—the Sambia believe women's breasts transform semen into milk.[84] After weaning, young girls continue to grow on their own due to the presence of female blood in their systems. Growth in boys however, requires daily ingestion of semen in order to develop their skin, bones, and male features.[85]

Thus, the Sambia is a highly sex-stratified culture in which men are superior to and vilify women and in which men exclusively possess the elixir necessary for human reproduction and growth. In light of the central role that semen plays in the Sambia gender-based belief system, it would be careless to understand the transmission of semen, either between males or between males and females, solely or even primarily as an erotic practice. Given that fellatio between men and boys is explicitly undertaken to effect the transformation of boys from a feminized to a masculinized state, and is part of a larger indoctrination process whereby the boys learn of and internalize gender norms premised upon male superiority, the integrity of an interpretation of these practices that understands them as primarily erotic in nature is quite questionable. In effect, semen practices are both the lubricant that facilitates and the glue that adheres the representational ideal of male superiority and female inferiority.

In his later writings on the Sambia, Herdt reflects a sensitivity to the critique that he has made the most grave of ethnographic errors—the imposition of his own notions of sexual identity on his subjects:

> But what is it—attraction to the boy, excess libido, power, exhibitionism, fantasies of nurturance, and so on—that arouses the adult male? And is his younger partner also aroused? Should we represent the nature of these desires as homoerotic, not homosexual—that is, as form of desire and not just of social conformity to a sex role?[86]

Yet even here, in interrogating the "meaning" of same-sex semen practices among the Sambia, Herdt's gaze remains transfixed by what he regards as the brute fact of homoerotic arousal. Again, he rejects any interpretation that "peripheralizes the homoerotic ontology."[87]

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82. *See id.* at 63. Interestingly enough, more semen is necessary to make a girl than a boy. *See id.* at 64.

83. *Id.* at 65.

84. *Id.* at 62.

85. *Id.*; *see supra* note 21 and accompanying text (discussing the inherent nature of female maturation versus the artificial nature of male maturation in the Sambia belief structure).

86. Herdt, *Representations of Homosexuality*, *supra* note 43, at 605–06.

87. *Id.* at 607.

To be fair, Herdt does acknowledge the role that "ritualized homosexuality" plays in the masculinization of boys as they become initiated into "the whole male sexual culture."[88] But he fails to see the indispensable relation masculinity bears to misogyny and gender hierarchy within Sambia culture. Herdt's insistent focus on Sambia homoeroticism denies him the opportunity to appreciate the degree to which notions of the superiority of men and the inferiority of women are mutually constitutive within the Sambia culture. Deborah Elliston describes these practices as

> traumatic lessons in social hierarchy for the initiates. . . . [R]itual teachings about men's and women's differences inculcate among men a generalized suspicion and fear of women while simultaneously exalting men's abilities and supremacy; together these teachings instantiate a gender hierarchy.[89]

To represent their man/boy semen practices as being only about male sexuality or only about men elides the systemic nature of sex and gender norms as regulatory ideals amongst Sambia men and women.

Rather than homo*sexual* in nature, Sambia man/boy semen practices are better understood as homo*social*. Sedgwick would term them the product of male homosocial desire rather than male homosexuality.[90] The drape of male homosociality extends beyond the domain of the erotic to other bonds and norms of social identity that regulate inherited privilege, patriarchal power structures, and the enduring inequality of power between women and between men. Lauren Berlant made a similar observation in her reading of Nella Larson's *Passing*,[91] a story about the intimate and intense interactions of two light-skinned women of African descent.[92] Berlant resisted a reading of the text that characterized it as "a classically closeted narrative, half-concealing the erotics between Clare and Irene."[93] Rather, according to Berlant, "there may be a difference between want-

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88. HERDT, SAME SEX, DIFFERENT CULTURES, *supra* note 47, at 121.

89. Elliston, *supra* note 48, at 855.

90. *See* SEDGWICK, *supra* note 5, at 1. As Sedgwick describes:

> "Male homosocial desire" is intended to mark both discriminations and paradoxes. "Homosocial desire," to begin with, is a kind of oxymoron. "Homosocial" is a word occasionally used in history and the social sciences, where it describes social bonds between persons of the same sex; it is a neologism, obviously formed by analogy with "homosexual," and just as obviously meant to be distinguished from "homosexual." In fact, it is applied to such activities as "male bonding," which may, as in our society, be characterized by intense homophobia, fear and hatred of homosexuality. To draw the "homosocial" back into the orbit of "desire," of the potentially erotic, then, is to hypothesize the potential unbrokenness of a continuum between homosocial and homosexual.

Id.

91. Nella Larson, *Passing*, *in* QUICKSAND AND PASSING 135 (Deborah E. McDowell ed., 1986).

92. *See id.* at 149–61.

93. Lauren Berlant, *National Brands/National Body: Imitation of Life*, *in* COMPARATIVE AMERICAN IDENTITITES: RACE, SEX, AND NATIONALITY IN THE MODERN TEXT 110, 111 (Hortense J. Spillers ed., 1991).

ing someone sexually and wanting someone's body."[94] For the women in Larson's story, and for the Sambia boys, perhaps the best way to understand their desire for a more privileged person of the same sex is as "a desire to occupy, to experience the privileges of [the other's] body, not to love or make love to her [or him], but rather to wear her [or his] way of wearing her [or his] body, like a prosthesis, or a fetish."[95] The concealed erotics that mediate the race-envy in *Passing* are made literal among the Sambia: the swallowing of semen is necessary for the boy to become a man—for the initiates to occupy adult male bodies. Thus the homosocial as a frame accommodates both the erotic and the gender-generative significance of the Sambia ritualized semen practices. To label the desire underlying the semen practices homosocial rather than homosexual is to situate desire within these interlocking social bonds in such a way that the erotic does not eclipse other relations of power.

Herdt observes the Sambia and represents the same-sex semen practices as fundamentally homoerotic, thereby neglecting the role these practices play in both the creation and maintenance of male supremacy in Sambia culture. If it is true across cultures that "[t]he body requires incessant ritual work to be maintained in its sociocultural form,"[96] then we must acknowledge the ways in which sexual practices produce not only sexual identity, but corporal and social identity as well. "[T]he sutures of [social identity] become most visible under the disassembling eye of an alternative narrative, ideological as that narrative may itself be."[97] Thus, the man/boy semen practices of the Sambia, while astonishing at first, provide an instructive opportunity to challenge the inclination to essentialize certain practices as erotic. I turn next to a less exotic, although no less astonishing, incident which further illustrates the danger in essentializing certain behavior as sexual/erotic. The Sambia and the assault of Abner Louima both illustrate how the classification of practices as sexual holds the danger of obfuscating how sex "*both* epitomizes *and* itself influences broader social relations of power."[98]

III. ANAL/SEXUAL PRACTICES

On the night of August 9, 1997, Abner Louima was leaving the Rendez-Vous, a nightclub in Brooklyn popular among Haitian immigrants in New York, when the police arrived to break up a fight that had broken out between club patrons.[99] "The white cops started with some

94. *Id.*

95. *Id.*

96. T.O. BEIDELMAN, THE COOL KNIFE: IMAGERY OF GENDER, SEXUALITY, AND MORAL EDUCATION IN KAGURU INITIATION RITUAL 244 (1997).

97. SEDGWICK, *supra* note 5, at 15.

98. *Id.* at 13.

99. *E.g.*, Goozner, *supra* note 12, at 1.

racial stuff," Louima later reported.[100] "They said, 'Why do you people come to this country if you can't speak English?' They called us niggers."[101] One police officer believed Louima had knocked him down during the altercation.[102] The officer later declared, "No one jumps me and gets away with it."[103] Officers pushed Louima to the ground, handcuffed him, and delivered him to the 70th Precinct—beating him severely on the way.[104] Louima was charged with disorderly conduct, obstructing governmental administration, and resisting arrest.[105]

Once at the stationhouse officers strip-searched Louima in a public area, and with his pants down,[106] took him into the men's room where they brutally assaulted him:

> My pants were down at my ankles, in full view of the other cops. They walked me over to the bathroom and closed the door. There were two cops. One said, "You niggers have to learn to respect police officers." The other one said, "If you yell or make any noise, I will kill you." Then one held me and the other one stuck the [wooden handle of a toilet] plunger up my behind. He pulled it out and shoved it in my mouth, broke my teeth and said, "That's your s—t, nigger." Later, when they called the ambulance, the cop told me, "If you ever tell anyone . . . I will kill you and your family."[107]

Louima was then taken to a jail cell, and only after other prisoners complained that he was bleeding did the police call for an ambulance.[108] Louima required surgery to repair a pierced lower intestine and a torn

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100. Mike McAlary, *The Frightful Whisperings from a Coney Island Hospital Bed*, N.Y. DAILY NEWS, Aug. 13, 1997, at 2 (quoting Abner Louima as Louima lay in his hospital bed four days after the attack).

101. *Id.*

102. *See* Richard Goldstein, *What's Sex Got To Do With It? The Assault of Abner Louima May Have Been Attempted Murder. But It Was Also Rape.*, VILLAGE VOICE, Sept. 2, 1997, at 57; Tom Hays, *Haitian's Beating May Have Been Case of Mistaken Identity, Punch*, ARIZ. REPUBLIC, Aug. 22, 1997, at A11 (reporting that witnesses claimed another individual, not Louima, threw the punch against Officer Volpe).

103. *Report: Officer Boasted After Attack*, UPI, Aug. 19, 1997, *available in* LEXIS, Nexis Library, UPI File (reporting the alleged statement of Justin Volpe, New York City police officer).

104. David Kocieniewski, *Injured Man Says Brooklyn Officers Tortured Him in Custody*, N.Y. TIMES, Aug. 13, 1997, at B1 ("[T]he officers became furious when he protested his arrest, twice stopping the patrol car to beat him with their fists."); McAlary, *supra* note 100, at 2.

105. Kocieniewski, *supra* note 104, at B1.

106. Louima recounted the incident to a newspaper as follows:

> "The cops pulled down my pants in front of the desk sergeant." . . . "They marched you naked across the precinct?" "Yes." "There were other cops around?" "Yes. There was the sergeant and other cops. They saw." "And they said nothing?" "I kept screaming, 'Why? Why?' All the cops heard me, but said nothing." "What they said to me I'll never forget. In public, one says, 'You niggers have to learn how to respect police officers.'"

Mike McAlary, *Victim and City Deeply Scarred*, N.Y. DAILY NEWS, Aug. 14, 1997, at 4 (quoting interview with Abner Louima).

107. McAlary, *supra* note 100, at 2.

108. Kocieniewski, *supra* note 104, at B1.

bladder.[109] He remained in the hospital for two months recovering from the injuries he sustained from the police officers at the 70th Precinct.[110]

It took a short while for the media to learn of this vicious assault, yet once they did the headlines screamed: *Police Sodomize Suspect*;[111] *Suspect Claims Police Raped Him with Plunger*;[112] *Officer Accused of Sexually Brutalizing Suspect Arrested.*[113] Members of the Haitian community marched in protest against this outrageous form of police brutality, waving toilet plungers and carrying signs declaring the cops to be "Criminals," "Perverts," "Rapists."[114] A retired transit police officer who attended the march exclaimed: "That's a foul and sordid act they performed on that man."[115] Mayor Giuliani exclaimed that the attack inside the 70th Precinct station was "personally repulsive to him"[116] and that the cops charged with the assault were "perverted."[117] Immediately after the assault, several police officers who were associated with Justin Volpe, one of the officers charged with assaulting Louima, claimed that the Rendez-Vous was a gay club and that Louima's injuries stemmed from violent anal sex he had engaged in while at the club.[118] When the two police officers arrested in connection with the assault appeared for their arraignment, courthouse protesters taunted the cops by calling them "faggots."[119] The district attorney charged the officers with aggravated sexual abuse and first-degree assault, both class B felonies for which they could receive a maximum sentence of 24 years.[120] Only later was the

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109. *See* Tom Hayes, *Officer Accused of Sexually Brutalizing Suspect Arrested*, ASSOCIATED PRESS, Aug. 13, 1997, at 1 (as reproduced by a number of newspapers).

110. *See Louima Starts on Long Road Back*, NEWSDAY, Oct. 12, 1997, at A39.

111. J. Zamgba Browne, *Police Sodomize Suspect: The Tale of Torture at 70th Precinct*, N.Y. AMSTERDAM NEWS, Aug. 20, 1997, at 1.

112. *Suspect Claims Police Raped Him with Plunger*, SALT LAKE TRIB., Aug. 14, 1997, at A13.

113. Hayes, *supra* note 109, at 1; *see also New York Officer Surrenders in Sexual Assault on Immigrant*, L.A. TIMES, Aug. 14, 1997, at A18; *Cop Surrenders on Sexual Brutality Charges*, SAN DIEGO UNION & TRIB., Aug. 14, 1997, at A12.

114. *See* Vinette K. Pryce, *A Week of Outrage, Pain and Celebration*, N.Y. AMSTERDAM NEWS, Sept. 10, 1997, at 1 (containing photograph of protester at march shown holding sign saying "Criminals, Perverts, Rapists").

115. Charles Baillou, *Marchers Blast Police Barbarism at City Hall*, N.Y. AMSTERDAM NEWS, Sept. 10, 1997, at 8.

116. David Firestone, *Giuliani's Quandary: Mayor Who Linked Name to Police Success Is Now Facing a Very Ugly Police Failure*, N.Y. TIMES, Aug. 15, 1997, at A1.

117. The press reported that, during the assault of Louima at the 70th precinct, one of the officers said: "This is Giuliani time, not Dinkins time." Eleanor Randolph, *In Police Abuse Case, Giuliani's Balance Tested*, L.A. TIMES, Aug. 16, 1997, at A1. *But see* Carolina Gonzalez & Bill Hutchinson, *Sharpton Promises He'll Defend Louima*, N.Y. DAILY NEWS, Jan. 19, 1998, at 8 (reporting that Louima now is unsure of whether the officer actually made this statement). Mayor Giuliani provided a quite interesting response to reports of the officer's alleged comment: "The remark is as perverted as the alleged act." Randolph, *supra*, at A1.

118. John Sullivan, *New Charges Filed in Police Brutality Case*, N.Y. TIMES, Aug. 22, 1997, at B3.

119. Goldstein, *supra* note 102, at 57.

120. *See* Goozner, *supra* note 99, at 1; *see also* N.Y. PENAL LAW § 120.10 (McKinney 1998) (first degree assault); *id.* § 130.70 (first degree aggravated sexual abuse).

indictment amended to include aggravated harassment, a racial bias crime for which the maximum sentence is, interestingly enough, only four years.[121]

It was precisely the sexual aspect of this assault that provoked journalists to grant Louima the moniker: "America's most famous victim of police brutality since Rodney King."[122] Sure, the police get carried away from time to time,[123] shoot at fleeing suspects when deadly force isn't called for,[124] choke a suspect to death with a choke hold,[125] or even rape female prostitutes in a brothel they had raided.[126] But, as *Village Voice* journalist Richard Goldstein observed, "None of these documented cases arouse the outrage of this 'barbaric' act, which . . . is only supposed to happen in the Third World. *Here in the land of the free, when it comes to police brutality, we draw the line at raping a man.*"[127]

That this crime is heinous cannot be denied, but is it best characterized as a sex crime? What exactly was sexual about this assault? As Goldstein asked: "*What's Sex Got To Do With It?*"[128] Virtually every report of the case mentions early in the article that Louima is married and has children, and nightly news broadcasts regularly showed pictures of Louima and his family in the days following the assault.[129] What is more, the assailants were portrayed as healthy heterosexuals by the media.

So why call it a sex crime? The easy answer is tautological: The allegations fit the description of crimes so labeled.[130] But what is a sex crime? There are several ways in which to differentiate a sexual assault from an assault *simpliciter*: (i) it is motivated by the erotic desire of the perpetrator; (ii) it involves contact with the perpetrator's or the victim's

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121. *See 2 NYC Officers Get New Charge in Haitian's Beating*, BOSTON GLOBE, Sept. 9, 1997, at A8; *see also* N.Y. PENAL LAW § 240.31 (first degree aggravated harassment).

122. Mike McAlary, *Home Sweet Heartache: Love Alone Won't Aid Louima in Brooklyn*, N.Y. DAILY NEWS, Oct. 10, 1997, at 3.

123. A New York City commission report provides two examples:

> One officer from a Brooklyn North precinct told us how he and his colleagues once threw a bucket of ammonia in the face of an individual detained in a precinct holding pen. Another cooperating officer told us how he and his colleagues threw garbage and then boiling water on a person hiding from them in a dumbwaiter shaft.

CITY OF NEW YORK, COMMISSION TO INVESTIGATE ALLEGATIONS OF POLICE CORRUPTION AND THE ANTI-CORRUPTION PROCEDURES OF THE POLICE DEPARTMENT, COMMISSION REPORT 47 (1997) [hereinafter MOLLEN REPORT].

124. *See* AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: POLICE BRUTALITY AND EXCESSIVE FORCE IN THE NEW YORK CITY POLICE DEPARTMENT 37–54 (1996).

125. *See id.* at 26.

126. *See id.* at 47.

127. Goldstein, *supra* note 102, at 57 (emphasis added).

128. *Id.*

129. *See, e.g.*, Charles Baillou, *Angry Haitians March at the 70th Precinct in Brooklyn*, N.Y. AMSTERDAM NEWS, Aug. 27, 1997, at 1; *Nightline: The Blue Wall, Police Brutality and Police Silence* (ABC television broadcast, Aug. 22, 1997).

130. *See, e.g., infra* note 136 (providing the N.Y. Penal Code's definition of first degree aggravated sexual abuse).

sexual body parts (e.g., vagina, breasts, or penis) or involves acts which are typically regarded as sexual (e.g., kissing, fellatio, sexual intercourse); or (iii) it is experienced as sexual by the victim.

The New York Penal Law defines criminal sexual offenses[131] to be rape,[132] sodomy,[133] sexual misconduct,[134] sexual abuse,[135] aggravated sexual abuse,[136] and course of sexual conduct against a child.[137] Two of these crimes explicitly anchor the crime's sexual nature, in whole or in part, in the satisfaction of sexual desire: criminal sexual abuse and course of sexual conduct against a child. The Penal Law defines criminal sexual abuse as *sexual contact* with another person by force or when the person is incapable of granting consent.[138] Course of conduct against a child is committed when, among other things, a person engages in aggravated *sexual contact* with a child less than 11 years old.[139] As a foundation for these two violations, the Penal Code defines "sexual contact" as "any touching of the sexual or other intimate parts of a person not married to the actor *for the purpose of gratifying sexual desire of either party.*"[140]

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131. *See* N.Y. PENAL LAW §§ 130.00–.85 (McKinney 1998 & Supp. 1998) (listing New York's sex offenses).

132. *Id.* §§ 130.25–.35.

133. *Id.* §§ 130.38–.50.

134. The New York Penal Law defines sexual misconduct as:

> 1. Being a male, he engages in sexual intercourse with a female without her consent; or
> 2. He engages in deviate sexual intercourse with another person without the latter's consent; or
> 3. He engages in sexual conduct with an animal or a dead human body.

Id. § 130.20. "Deviate sexual intercourse" is defined as "sexual conduct between persons not married to each other consisting of contact between the penis and the anus, the mouth and penis, or the mouth and the vulva." *Id.* § 130.00(2).

135. *Id.* §§ 130.55–.65. As set forth in the New York Penal Law, first degree sexual abuse occurs when:

> [A person] subjects another person to sexual contact:
> 1. By forcible compulsion; or
> 2. When the other person is incapable of consent by reason of being physically helpless; or
> 3. When the other person is less than eleven years old.

Id. § 130.65.

136. First degree aggravated sexual abuse occurs when:

> [A person] inserts a foreign object in the vagina, urethra, penis or rectum of another person causing physical injury to such person:
> (a) By forcible compulsion; or
> (b) When the other person is incapable of consent by reason of being physically helpless; or
> (c) When the other person is less than eleven years old.

Id. § 130.70(1).

137. First degree course of sexual conduct against a child occurs when "over a period of time not less than three months in duration, [a person] engages in two or more acts of sexual conduct, which includes at least one act of sexual intercourse, deviate sexual intercourse or aggravated sexual contact, with a child less than eleven years old." *Id.* § 130.75; *see also id.* § 130.80 (second degree course of sexual conduct against a child).

138. *Id.* § 130.65.

139. *See supra* note 137.

140. N.Y. PENAL LAW § 130.00(3) (emphasis added). In its entirety, "sexual contact" means:

> [A]ny touching of the sexual or other intimate parts of a person not married to the actor for the purpose of gratifying sexual desire of either party. It includes the touching of the

But since the satisfaction of sexual desire must be accomplished by touching sexual or intimate parts, it must be those parts that make this conduct a sex crime. Yet what are sexual or other intimate parts? Courts have found the chest,[141] the upper leg,[142] the leg,[143] the mouth,[144] and the navel[145] to be "sexual or intimate parts" for purposes of the criminal sexual abuse statute. Further, it has been established that "'intimate parts' is much broader than the term 'sexual parts'" and that "intimacy . . . must be viewed within the context in which the contact takes place. . . . [A] body part which might be intimate in one context, might not be intimate in another."[146] So really, any body part could be considered a sexual or intimate body part depending upon the context. Thus, it appears that it is the perpetrator's erotic desire that sexualizes the body part, thus making contact with that body part a sex crime.

But it cannot be the perpetrator's desire that sets some crimes apart as sex crimes. Sexual misconduct, rape, sodomy, and aggravated sexual abuse are all premised upon penetration of the vagina, rectum, or mouth.[147] The satisfaction of sexual desire is irrelevant to these crimes. So, at least for purposes of the criminal law, these body parts are essentially sexual, thus rendering crimes involving them, ipso facto, sex crimes.

The Sex Offender Registration Act,[148] New York's version of "Megan's Law,"[149] provides a salient example of the power of law to label or mark certain behavior as sexual exogenously. In New York, persons who have been convicted of rape, sodomy, sexual abuse, aggravated sexual abuse, incest, sexual performance by a child, unlawful imprisonment, or kidnapping of a person under 17 years old are subject to the notification and registration provisions of the New York Sex Offender Registration Act.[150] The last two categories, unlawful imprisonment and kidnapping of

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actor by the victim, as well as the touching of the victim by the actor, whether directly or through clothing.

Id.

141. *See* People v. Cammarere, 611 N.Y.S.2d 682, 684 (App. Div. 1984).

142. *See* People v. Gray, 607 N.Y.S.2d 828, 829 (App. Div. 1994).

143. *See* People v. Graydon, 492 N.Y.S.2d 903, 904 (Crim. Ct. 1985).

144. *See* People v. Rondon, 579 N.Y.S.2d 319, 320–21 (Crim. Ct. 1992); People v. Rivera, 525 N.Y.S.2d 118, 119 (Sup. Ct. 1988).

145. *See* People v. Belfrom, 475 N.Y.S.2d 978, 980 (Sup. Ct. 1984).

146. *Rivera*, 525 N.Y.S.2d at 119.

147. *See* N.Y. PENAL LAW § 130.20 (McKinney 1998) (necessary element of sexual misconduct is sexual intercourse which is defined as "its ordinary meaning and occur[ing] upon any penetration, however slight" pursuant to *id.* § 130.00(1)); *id.* § 130.35 (necessary element of rape is sexual intercourse as defined *supra*); *id.* § 130.50 (necessary element of sodomy is sexual intercourse as defined *supra*); *id.* § 130.70 (aggravated sexual abuse requires "insert[ion] of a foreign object in the vagina, urethra, penis, or rectum of another person").

148. N.Y. CORRECT. LAW §§ 168–168-v (McKinney Supp. 1998).

149. N.J. STAT. ANN. §§ 2C:7-1 to -11 (West 1995 & 1998).

150. New York law requires the registration of "sex offenders." N.Y. CORRECT. LAW § 168-b. The statute defines "sex offender" as a person convicted of certain enumerated offenses. *See id.* §

a person under 17 years old, in no way require the crime to have been sexual in nature, yet the law labels persons convicted of these crimes sex offenders.[151] What is more, parents of the person imprisoned or kidnapped are specifically exempt from the notification law[152]—the presumption being that no parent would kidnap or imprison their own child for sexual reasons. This is, of course, a demonstrably false premise.

This brief tour through the New York penal law illustrates that those behaviors labeled sex crimes bear, at best, a family resemblance to one another. The answer to the question—What makes something a sex crime?—is not revealed in the positive law itself. Instead, a complex set of interpretive moves are required to ascribe a sexual nature to the behavior. Some of the symbolic work is done endogenously by one or both of the parties involved, and some of it is done exogenously by those who act as public interpreters of the behavior—prosecutors, judges and juries. But in all cases, that which makes the crime sexual "is a discursive formation . . . not a fact or property of the body."[153]

So what rendered the assault of Abner Louima a sex crime? Of course, the penetration of his rectum. But why? Surely we would not want to ground the sexual nature of the crime in the erotic pleasure, latent or otherwise, that the officers received from performing this act. Mr. Louima certainly did not experience this assault as erotic. Nor would we want to say that the violent insertion of a wooden handle in a person's rectum is intrinsically a sexual act, or that any act involving a rectum is to be so construed.

Nevertheless, most people would want to say that there was something particularly wrong with this assault that distinguishes it from an equally violent punch in the face or a kick in the ribs. Justin Volpe, the police officer charged with principal responsibility for Louima's injuries, was quoted as having said to other cops on the night of the assault: "I had to break a man."[154] In this comment lies the key for understanding the power and the wrong of the assault on Louima. I suggest that the power of the assault principally lies not in its sexual nature, simpliciter, but in the unique way that it humiliated Louima as a black man. For white men,

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168-a(1) (referencing the offenses listed in section 168-a(2), (3)). These enumerated offenses consist of those crimes listed in the text accompanying this note. *See id.* § 168-a(2), (3).

151. Under the New York penal code, unlawful imprisonment in the second degree occurs when "[a] person . . . restrains another person." N.Y. PENAL LAW § 135.05. First degree unlawful imprisonment must meet this definition plus "expose the [victim] to a risk of serious physical injury." *Id.* § 135.10. Kidnapping in the second degree occurs when "[a] person . . . abducts another person." *Id.* § 135.20 First degree kidnapping must meet this definition plus include one of a number of other circumstances including: death, intent to extract a ransom, or restraint for more than twelve hours with intent to "[i]nflict physical injury upon him or violate or abuse him sexually." *Id.* § 135.25.

152. *Id.* § 135.15 (unlawful imprisonment); *id.* § 135.30 (kidnapping).

153. Bell, *supra* note 16, at 86 (attributing this argument to Michel Foucault).

154. *See* Goldstein, *supra* note 102, at 57.

particularly white police officers, to assault a black man anally is one of the most powerful ways to assault black masculinity. Tragically, Louima is not the first man to experience this kind of assault. At least six black men, all immigrants, have complained that a white police officer abducted them, took them to an isolated place in Queens, and anally raped them at gunpoint.[155] The victims and witnesses report that the cop threatened them with death if they spoke to the authorities about these assaults.[156] What distinguished Louima's assault from other incidents of police violence was not that it was sexual, but that the police officers got caught.

A preoccupation with the supposedly sexual nature of these assaults deflects attention away from the gender and race-based nature of this crime. Here we have an example of what is commonly thought to be a sexual act being used as an instrument of gender- and race-based terror.[157] One cannot understand the meaning of this conduct without taking into account its gender- and race-based significance. To view it as primarily sexual is to make the same mistake as that made by Herdt in Melanesia—it is to essentialize certain conduct and body parts as sexual, and to occlude the ways in which "the sexual" can be deployed as the instrumentality by which other forms of power and supremacy are cultivated.[158] After all, the Louima incident began with a police officer telling him, "You niggers have to learn to respect police officers."[159]

What is more, hyper-sexualizing the Louima assault carries the additional danger of normalizing other violent police practices because they aren't sexually barbaric. Recall Richard Goldstein's observation: "[W]hen it comes to police brutality, we draw the line at raping a man."[160] Other non-sexual forms of police violence may be regrettable, but many

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155. Earl Caldwell, *Police Sodomy in Queens: The Column the* Daily News *Killed*, N.Y. AMSTERDAM NEWS, Aug. 27, 1997, at 12 [hereinafter Caldwell, *Police Sodomy in Queens*]. The "black" newspapers in New York reported these incidents at great length, but none of the "white" papers have mentioned them. *See* Earl Caldwell, *Earl Caldwell to the* Daily News . . . *'I warned you. You fired me.'*, N.Y. AMSTERDAM NEWS, Aug. 27, 1997, at 1 ("The major papers seemed to have a blackout of the story. The [New York] Daily News had published nothing. The New York Times had published no story either.").

156. Caldwell, *Police Sodomy in Queens*, *supra* note 155, at 12.

157. In a characteristically laconic passage in BELOVED, Toni Morrison depicts the acrid humiliation suffered by African American men on a chain gang who are forced each morning by white male guards to put on their own chains, kneel down in a row and fellate the guards on demand. *See* TONI MORRISON, BELOVED 107–08 (1987). I read this passage not to be principally about the expropriation of sex from African American men, but rather about the routine ways in which sexual practices were used to degrade these prisoners.

158. *See supra* Part II (discussing and rejecting Herdt's representation of seminal/sexual practices in Papua New Guinea as primarily a function of homoeroticism).

159. *See* McAlary, *supra* note 100, at 2 (quoting Abner Louima's recollection of an officer's statement just prior to the insertion of a plunger into Louima's anus).

160. *See* Goldstein, *supra* note 102, at 57.

may view this behavior as a kind of police-based *droit du seigneur.*[161] In fact, it may well be the case, as Goldstein argues, that there is a kind of sadist satisfaction that accompanies the use of handcuffs, choke holds, or other excessive methods of police restraint, such as hog-tying suspects.[162] To regard the Louima assault as the exception, where perverted cops acted completely beyond the pale, "prevents us from imagining that cops who specialize in [violent] tactics might find them exciting."[163] To over-eroticize the treatment of Louima carries the danger of under-eroticizing police tactics that do not involve penetration of a "sexual or intimate body part."[164] After all, since Kinsey suggested that young men can get aroused by being chased by police,[165] why shouldn't police get aroused when running after suspects? Recent misconduct charges filed against a police officer in Seattle lay bare the erotic potential of routine police practices.[166]

Which, of course, prompts the most fundamental of questions: Is it the sexual/erotic nature of any of these practices that makes them wrong? For the most part, I think not. It seems to me that these incidents should be analyzed in order to uncover the way in which the sexual/erotic operates as a particularly efficient and dangerous conduit with which to exercise power. Thus, to say that the Louima assault was sexual is at once to say too much and not enough about it. As Ana Ortiz has explained so eloquently, this simple construction of the injury of Louima's assault occludes the particularly gendered and raced salience of anal penetration for a Caribbean Black man.[167] "They have always taken us for this frail and vulnerable community," said Tatiana Wah, a Haitian activist who was one of the organizers of the march protesting the police assault of Louima.[168] The anal assault of Louima, performed not in private, but in front of an audience of white cops on their turf, effectively enacted the perceived frailness and vulnerability of Haitian men.

How best to avoid the erasure of racial- or gender-based subordination by and through the invocation of the sexual? In the section that fol-

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161. *Droit du seigneur*, or "right of the lord," historically referred to "a supposed legal or customary right at the time of a marriage whereby a feudal lord had sexual relations with a vassal's bride on her wedding night." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 633 (1993).

162. Goldstein, *supra* note 102, at 57.

163. *Id.*

164. *See supra* notes 138–46 and accompanying text (discussing the New York Penal Law's definition, and subsequent judicial interpretations, of the term "sexual contact").

165. *See* KINSEY ET AL., *supra* note 63, at 164.

166. After flirting with a female bartender while on his break, a male police officer followed her when she drove home from work, pulled her over and teasingly said, "Now you know what it's gonna be like to be arrested." Ronald K. Fitten, *County Officer Faces Charges of Misconduct*, SEATTLE TIMES, Oct. 24, 1998, at A7. "He then took her out of the car, handcuffed her, grabbed her hair and pulled her head back and began to fondle her sexually." *Id.*

167. *See* Ana Ortiz, Remarks at the InterSEXionality Symposium, University of Denver College of Law, Feb. 6, 1998 (transcript on file with *Denver University Law Review*).

168. Richard Goldstein & Jean Jean Pierre, *Day of Outrage*, VILLAGE VOICE, Sept. 9, 1997, at 44 (quoting Tatiana Wah).

lows, I will consider the desexualization of sodomy, rape, and other assaults labeled sex crimes.

IV. THE DESEXUALIZATION OF VIOLENCE

Beginning with *The History of Sexuality*, Michel Foucault developed a theory of the discursive truth of sex[169] and, for present purposes, a critical analysis of the means by which certain forms of knowledge-based power are deployed such that sexuality gets anchored in certain parts of the body.[170] The examples I provide above from the New York Penal Law illustrate quite well Foucault's point: The Penal Law does not merely pick out the set of practices which are truly sexual in nature, but rather, certain body parts or practices become sexual by virtue of their regulation by law.[171] As a result, different parts of the body become attached to different fields of knowledge: When we interrogate practices involving the genitals we are, by definition, learning something sexual.

Shortly after the publication of *The History of Sexuality*, Foucault entered into a set of discussions with feminists about rape.[172] Given his concerns about the dangers of punishing sexuality, Foucault poses the question: "What should be said about rape?"[173] In these conversations, he urges the position that "when one punishes rape one should be punishing physical violence and nothing but that. . . . [I]t may be regarded as an act of violence, possibly more serious, but of the same type, as that of punching someone in the face."[174] Well, Foucault is unequivocally weighing in on the violence side of the sex vs. violence debate among feminists about the meaning of rape.[175]

In response to the women who objected to his insistence upon desexualizing rape, Foucault reveals his true concern. By making rape a "sex" crime, we are once again anchoring sexuality in certain parts of the body, and in so doing, "the body is discursively marked [thereby] construct[ing] certain parts of the body as more important than others."[176] By bestowing this "special" status upon parts of the body marked sexual, "sexuality as such, in the body, has a preponderant place, the sexual organ isn't like a hand, hair, or a nose. It therefore has to be protected, sur-

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169. *See* FOUCAULT, THE HISTORY OF SEXUALITY, *supra* note 3, at 57–63.

170. *See id.* at 152 ("Is 'sex' really the anchorage point that supports the manifestations of sexuality, or is it not rather a complex idea that was formed inside the deployment of sexuality?").

171. *See supra* notes 131–51 and accompanying text (disscussing the New York Penal Law's treatment of sex offenses).

172. *See* FOUCAULT, POLITICS, *supra* note 15, at 200–04; Bell, *supra* note 16, at 84–87.

173. FOUCAULT, POLITICS, *supra* note 15, at 200. Foucault sets up the discussion with the provocative declaration that "in any case, sexuality can in no circumstances be the object of punishment." *Id.*

174. *Id.* at 200–01.

175. *See, e.g.*, Franke, *supra* note 6, at 740–44 (discussing the debate among feminists concerning the proper meaning of rape—as a crime of violence or sex).

176. Bell, *supra* note 16, at 92.

rounded, invested in any case with legislation that isn't that pertaining to the rest of the body."[177]

Many feminists would respond: So what's wrong with that? Sexual assaults are different. Foucault's concern derives from the way in which the deployment of sex in this fashion occludes the way in which power operates on the body, "ordering it as it studies, organizing its movements as it observes, categorizing as it probes. In this way, power, or power/knowledge, produces our understanding of the body."[178] Thus, for Foucault, sex is not a thing we have or do, but is instead a regulatory ideal. Judith Butler expresses a similar interest in the ways in which "sex" "produces the bodies it governs"[179] and in so doing, produces bodies that matter, and bodies that don't. Wendy Brown pushes these Foucaultian insights in yet another direction, illuminating the danger of a rights-based politic that is built upon the naturalization of identity which is, in fact, the result of a regulatory ideal: "[D]isciplinary productions of identity may become the site of rights struggles that naturalize and thus entrench the powers of which those identities are the effects."[180]

It is the regulatory power of sex that Foucault seeks to interrupt by questioning the need to treat rape differently from a punch in the face. To his mind, we stand to gain much and lose little by punishing the physical violence of rape "without bringing in the fact that sexuality was involved."[181]

For the most part, I find myself in agreement with Foucault's theoretical point, yet I think Monique Plaza is right when she argues that women, in particular, cannot afford the jump into the realm of the ideal.[182] While in principle, there is much to Foucault's suggestion that we treat rape and "non-sexual" assault as crimes of violence, to recommend such a change in the positive laws at this moment means that rape victims will bear the transition costs of this representational reform. That is, rape victims will continue to experience rape as an assault to their sexual body during the period in which the withdrawal of regulation by sex crime laws transforms the way we know the body.

In order to reconcile the tension between the damage done by laws that perpetuate "the sexual" as a regulatory ideal, and the cost to rape victims of demanding that the law not recognize a sexual aspect to their

177. FOUCAULT, POLITICS, *supra* note 15, at 201–02.

178. Bell, *supra* note 16, at 87.

179. JUDITH BUTLER, BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX" 1 (1993). In addressing Foucault's "regulatory ideal," Butler notes: "[S]ex not only functions as a norm, but is part of a regulatory practice . . . whose regulatory force is made clear as a kind of productive power, the power to produce—demarcate, circulate, differentiate—the bodies it controls." *Id.*

180. WENDY BROWN, STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY 120 (1995).

181. FOUCAULT, POLITICS, *supra* note 15, at 202.

182. Monique Plaza, *Our Costs and Their Benefits*, *in* M/F: A FEMINIST JOURNAL 28, 35 (1980).

injury, I now turn to what I regard to be an example of a compromise position—the recognition of sex-based violence as a violation of international humanitarian law.

V. RAPE AND TORTURE

Between 1991 and 1995 an inter-ethnic, inter-religious war devastated the country that had been known as Yugoslavia. Rape and sexual assault have always been a part of war, but what happened "in Bosnia and Herzegovina to Muslim and Croatian women seems unprecedented in the history of war crimes. Women [were] raped by Serbian soldiers in an organized and systematic way, as a planned crime to destroy a whole Muslim population, to destroy a society's cultural, traditional and religious integrity."[183] Serbian soldiers were not the only ones accused of using rape and other sexual assault as an instrument of war in the former Yugoslavia. Muslim and Croat soldiers as well have been found to have engaged in sex-based atrocities in manners similar to those used by the Serbs.[184] Never has this seemingly inevitable aspect of war been granted the degree of international attention and consternation as have the atrocities committed in the former Yugoslavia. In what came to be called euphemistically as "ethnic cleansing," Serbs established camps that were "set up for the purpose of rape [of Bosnian Muslim women] . . . to impregnate the women."[185] Furthermore, they detained pregnant women until abortion was no longer an option.[186] A U.N. Commission characterized this pattern of rape[187] as "part of a policy of 'ethnic cleansing.'"[188] While mass executions of civilians also characterized the inhumanity that lay at the core of this conflict, it was clear that both women and men

183. Slavenka Drakulic, *Rape After Rape After Rape*, N.Y. TIMES, Dec. 13, 1992, § 4, at 17.

184. See Prosecutor v. Delalic et al., Judgment, Case No. IT-96-21-T (ICTY Nov. 16, 1998) [hereinafter Celebici Judgment]. Seventy-eight suspects have been indicted by the tribunal. *See* Charles Trueheart, *Bosnian Muslims, Croat Convicted of Atrocities Against Serbs*, WASH. POST, Nov. 17, 1998, at A34. The majority of those charged with committing war crimes are Bosnian Serbs, and most of the tens of thousands of victims of the 1991–95 war were Croats and Muslims. *See id.* However, "most of those indicted who have surrendered or been arrested are Muslims or Croats; the tribunal's two convictions to date involved a Bosnian Serb and a Croat, and one Bosnian Serb has confessed." *Id.* The indictment of Slobodan Milosovic, the Bosnian Serb leader, has yet to result in his arrest.

185. *Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780*, 49th Sess. ¶ 248, U.N. Doc. S/1994/674 (1994)) [hereinafter *Final Report*].

186. *Id.*

187. The *Final Report* identified five patterns of rape, of which the rape camp for the purposes of ethnic cleansing was one. *Id.* ¶¶ 244–45. Four other patterns were recognized: (1) rapes occurring in conjunction with looting and intimidation, (2) rapes occurring in conjunction with fighting in the area, (3) rapes at detention facilities, and (4) rapes at detention facilities established for the "sole purpose of sexually entertaining soldiers." *Id.* ¶¶ 245–47, 249.

188. One Muslim woman was told that "she would give birth to a chetnik boy who would kill Muslims when he grew up." *Id.* ¶ 249.

were victims of sexual assault, as sex-related violence became "a weapon of war"[189] in ways never seen before.

In response to enormous pressure placed upon the United Nations from its member states as well as from international media, in May 1993 the U.N. Security Council established the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("ICTY" or the "Tribunal") with the "power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991."[190] Pursuant to the Statute of the International Tribunal ("Tribunal Statute"), the Tribunal has authority to prosecute individuals who have committed, among other things, (i) Grave Breaches of the Geneva Conventions of 1949,[191] (ii) Violations of the Customs of War,[192] (iii) Genocide,[193] and (iv) Crimes Against Humanity.[194] The Tribunal Statute specifically enumerates rape as a Crime Against Humanity when committed in armed conflict and directed against any civilian population.[195] In his report elaborating the specific grounds for Tribunal jurisdiction, the Secretary General set forth that Crimes Against Humanity includes "torture or rape, committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds."[196] Specifically, the Secretary General declared that "[i]n the conflict in the territory of the former Yugoslavia, such inhumane acts have taken the form of so-called 'ethnic cleansing' and widespread and systematic rape and other forms of sexual assault, including forced prostitution."[197] Thus, in this Tribunal, rape and sexual assault were for the first time to be prosecuted as serious violations of international humanitarian law.[198]

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189. *Rape Becomes a Weapon of War*, N.Y. TIMES, Jan. 10, 1993, § 4, at 4.

190. *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808* (1993), U.N. SCOR, 48th Sess., Annex, art. 1, at 36, U.N. Doc. S25704 (1993), *reprinted in* 32 I.L.M. 1163, 1192 (1993), *available at* <http://www.un.org/icty/basic/i-bencon.htm> (visited Sept. 2, 1998) [hereinafter *Tribunal Statute*] (setting forth the Statute of the International Tribunal in the annex), *adopted by* S.C. Res. 827, U.N. SCOR, 48th. Sess., 3217th mtg. at 2, U.N. Doc. S/RES/827 (1993). Many documents from the International Criminal Tribunal for the Former Yugoslavia, including the indictments and opinions discussed *infra*, are available from the ICTY homepage, <http://www.un. org/icty/> (visited Sept. 20, 1998).

191. *Tribunal Statute*, *supra* note 190, art. 2, at 36.

192. *Id.* art. 3, at 37.

193. *Id.* art. 4, at 37.

194. *Id.* art. 5, at 38.

195. *See id.* art. 5(g), at 38.

196. *Id.* ¶ 48.

197. *Id.*

198. *See* Justice Richard Goldstone, *The United Nations' War Crimes Tribunals: An Assessment*, 12 CONN. J. INT'L L. 227, 231 (1997) ("The ICTY is setting an important precedent in respect to gender related crimes because it is the first time that systematic mass rape is ever being charged and prosecuted as a war crime."); Jennifer Green et al., *Affecting the Rules for the*

Since its creation in 1993, the Tribunal has investigated and prosecuted extreme forms of human cruelty and brutality, some of which were sexual in nature. In interesting ways, the manner in which sexual violence is characterized by the Tribunal, as well as the particular provisions of international human rights law that it has invoked to prosecute sex-based violence, has evolved over this period. The changes occurring within the Tribunal in this regard reflect an increasingly sophisticated approach to the role that sex can play in the degradation, humiliation, torture, and great suffering experienced by the victims of this horrible war.

In May 1992, Serb forces were alleged to have rounded up and sent to the Omarska Prison Camp roughly 3,000 Muslims and Croats, in particular intellectuals, professionals, and political leaders.[199] Of these prisoners, approximately forty were women.[200] Conditions in Omarska were horrible, and soldiers subjected many civilians "inside and outside the camps to a campaign of terror which included killings, torture, sexual assaults, and other physical and psychological abuse."[201] In February 1995, the Tribunal Prosecutor issued two separate indictments, the Meakic indictment[202] and the Tadic indictment,[203] in connection with atrocities committed by Serbian forces against Croat Muslims at Omarska. Both indictments, commonly referred to as the Omarska indictments, contained allegations of sexual violence—in the Meakic case primarily by men against women,[204] and in the Tadic case by men against

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Prosecution of Rape and Other Gender-Based Violence Before the International Criminal Tribunal for the Former Yugoslavia: A Feminist Proposal and Critique, 5 HASTINGS WOMEN'S L.J. 171, 173 & n.5 (1994). The International Criminal Tribunal for Rwanda, a sister United Nations war crimes tribunal to the ICTY, has undertaken prosecution of similarly heinous sex-based atrocities committed in 1994 during the ethnic war in Rwanda. On September 2, 1998, the Rwanda War Crimes Tribunal issued a final judgment in which it determined that Jean-Paul Akayesu, a Hutu official, was guilty of nine counts of genocide and crimes against humanity for having incited the rape and sexual assault of Tutsi women. *See* Prosecutor v. Jean-Paul Akayesu, Judgment, Case No. ICTR-96-4-T (ICTY Sept. 2, 1998), *available at* <http://www.un.org/ictr/english/judgments/akayesu.html> (visited Dec. 21, 1998).

199. *See* Prosecutor v. Meakic, Indictment, Case No. IT-95-4, ¶ 1 (ICTY Feb. 13, 1995) [hereinafter Meakic Indictment], *reprinted in* 34 I.L.M. 1013, 1014.

200. *See* Prosecutor v. Tadic, Second Amended Indictment, Case No. IT-94-1-T, ¶ 2.3 (ICTY Dec. 14, 1995) [hereinafter Tadic Second Amended Indictment], *reprinted in* 36 I.L.M. 908, 915.

201. Prosecutor v. Tadic, Opinion and Judgment, Case No. IT-94-1-T, ¶ 377 (ICTY May 7, 1997) [hereinafter Tadic•Opinion], *excerpts reprinted in* 36 I.L.M. 908 (exerpting paragraphs 1–12, 557–765 of the Opinion and paragraphs 1–14 of the Separate and Dissenting Opinion of Judge McDonald Regarding the Applicability of Article 2 of the Statute).

202. Meakic Indictment, *supra* note 199.

203. Prosecutor v. Tadic, Initial Indictment, Case No. IT-94-1-T (ICTY Feb. 13, 1995), *reprinted in* 35 I.L.M. 1011, 1028 [hereinafter Tadic Initial Indictment]. The Tadic Initial Indictment was amended twice. *See* Prosecutor v. Tadic, First Amended Indictment, Case No. IT-94-1-T (ICTY Sept. 1, 1995); Tadic Second Amended Indictment, *supra* note 200; *see also* Tadic Opinion, *supra* note 201, ¶ 36. Given the posture of the following argument, subsequent citations will be to the initial indictment with pertinent alterations provided when necessary.

204. Meakic Indictment, *supra* note 199, ¶¶ 2.6, 22.1, 25.1, 26.1, 30.1.

both women and men.[205] The allegations of rape and sexual violence in both cases are absolutely horrifying, yet as was typical for indictments filed early in the Tribunal's tenure, the Prosecutor's juridical treatment of these atrocities differed depending upon the sex of the victim.

In the Meakic indictment, the Prosecutor charged Serbian soldiers with a number of violations of international humanitarian law. Among them were charges that, between May and December 1992, Serbian soldiers had repeatedly raped female prisoners at Omarska.[206] Croatian women were forcibly removed from their beds at night, taken to a room downstairs, thrown on a table or on the floor and repeatedly raped, night after night.[207] Young women between the ages of 12 and 19 were the most vulnerable. A prisoner with medical training who was assigned to treat and counsel many of the rape victims, testified before the Tribunal:

> The very act of rape, in my opinion—I spoke to these people, I observed their reactions—it had a terrible effect on them. They could, perhaps, explain it to themselves when somebody steals something from them, or even beatings or even some killings. Somehow they sort of accepted it in some way, but when the rapes started they lost all hope. Until then they had hope that this war could pass, that everything would quiet down. When the rapes started, everybody lost hope, everybody in the camp, men and women. There was such fear, horrible.[208]

For this conduct, the Prosecutor charged Serbian soldiers with, among other things, Grave Breaches of the Geneva Convention of 1949 under Article 2(c) of the Tribunal Statute (wilfully causing great suffering or serious injury to body or health),[209] Violations of the Laws or Customs of War under Article 3 of the Tribunal Statute,[210] and Crimes Against Humanity under Article 5(g) (rape).[211] Contrast this construction

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205. Tadic Initial Indictment, *supra* note 203, ¶¶ 4.1, 5.1. The charges associated with paragraph 4.1 were ultimately withdrawn at trial. *See* Tadic Opinion, *supra* note 201, ¶ 37 (noting the withdrawal of the charges associated with paragraph 5 of the Second Amended Indictment which corresponds to paragraph 4.1 of the Initial Indictment).

206. Meakic Indictment, *supra* note 199, ¶¶ 22.1–22.16, 25.1–25.4, 26.1–26.4, 30.1–30.4.

207. *See id.* ¶ 22.1; *see also* Tadic Opinion, *supra* note 201, ¶ 165 ("Women who were held at Omarska were routinely called out of their rooms at night and raped. One witness testified that she was taken out five times and raped and after each rape she was beaten.").

208. Tadic Opinion, *supra* note 201, ¶ 175.

209. Meakic Indictment, *supra* note 199, ¶¶ 22.2, 22.5, 22.8, 22.11, 22.14, 25.2, 26.2, 30.2. Article 2(c) of the Tribunal Statute, entitled Grave Breaches of the Geneva Conventions of 1949, authorizes the International Tribunal to prosecute individuals for "wilfully causing great suffering or serious injury to body or health." *Tribunal Statute*, *supra* note 190, art. 2(c), at 36.

210. Meakic Indictment, *supra* note 199, ¶¶ 22.3, 22.6, 22.9, 22.12, 22.15, 25.3, 26.3, 30.3. Article 3, Violations of the Laws or Customs of War, provides a non-exclusive set of violations relating to suffering or destruction imposed upon civilians or civilian property. *See Tribunal Statute*, *supra* note 190, art. 3, at 37.

211. Meakic Indictment, *supra* note 199, ¶¶ 22.4, 22.7, 22.10, 22.13, 22.16, 25.4, 26.4, 30.4. Article 5(g), Crimes Against Humanity, authorizes the prosecution of rape. *Tribunal Statute*, *supra* note 190, art. 5(g), at 38.

of the nature of the injury with the charges filed in connection with the torture of men at the Omarska camp. According to the indictment, Serb soldiers fatally beat male prisoners for using Muslim expressions,[212] stripped male prisoners to their underwear, kicked them in the testicles, and beat them in the ribs until they became unconscious.[213] Soldiers ordered other prisoners to drink water like animals from puddles on the ground and later discharged a fire extinguisher into the mouths of those prisoners.[214] Like the prosecutions involving female victims, the Prosecutor charged offending soldiers with Grave Breaches under Article 2(c) (wilfully causing great suffering or serious injury to body or health),[215] and Violations of the Law or Customs of War under Article 3.[216] But instead of charging a violation of Article 5(g) (rape), the Prosecutor alleged a Crime Against Humanity for "other inhumane acts" under Article 5(i).[217]

Thus, the torture and humiliation of female prisoners by raping them was prosecuted as "wilfully causing great suffering or serious injury to body or health" and rape, but the torture and humiliation of male prisoners, even when it involved the genitals, was prosecuted as "wilfully causing great suffering or serious injury to body or health" and the residual category for "other inhumane acts." This differential is even greater exemplified by the indictment in the Tadic case.

The Tadic prosecution relates to the well-publicized atrocities committed against Muslim Croats at Omarska. As in the Meakic indictment, the Tadic indictment includes allegations of sexual and non-sexual violence against civilian prisoners in the camp. Just as in the Meakic indictment, in the allegations relating to the rape of a woman "F" at Omarska, the defendant is charged with committing a Crime Against Humanity under Article 5(g) (rape) of the Tribunal Statute.[218] However, the charges associated with sexual violence involving men exemplifies a different approach. The Tribunal found that the defendants beat a male prisoner named Harambasic, after which they ordered two male prisoners

212. Meakic Indictment, *supra* note 199, ¶ 27.1.

213. *Id.* ¶ 29.1.

214. *Id.* ¶ 31.1.

215. *Id.* ¶¶ 29.2, 31.2.

216. *Id.* ¶¶ 29.4, 31.4.

217. *See id.* ¶¶ 29.4, 31.4. Article 5(i), Crimes Against Humanity, authorizes prosecution for "other inhumane acts." *Tribunal Statute*, *supra* note 190, art. 5(i), at 38.

218. *Compare* Tadic Initial Indictment, *supra* note 203, ¶¶ 4.1–.4 (charging violations of Article 2(c) (wilfully causing great suffering), Article 3, and Article 5(g) (rape)), *with* Meakic Indictment, *supra* note 199, ¶¶ 22.1–.4 (charging the same violations). The amended Tadic indictments substituted a violation of Article 2(b) (inhuman treatment) for the initial Article 2(c) (wilfully causing great suffering) charge of the Tadic Initial Indictment. *See* Tadic Second Amended Indictment, *supra* note 200, ¶ 5, count 2. The charges associated with this rape of a woman were eventually dropped at trial. *See* Tadic Opinion, *supra* note 201, ¶ 37 (noting the withdrawal of the charges associated with paragraph 5 of the Second Amended Indictment which corresponds to paragraph 4.1 of the initial indictment).

to lick his buttocks and suck his penis, and then to bite his testicles.[219] As stated by the Tribunal:

> Meanwhile a group of men in uniform stood around the inspection pit watching and shouting to bite harder. . . . Witness H was threatened with a knife that both his eyes would be cut out if he did not hold Fikret Harambasic's mouth closed to prevent him from screaming; G was then made to lie between the naked Fikret Harambasic's legs and, while the latter struggled, hit and bit his genitals. G then bit off one of Fikret Harambasic's testicles and spat it out and was told he was free to leave. . . . Harambasic has not been seen or heard of since.[220]

For this conduct, the Prosecutor charged Tadic with a Grave Breach under Article 2(b) (torture or inhuman treatment),[221] a Violation of the Laws or Customs of War under Article 3 (cruel treatment),[222] and a Crime Against Humanity under Article 5(i) (other inhumane acts) of the Tribunal Statute.[223] Although the Presiding Judge at turns referred to the above-described conduct as a sexual assault[224] and sexual mutilation,[225] Tadic was not charged with violating Article 5(g) of the Statute (rape), even though the conduct included forced fellatio and other sex-based violence.

Five months after issuing the indictments in the Tadic and Meakic cases, the Tribunal issued five more indictments,[226] three of which contained allegations of sex-related violence.[227] These indictments evidence an evolution in the form in which the Prosecutor's office drafted its

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219. Tadic Initial Indictment, *supra* note 203, ¶ 5.1; *see also* Tadic Second Amended Indictment, *supra* note 200, ¶ 6.

220. Tadic Opinion, *supra* note 201, ¶ 206.

221. Tadic Initial Indictment, *supra* note 203, ¶¶ 5.29, 5.32.

222. *Id.* ¶¶ 5.21, 5.24.

223. *Id.* ¶¶ 5.31, 5.34. In the amended indictments, Tadic was charged with, among other things, violations of Article 2(b) (torture or inhuman treatment), Article 2(c) (wilfully causing great suffering or serious injury to body and health), Article 3 (cruel treatment), and Article 5(i) (inhumane acts). *See* Tadic Second Amended Indictment, *supra* note 200, ¶ 6, counts 8–11. Tadic was eventually found guilty of violating Articles 3 and 5(i) of the Tribunal Statute, but the Tribunal found the evidence did not overcome the reasonable doubt standard for the Article 2 charges. *See* Tadic Opinion, *supra* note 201, ¶¶ 237, 719–30.

224. *See* Tadic Opinion, *supra* note 201, ¶¶ 222, 231.

225. *See id.* ¶¶ 45, 231.

226. *See* Prosecutor v. Karadzic, Case No. IT-95-5 (ICTY July 25, 1995); Prosecutor v. Martic, Case No. IT-95-11 (ICTY July 25, 1995); Prosecutor v. Sikirica, Indictment, Case No. IT-95-8, ¶ 19 (ICTY July 21, 1995) [hereinafter Karaterm Indictment]; Prosecutor v. Miljkovic, Indictment, Case No. IT-95-9, ¶ 31 (ICTY July 21, 1995) [hereinafter Bosanski Samac Indictment]; Prosecutor v. Jelisic, Indictment, Case No. IT-95-10 (ICTY July 21, 1995) [Brcko Initial Indictment], *amended by* Prosecutor v. Jelisic, Amended Indictment, Case No. IT-95-10-PT (ICTY Mar. 3, 1998) [hereinafter Brcko First Amended Indictment] *and* Prosecutor v. Jelisic, Second Amended Indictment, IT-95-10-PT (ICTY Oct. 19, 1998).

227. *See* Karaterm Indictment, *supra* note 226, ¶¶ 19, 20 (forcing victims to engage in fellatio); Bosanski Samac Indictment, *supra* note 226, ¶ 31 (forcing two individuals to "perform sexual acts on each other"); Brcko Indictment, *supra* note 226, ¶ 33 (forcing two brothers to "perform sexual acts on each other").

pleadings, as well as a shift in the substantive manner in which atrocities involving rape, forced sex, and other forms of sex-related torture were prosecuted. These changes better represent, to my mind, the complex ways in which sex figured in the torture, humiliation, and inhumane treatment of both women and men in the war in the former Yugoslavia. What is more, the approach now used by the Prosecutor's office in dealing with sex-related violence, shaped in no small part by the work of Tribunal adviser for gender-related issues, Patricia Sellers,[228] provides a helpful model as an alternative to the more essentializing and static ways in which the New York Penal Law, for instance, categorizes certain behavior as a sex crime.[229]

While sex-related atrocities make up a significant part of the Prosecutor's docket, they are not prosecuted as sex crimes per se, but instead as the *actus reus* of other crimes, such as Crimes Against Humanity, Grave Breaches, Genocide, or Violations of the Laws and Customs of War. This mode of charging these crimes, together with the Tribunal's Rules of Procedure and Evidence that reflect a sensitivity to the unique issues that arise in the prosecution of sex-related violence,[230] make for a juridical structure that at once acknowledges the way in which sex operates as "an especially dense transfer point for relations of power"[231] without over-sexualizing rape and other sexual violence.

In the indictments issued in July 1995, the Prosecutor's office for the first time adopted the use of headings within which various counts were organized, such as, "Genocide," "Killing of [X]," "Torture of [Y]," "Beatings of [Z]," and "Sexual Assault."[232] These headings represent not only a change in form, but an evolution in the substantive manner in

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228. Formerly Legal Advisor for Gender-Related Crimes at the International Criminal Tribunals for the Former Yugoslavia and Rwanda, and now ICTY prosecutor in the Hague.

229. *See supra* notes 131–51 and accompanying text (discussing New York penal law's treatment of sex crimes).

230. *See* INTERNATIONAL TRIBUNAL FOR THE PROSECUTION OF PERSONS RESPONSIBLE FOR SERIOUS VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW COMMITTED IN THE TERRITORY OF THE FORMER YUGOSLAVIA SINCE 1991: RULES OF PROCEDURE AND EVIDENCE 96, U.N. Doc. IT/32/Rev.13 (1998) [hereinafter TRIBUNAL RULES OF PROCEDURE], *reprinted in* 33 I.L.M. 484, 535 (1994), *available at* <http://www.un.org/icty/basic/rpe/rev13e.htm> (visited Sept. 2, 1998). Rule 96 of the *Tribunal Rules of Procedure*, "Evidence in Cases of Sexual Assault" states:

> In cases of sexual assault:
> (i) no corroboration of the victim's testimony shall be required;
> (ii) consent shall not be allowed as a defence if the victim
> (a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or
> (b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear;
> (iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible;
> (iv) prior sexual conduct of the victim shall not be admitted in evidence.

Id.

231. FOUCAULT, THE HISTORY OF SEXUALITY, *supra* note 3, at 103.

232. *See, e.g.*, Brcko Indictment, *supra* note 226.

which the Tribunal prosecuted sex-based violence. The Brcko indictment, for instance, charged that Ranko Cesic forced two brothers at gunpoint, "to beat each other and perform sexual acts on each other in the presence of others, causing them great humiliation and degradation."[233] For this conduct, the Prosecutor charged Cesic with a violation of Article 2(b) (inhuman treatment), Article 3 (humiliating and degrading treatment) and Article 5(g) (rape, which includes other forms of sexual assault) of the Tribunal Statute.[234] Two important changes are worth noting in this indictment. First, Crimes Against Humanity as set forth in Article 5(g) was interpreted for the first time to include not only rape, but also "other forms of sexual assault."[235] Second, the sexual assault of a man by a man was determined to constitute a sexual assault within the meaning of Article 5(g) rather than a generalized inhumane act under Article 5(i).[236]

In a separate indictment issued in July 1995, in connection with atrocities committed in the town of Bosanski Samac, Serbian soldiers were charged with forcing two male prisoners "to perform sexual acts upon each other in the presence of several other prisoners and guards."[237] For these allegations the Tribunal indicted the accused under the same violations of humanitarian law as the Brcko defendants—among other things, Crimes Against Humanity under Article 5(g) (rape, which includes other forms of sexual assault).[238]

In two indictments issued in 1996, the Prosecutor developed an even more refined approach to the prosecution of conduct that included some

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233. *Id.* ¶ 33.

234. *Id.* ¶ 33, counts 50–52. The Amended Indictment, issued March 3, 1998, eliminated the Article 2(b) charge. *See* Brcko Amended Indictment, *supra* note 226, ¶ 32, counts 34–35.

235. Brcko Initial Indictment, *supra* note 226, ¶ 33, count 52 (charging a "Crime Against Humanity recognized by Article 5(g) (rape, which includes other forms of sexual assault) of the Tribunal Statute").

236. The reform of indictment policy evidenced in the Brcko indictment, however, was not consistently implemented by the Prosecutor's office. *Compare id.* (charging violation of Article 5(g) (rape, which includes other forms of sexual assault) when defendants allegedly forced two brothers to perform sexual acts on each other), *with* Tadic Initial Indictment, *supra* note 203, ¶¶ 5.1, 5.31, 5.34 (charging violation of Article 5(i) (other inhuman acts) when defendants forced two individuals to "lick [a victim's] buttocks and genitals and then to sexually mutilate [the victim]"). In another indictment issued the same day as the Brcko indictment, the Prosecutor charged several Serbian soldiers with forcing a man to engage in "degrading, humiliating and/or painful acts, such as lying on broken glass, repeatedly jumping from a truck, and engaging in fellatio." Karaterm Indictment, *supra* note 226, ¶ 19. For this conduct, the defendants were charged with committing great suffering under Article 2(c), cruel treatment under Article 3, and inhumane acts under Article 5(i), but not rape or sexual assault under Article 5(g). *See id.* ¶¶ 19.2.1–.2.3. Male soldiers were similarly charged in a separate count for forcing a male prisoner to run while carrying a heavy machine gun and to engage in fellatio. *Id.* ¶ 20. The Karaterm indictment did not contain the subject headings contained in the Brcko and other indictments issued in July 1995.

237. Bosanski Samac Indictment, *supra* note 226, ¶ 31.

238. Like the Brcko defendants, the Bosanski Samac defendents were charged with a Grave Breach under Article 2(b) (inhuman treatment), Violation of the Laws or Customs of War under Article 3 (humiliating and degrading treatment), and a Crime Against Humanity under Article 5(g) (rape, which includes other forms of sexual assault). *Id.* ¶ 31, counts 36–38; *see supra* note 234 (describing the charges against the Brcko defendants, including subsequent amendments).

degree of sex-related violence. Continuing the use of subject headings in the indictments, in March 1996, the Prosecutor issued an indictment in connection with atrocities committed in a camp in the village of Celebici.[239] One allegation charges that Hazim Delic, the commander of the Celebici camp, forced a female prisoner to repeated forcible sexual intercourse, sometimes in public and other times by more than one rapist.[240] In a separate allegation, he was charged with raping another female prisoner during her first interrogation, and then every few days for the next six weeks.[241] For these actions, Delic was charged with a Grave Breach under Article 2(b) (torture), and Violations of the Laws and Customs of War under Article 3 (torture) and (cruel treatment).[242] This is the first time that the ICTY Prosecutor characterized sex-related violence against either a man or a woman, as torture, not rape.[243]

Further, the Tribunal issued an indictment in June 1996 in which rape, sexual enslavement, and other forms of sexual assault made up the central focus of the charges.[244] In the Foca indictment, the Tribunal described how, between April and July 1992, soldiers detained young and adult Muslim women of the town of Foca in houses, athletic fields, the local high school, detention centers, apartments, and houses.[245] Both individuals and groups of Serbian soldiers systematically raped, tortured, and humiliated these women.[246] On several occasions, the soldiers told women, while raping them, that they would give birth to Serbian babies,[247] and in one case, that her body "would be found in five different countries if she told anyone that he had raped her."[248] In addition, the indictment describes how many Muslim women were enslaved in houses and apartments converted into "rape camps,"[249] and were subjected to

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239. Prosecutor v. Delalic, Indictment, Case No. IT-96-21 (ICTY Mar. 21, 1996) [hereinafter Celebici Indictment].

240. *Id.* ¶ 24.

241. *Id.* ¶ 25.

242. *Id.* ¶ 24, counts 18–20; *id.* ¶ 25, counts 21–23.

243. It is very possible that the Prosecutor did not include a charge of Crime Against Humanity under Article 5(g) (rape) because she did not feel that she had sufficient evidence to prove that the rapes were committed as part of a widespread or systematic attack against a civilian population on national, political, ethnic, racial, or religious grounds.

244. Prosecutor v. Gagovic, Indictment, Case No. IT-96-23 (ICTY June 26, 1995) [hereinafter Foca Indictment].

245. *Id.* ¶¶ 5.1, 6.1, 7.1, 9.1, 10.1, 11.1, 12.1.

246. One victim was gang-raped for three hours by at least fifteen men, then sexually abused in "all possible ways," including having a soldier threaten to cut off her breast with a knife. *Id.* ¶ 9.10. Another victim was gang-raped by at least eight men, during which time one man bit her nipples to the point of bleeding, and then another squeezed and pinched her breasts while he raped her. She then lost consciousness from the pain. *Id.* ¶ 9.11. While one other victim was being raped by a male soldier, the soldier threatened to cut off her arms and legs and take her to church to be baptized. *Id.* ¶ 9.15.

247. *Id.* ¶¶ 9.3, 9.13.

248. *Id.* ¶ 8.1.

249. For the use of the term, see AMNESTY INT'L, BOSNIA-HERZEGOVINA: RAPES AND SEXUAL ABUSE BY THE ARMED FORCES 10–12 (1993); Roy Gutman, *Rape Camps: Evidence Serb Leaders in*

rape and other sexual assaults continually.[250] These women were also forced to perform domestic duties for the Serbian soldiers such as cooking, laundry, and cleaning,[251] and were bought and sold by Serbian and Montenegrin soldiers.[252]

The Prosecutor indicted eight Serbs for these crimes.[253] Where women were alleged to have been raped and tortured individually, rather than in "rape camps," the Prosecutor placed the allegations under the heading "Torture and Rape" and charged the defendants with Grave Breaches under Article 2(b) (torture), Violations of the Laws or Customs of War under Article 3 (torture) and Crimes Against Humanity under Article 5(f) (torture) and 5(g) (rape).[254] Allegations of rape, with no additional allegations of actual or threatened violence, such as cutting or biting, appeared under the heading "Rape" and the defendants were charged only with a Crime Against Humanity under Article 5(g) (rape), but not with a Grave Breach (torture).[255] Finally, allegations involving "rape camps," appeared under the heading "Enslavement and Rape," and the Prosecutor charged the defendants with Crimes Against Humanity under Article 5(c) (enslavement) and 5(g) (rape), Grave Breach under Article 2(b) (inhumane treatment), and Violations of the Laws and Customs of War under Article 3 (outrages to personal dignity).[256] Why this conduct was not characterized as torture is curious. Similarly puzzling is the prosecutor's decision in the Foca indictment to abandon the descriptions of acts charged under Article 5(g) as "rape, which includes other forms of sexual assault."

Finally, in the Kovacevic indictment,[257] the Prosecutor charged two Serbian officials with Genocide in connection with the torture of Muslim men and women in the towns of Prijedor and Banja Luka.[258] While the indictment enumerated the rape and torture of women and girls by subordinates of the named defendants, they were not charged with rape under Article 5(g), but rather with Genocide under Articles 4 and 7.[259] The indictment was later amended to charge the defendants with crimes

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Bosnia OKd Attacks, NEWSDAY, April 19, 1993, at 5; Maggie O'Kane, *Bosnia Crisis: Forgotten Women of Serb Rape Camps*, GUARDIAN, Dec. 19, 1992, at 9; Tom Post, *A Pattern of Rape*, NEWSWEEK, Jan. 4, 1993, at 32.

250. Foca Indictment, *supra* note 244, ¶¶ 10.1–.7, 12.1–.4.

251. *Id.* ¶¶ 10.6, 12.1.

252. *Id.* ¶ 12.5.

253. *Id.* ¶¶ 2.1–.8 (discussing the accused).

254. *See id.* ¶¶ 8.1–.2, counts 32–35; *id.* ¶¶ 9.1–9.26, counts 36–55.

255. *See id.* ¶¶ 11.1–.3, count 60.

256. *See id.* ¶¶ 12.1–12.6, counts 61–62.

257. Prosector v. Drljaca, Initial Indictment, Case No. IT-97-24-I (ICTY Mar. 13, 1997) [hereinafter Kovacevic Initial Indictment] (naming Drljaca and Kovacevic as defendants), *amended by* Prosector v. Kovacevic, Amended Indictment, Case No. IT-97-24-I (Jan. 28, 1998) [hereinafter Kovacevic Amended Indictment].

258. Kovacevic Initial Indictment, *supra* note 257, ¶¶ 9–16, count 1.

259. *Id.*

Against Humanity, Violations of the Laws or Customs of War, and Grave Breaches.[260] In this case, rapes and other forms of sexual assault comprised the predicate acts of Genocide, but not a substantive violation of international humanitarian law.

Thus, over time, the manner in which the ICTY Prosecutor's office framed sex-related violence has shifted. At the outset, the Prosecutor interpreted sex-related violence to amount to a Grave Breach, a Violation of the Laws and Customs of War, and a Crime Against Humanity.[261] However, violence suffered by women was pled as rape under the Statute's Crimes Against Humanity provisions,[262] whereas sex-related violence suffered by men was prosecuted under the provision reaching other inhumane acts.[263] After a period of time, rape, a crime specifically enumerated as a Crime Against Humanity in the Statute, was interpreted broadly to mean sexual assault, "an 'umbrella phrase' that refers to . . . forcible sexual penetration, indecent assault, enforced prostitution, sexual mutilation, forced impregnation, and forced maternity."[264] Thus, charges now brought under Article 5(g) are frequently described as "rape which includes other forms of sexual assault."[265] This expanded term has been applied to the rape of women as well as to men who were forced to perform sex acts, whether it be forced sexual intercourse or forced fellatio.[266]

What is more, the ICTY Prosecutor has come to regard sex-related violence as not only a sexual assault under Article 5(g), but as a form of torture and genocide—whether committed against men or women. "This is done by prosecuting sexual assaults not as enumerated crimes in and of themselves (such as under Article 5(g)), but rather as elements, usually the actus reus, of the crimes."[267] Thus, borrowing the definition from other conventions on torture, the ICTY Prosecutor defines torture, in relevant part, as:

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260. Kovacevic Amended Indictment, *supra* note 257, ¶¶ 33–57, counts 3–15.

261. *See* Meakic Indictment, *supra* note 199, ¶¶ 22.1–22.16, 25.1–25.4, 26.1–26.4, 30.1–30.4; Tadic Initial Indictment, *supra* note 203, ¶¶ 5.1, 5.29–.34; *see also* discussion *supra* notes 206–17, 218–25 and accompanying text (discussing the Meakic and Tadic charges).

262. *See* Meakic Indictment, *supra* note 199, ¶¶ 22.4, 22.7, 22.10, 22.13, 22.16, 25.4, 26.4, 30.4; Tadic Initial Indictment, *supra* note 203, ¶¶ 4.1–4.4; *see also* discussion *supra* notes 206–11, 213 and accompanying text (discussing the Meakic and Tadic charges as applied to female victims).

263. *See* Meakic Indictment, *supra* note 199, ¶¶ 29.4, 31.4; Tadic Initial Indictment, *supra* note 203, ¶¶ 5.31, 5.34; *see also* discussion *supra* notes 213–17, 219–25 accompanying text (discussing the Meakic and Tadic charges as applied to male victims).

264. Patricia Viseur Sellers & Kaoru Okuizumi, *Intentional Prosecution of Sexual Assaults*, 7 TRANSNAT'L L. & COMTEMP. PROBS. 45, 51 (1997); *cf.* TRIBUNAL RULES OF PROCEDURE, *supra* note 230, at Rule 96 (use of "sexual assualt" in Rule 96, as opposed to "rape," indicates Tribunal's intent to interpret Artilce 5(g) broadly).

265. *See, e.g.*, Brcko Indictment, *supra* note 226, ¶ 33, count 52; *see also* discussion *supra* note 235.

266. *See, e.g.*, Foca Indictment, *supra* note 244, ¶¶ 11.1–.3, count 60 (applying Article 5(g) to rape of four women); Brcko Initial Indictment, *supra* note 226, ¶ 33, count 52 (applying Article 5(g) to men forced to perform sexual acts on each other).

267. Sellers & Okuizumi, *supra* note 264, at 57–58.

> [A]ny act by which severe pain or suffering, whether physical or mental, is inflicted on a person for such purposes as . . . punishing him for an act that he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind.[268]

Sexual assault is therefore regarded as an element of the crime of torture—as an act by which severe pain and suffering, whether physical or mental, is inflicted upon a person for a prohibited purpose. This view mirrors that of the U.N. Special Rapporteur on torture, who called rape "an especially traumatic form of torture."[269] Thus, evidence of rape or other sexual assault "only partially satisfies the elements of torture . . . which in turn only partially satisfies the elements required to establish a grave breach."[270] The evolution in the manner in which sex-related violence is charged before the ICTY has culminated in two judg-

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268. *Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment*, art. 1, G.A. Res. 39/46, U.N. GAOR 3d Comm., 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 (1984); *see* C.P.M. Cleiren & M.E.M. Tijssen, *Rape and Other Forms of Sexual Assault in the Armed Conflict in the Former Yugoslavia: Legal, Procedural, and Evidentiary Issues*, 5 CRIM. L.F. 471, 492 (1994).

269. *Question of the Human Rights of All Persons Subjected to Any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Report of the Special Rapporteur, Mr. Nigel S. Rodley, Submitted Pursuant to Commission on Human Rights Resolution 1992/32*, U.N. ESCOR, 50th Sess. ¶ 19, U.N. Doc. E/CN.4/1995/34. The 1949 Geneva Conventions, which now constitute the core rules of international humanitarian law applicable in international armed conflicts, do not enumerate rape as a grave breach. *See* Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, art. 147, 6 U.S.T. 3516, 3618, 75 U.N.T.S. 287, 388 [hereinafter Geneva Convention] (including "wilful killing, torture or inhuman treatment . . . wilfully causing great suffering or serious injury to body or health" as grave breaches). However, the International Commission of the Red Cross and the U.S. State Department have declared that Grave Breach under Article 147 (relating to "torture or inhumane treatment") encompasses rape. *See* Simon Chesterman, *Never Again . . . and Again: Law, Order, and the Gender of War Crimes in Bosnia and Beyond*, 22 YALE J. INT'L L. 299, 331 & n.199 (1997) (citing Theodor Meron, Editorial Comment, *Rape as a Crime Under International Humanitarian Law*, 87 AM. J. INT'L L. 424, 426–27 (1993) (quoting INT'L COMM. OF THE RED CROSS, AIDE-MEMOIRE (Dec. 3, 1992)) and *Final Report*, *supra* note 185, ¶ 105).

270. Sellers & Okuizumi, *supra* note 264, at 62. The Trial Chamber has determined that the elements of torture in an armed conflict require that torture:

> (i) consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental; in addition
> (ii) this act or omission must be intentional;
> (iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person;
> (iv) it must be linked to an armed conflict;
> (v) at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, e.g. as a de facto organ of a State or any other authority—wielding entity.

Prosecutor v. Furundzija, Judgment, Case No. IT-95-17/1-PT, ¶ 162 (ICTY Dec. 10, 1998) [hereinafter Furundzija Judgment]; *see also* Prosecutor v. Tadic, Prosecutor's Pre-Trial Brief, Case No. IT-94-I-T (ICTY Apr. 10, 1995). To prove a Grave Breach, the Prosecutor must show (1) that the act was undertaken during "armed conflicts of an international character," and (2) that the victim was a person "regarded as 'protected,' in particular civilians in the hands of a party to a conflict of which they are not nationals." Tadic Opinion, *supra* note 201, ¶ 559.

ments issued by the Tribunal's Trial Chamber in cases involving charges of rape and other forms of sexual assault. In the Celebici case,[271] three military officials, two Muslims and a Croat, were convicted of having committed a number of war crimes, including rape of female prisoners,[272] placing burning fuses around the genital areas of male prisoners,[273] and forcing brothers to perform fellatio on one another.[274] In the Furundzija case,[275] the trial chamber convicted the defendant of aiding and abetting the rape and sexual assault of a female prisoner by a soldier in Furundzija's command while he looked on and did nothing.[276]

In both these cases, the judges were careful to thoroughly discuss the manner in which sexual assaults, including rape, were used as a form of torture. In order to make out a claim of torture, the prosecutor must show the intentional infliction of severe physical or mental pain or suffering undertaken for a prohibited purpose.[277] According to the Celebici panel, "it is difficult to envisage circumstances in which rape . . . could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation."[278] With regard to the specific sexual assaults with which the defendants were charged, the panel concluded that "the violence suffered by [female prisoners] in the form of rape, was inflicted upon her by Delic because she is a woman. [T]his represents a form of discrimination which constitutes a prohibited purpose for the offence of torture."[279] Similarly, the Furundzija panel concluded that the Prosecutor had proved that the rape of the female prisoner was a form of torture because they inflicted this form of severe physical and mental suffering in order to obtain information from her during an interrogation.[280] It is worth noting that the man who raped the victim in the Furundzija case had warned another soldier "not to hit her as he had 'other methods' for women, methods which he then put to use."[281] Thus, the Furundzija panel could have concluded that the rapes and other sexual assault of the female prisoner were conducted for a discriminatory purpose as well as for the purpose of extracting information.

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271. Celebici Judgment, *supra* note 184.

272. *Id.* ¶¶ 925–65, counts 18–23.

273. *Id.* ¶¶ 1035–48.

274. *Id.* ¶¶ 1060–66, counts 44–45.

275. Furundzija Judgment, *supra* note 270.

276. *Id.* ¶¶ 264–75. The man accused of assaulting the female victim in this case was charged with "rubb[ing] his knife on the inner thighs of [the victim] and threatened to cut out her private parts if she did not tell the truth in answer to the interrogation." *Id.* ¶ 264. Subsequently, she was vaginally, anally and orally raped by the same man as part of the interrogation while Furundzija watched and interrogated her as well as other prisoners. *Id.* ¶ 266–67.

277. *See* Celebici Judgment, *supra* note 271, ¶¶ 452–97; Furundzija Judgment, *supra* note 270, ¶¶ 165–86.

278. Celebici Judgment, *supra* note 271, ¶ 495.

279. *Id.* ¶ 941.

280. Furundzija Judgment, *supra* note 270, ¶ 267.

281. *Id.* ¶ 87 (footnote omitted).

This shift to treating sex-related violence, including rape, as torture under Article 2(b) pertaining to Grave Breaches, is a position that Professor Rhonda Copelon has urged to the Prosecutor both directly in correspondence[282] and indirectly in her scholarly publications.[283] Her reasoning for doing so is threefold. First, Copelon argues, it is most appropriate to classify rape and other sexual assault as a Grave Breach, because "[u]nder the Geneva Conventions, the most serious war crimes are designated as 'grave breaches.'"[284] Second, to prove a Grave Breach, one need not show that the conduct was systematic or took place on a mass scale; "one act of rape is punishable,"[285] just as one act of murder or torture would be. Finally, crimes classified as Grave Breaches are conferred universal jurisdiction, thereby providing authority for the prosecution of such crimes before an international tribunal.[286] Thus, Copelon and others urge the prosecution of rape and other sex-related crimes as a form of torture in order to remove any ambiguity as to the seriousness of the offense.[287] The Prosecutor and the Trial Chambers have adopted this strategy not as a matter of amendment of the Statute, but as a matter of interpretation: The Grave Breach provisions of Article 2(b) pertaining to torture have now been interpreted by the Trial Chamber to include the rape of women in the Lasva River Valley[288] and at Celebici.[289]

What the ICTY Prosecutor has devised, in effect, is a strategy to evaluate on a case-by-case basis what role sex-related violence plays in the context of violations of international humanitarian law, in so far as it "shock[s] the conscience of humankind to such a degree [that it has] an international effect."[290] Rather than rely upon special laws that isolate rape and/or sexual assault as a privileged kind of injury, the Tribunal's Prosecutor and judges have chosen to tailor the construction of these crimes to the way in which sex-related violence figured in the physical or mental destruction of a people or person. Where sex-related violence takes place on a mass scale, or is the subject of orchestrated policy, then it is appropriately prosecuted as a Crime Against Humanity, which requires a showing that the accused's actions were part of a widespread or

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282. *See* Rhonda Copelon, *Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law*, 5 HASTINGS WOMEN'S L.J. 243, 253–54 & n.46. (1994) (describing communications between Rhonda Copelon and the Chief Prosecutor of the ICTY).

283. *See id.* at 248–57 (arguing for the prosecution of rape as a Grave Breach under Article 2(b) of the Tribunal Statute (torture)).

284. *Id.* at 249.

285. *Id.* at 250.

286. *Id.*

287. *See, e.g.*, Chesterman, *supra* note 269, at 327; Copelon, *supra* note 282, at 248–57; Madeline Morris, *By Force of Arms: Rape, War and Military Culture*, 45 DUKE L.J. 651, 685 n.108 (1996); Amy E. Ray, *The Shame of It: Gender-Based Terrorism in the Former Yugoslavia and the Failure of International Human Rights Law to Comprehend the Injuries*, 29 AMER. U. L. REV. 793, 818 (1997).

288. Furundzija Judgment, *supra* note 270, ¶¶ 264–69.

289. *See* Celebici Indictment, *supra* note 239, ¶¶ 24–25, counts 18, 21.

290. Goldstone, *supra* note 198, at 228.

systematic attack against a civilian population.[291] Where it operates as part of a campaign to destroy a national, ethnical, racial, or religious group, it should be prosecuted as Genocide.[292] Yet, as ICTY Judge Elizabeth Odio Benito observed, "it will be difficult to compile sufficient evidence to prosecute persons individually responsible for . . . crimes against humanity or genocide."[293] Thus the Tribunal can and should invoke its Statute's provisions relating to Grave Breaches and Violations of the Laws and Customs of War in cases involving sex-related violence as well.

All of these formulations are clearly preferable to the treatment of rape as a spoil of war, as a crime of passion or lust, or as a crime against honor, modesty, or dignity, as international humanitarian law has in the past.[294] While it is true that rape and other sex-related violence was undertaken in the former Yugoslavia systematically as part of a campaign of ethnic- and religious-based persecution,[295] it was also undertaken as part of a systematic campaign of gender-based persecution. International humanitarian law has begun to recognize the significance of gender-based persecution insofar as rape has been treated as a form of sex discrimination within the context of torture prosecutions. The ICTY Trial Chambers construction of rape as torture made a tremendous step beyond the view that "rape and other sexual assaults have often been labeled as 'private,' thus precluding them from being punished under national or international law.[296]

The same interpretative advance must be undertaken with respect to the meaning of Crimes Against Humanity. "The women victims and survivors in Bosnia are being subjected to crimes against humanity based on *both* ethnicity and religion, and gender. It is critical to recognize both and to acknowledge that the intersection of ethnic and gender violence has its own particular characteristics."[297] Thus, persecution based on gender must be recognized as its own class of crimes against humanity. It is important to be clear, however, that to do so is a quite different interpretive strategy than focusing on the role of sex in war.

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291. *See* Tadic Opinion, *supra* note 201, ¶ 626; Sellers & Okuizumi, *supra* note 264, at 57 n.47; Elizabeth Odio Benito, Rape and Other Sexual Assaults as War Crimes Prohibited by International Humanitarian Law 22 (Mar. 8, 1998) (unpublished manuscript, on file with author).

292. *See* Kovacevica Initial Indictment, *supra* note 258, ¶¶ 9–16; *Tribunal Statute*, *supra* note 190, art. 4, at 37.

293. Benito, *supra* note 291, at 12.

294. *See* Geneva Convention, *supra* note 269, art. 27, 6 U.S.T. at 3516, (declaring that women "shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault"); Rhonda Copelon, *supra* note 282, at 249.

295. *See Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, Including the Question of the Programme and Methods of Work of the Commission*, U.N. Comm'n on Human Rts., 50th Sess., Agenda Item 11(a), ¶ 268, U.N. Doc. E/CN.4/1995/42 (1994).

296. Celebici Judgment, *supra* note 271, ¶ 471.

297. Copelon, *supra* note 282, at 261.

The ICTY has for the first time treated sex-related violence as a serious, and often grave, breach of international humanitarian law, while avoiding the mistake of essentializing sexual conduct as a special kind of injury that deserves to be "protected, surrounded, invested"[298] with a unique legal response. The Tribunal's Rules of Procedure and Evidence reflect a sensitivity to the particularities of sex-related violence with respect to the corroboration of sexual assault victim's testimony, evidence of prior sexual conduct, and complexity of the notion of consent.[299] Indeed, the Trial Chamber rested its conviction in the Celebici case on the uncorroborated testimony of the rape victim.[300] Thus, the prosecution of sex-related violence before this Tribunal stands a good chance of being done in such a way that recognizes the way that sex was used as a weapon of war, yet avoids many of Foucault's concerns with respect to the ways in which sex is legally inscribed on the body. At the same time, this method of prosecution remains sensitive to particular meanings of sex-related violence for the people who suffered it, as well as for the larger culture in the former Yugoslavia.

VI. CONCLUSION

Of course, all cultures sexualize different body parts and behaviors in myriad ways. In a sense, I am urging a reverse sociology of the erotic. Rather than study the ways in which fingers, toes, lips, ears, penises, vaginas, or anuses become eroticized across cultures, I am concerned with the way in which body parts and practices, once sexualized, cannot escape a signification process by which contact with those body parts and the enactment of those practices are always, already, and exclusively understood to be sexual. In this sense, I want to question whether the sexual is a satisfactory lens of analysis by which to understand the meaning of interpersonal practices such as sexual harassment, seminal practices in Melanesia, the assault of Abner Louima, or sex-related violence in the former Yugoslavia.

In the Tadic case, the Tribunal found that Suada Ramica, a Muslim woman who was three to four months pregnant as a result of being raped by a Serbian soldier in a camp, was

> taken to the Prijedor police station by a Serb policeman with whom she was acquainted through work. On the way he cursed at her, using ethnically derogatory terms and told her that Muslims should all be killed because they "do not want to be controlled by Serbian authorities." When she arrived at the police station she saw two Muslim men

298. FOUCAULT, POLITICS, *supra* note 15, at 202.

299. TRIBUNAL RULES OF PROCEDURE, *supra* note 230, Rule 96 (providing strict rules for the admission of testimony and limiting the defense of consent in cases of sexual assault); *see supra* note 230 (providing the full text of Rule 96). The Celebici defendants were convicted.

300. Celebici Judgment, *supra* note 271, ¶ 936.

> whom she knew, covered in blood. She was taken to a prison cell which was covered in blood and . . . raped again and beaten . . . .[301]

This evidence supported a finding by the Tribunal that Tadic was guilty of religious persecution—a Crime Against Humanity.[302] This evidence sounds eerily similar to Abner Louima's recount of the conduct and comments of the police officers who verbally and physically assaulted him on the night of August 19, 1997. Recall, the white police officers are accused of saying:

> "You niggers have to learn to respect police officers." The other one said, "If you yell or make any noise, I will kill you." Then one held me and the other one stuck the [wooden handle of a toilet] plunger up my behind. He pulled it out and shoved it in my mouth, broke my teeth and said, "That's your s—t, nigger." Later, when they called the ambulance, the cop told me, "If you ever tell anyone . . . I will kill you and your family."[303]

If what Suada Ramic experienced was sexual violence in the service of religious persecution, surely what Abner Louima suffered was sexual violence as a form of racial persecution. In both cases, the victims suffered a form of gender-based violence as well. Hopefully, international humanitarian law will one day recognize gender-based crimes as being on a par with crimes that are racial, religious, ethnic, or political in nature. But in either case, it would be a mistake to reduce the wrong of the atrocities they suffered to the fact that they were sexual. So too, when observers object to the ritualized semen practices of the Sambia because they amount to intergenerational sex, we lose sight of the power those practices have to teach boys important gender-based lessons. In all these cases, it is paramount that we keep our focus on how sex is put to work to construct men, masculinity, and nations, and to destroy women, men, and a people.

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301. Tadic Opinion, *supra* note 201, ¶ 470.
302. *Id.* ¶ 718.
303. McAlary, *supra* note 100, at 2.