

# Lucky: The Sequel

MARTHA CHAMALLAS\*

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## INTRODUCTION

When I read Alice Sebold's memoir *Lucky*,<sup>1</sup> I was struck by how much it seemed to me to be a sequel to Susan Estrich's influential hook, *Real Rape*.<sup>2</sup> Although the books were written over a decade apart, each of the authors wrote of her brutal rape by a stranger. In both cases, the women were young. Sebold was only a freshman in college and Estrich was just getting ready to enter law school when the attacks occurred.<sup>3</sup> In both cases, the rapist was an African-American man and the victim was a white woman. In Estrich's case, the rapist was never found.<sup>4</sup> In fact, the starting point for Estrich's book is that, in comparison, she is "lucky" to have been a victim of a stranger rape because she was more likely to be believed than a woman who was raped by a man she knew.<sup>5</sup> Estrich made the now-familiar assertion that, under the law,

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\* Robert J. Lynn Chair in Law, Moritz College of Law, The Ohio State University. Many thanks to Susan Appleton, Debbie Brake, Sharon Davies, Marc Spindelman, Peter Shane, and Stephanie Wildman for their helpful suggestions on this essay. I am also indebted to my colleagues at Ohio State who attended the summer brown-bag session and responded to an earlier draft of this essay. Finally, I am very grateful to Amanda Klase for her excellent research assistance.

1 ALICE SEBOLD, *LUCKY* (1999).

2 SUSAN ESTRICH, *REAL RAPE* (1987).

3. *Id.* at 6; see SEBOLD, *supra* note 1, at 3.

4. Estrich, *supra* note 2, at 3.

5. *Id.* ("In many respects I am a very lucky rape victim, if there can be such a thing. Not because the police never found him: looking for him myself every time I crossed the street, as I did for a long time, may be even harder than confronting him in a courtroom. No, I am lucky because everyone agrees I was 'really' raped. When I tell my story no one doubts my status as a victim.").

acquaintance rapes are not regarded as “real rapes” and devoted her book to describing the inadequacies of the law and the ways to change it.

In Alice Sebold’s case, she saw the man who raped her on the street nearly six months after the crime took place.<sup>6</sup> He was charged and ultimately convicted and given the maximum sentence.<sup>7</sup> In this respect, Sebold’s story reads like a sequel to Estrich’s story in which the rapist is caught. At first blush, it also seems to bear out Estrich’s prediction that victims of stranger-rapes can get justice, at least when the defendant is black and the victim is white. But Sebold does not believe she was “lucky”: her title is meant to be ironic, a bleak rejoinder to those who expressed the view that she was lucky to be alive.<sup>8</sup> Sebold’s story vividly recounts her experience as a rape victim, the multiple harms of rape, and the effects that the trauma of the rape had on her life over the long term.

Although Sebold’s book is not a legal analysis or critique, it deals at length with her navigation of the legal system, from police investigation to trial and conviction. Sebold’s account shows that even for the “perfect” victim, who is young, white, and a virgin, an encounter with the law can be exceedingly tough and that it is not only acquaintance-rape victims who find it hard to see the process through. Additionally, the fact that Sebold’s rape occurred after the first feminist-inspired rape reforms of the 1970s meant that she was afforded a rape crisis counselor and a feminist district attorney who treated her with understanding and respect. These supports, however, did not bring closure or significantly lessen the injury produced by her attack. Her story suggests that, even if the challenges faced by victims of date and stranger rape differ in certain respects, the similarities are striking.

I believe that we are currently experiencing a backlash with respect to the issue of rape and its victims. The Kobe Bryant case dramatically demonstrates that skepticism towards rape victims has resurfaced with a vengeance.<sup>9</sup> Before the criminal charges were dismissed in that case, the defense challenged Colorado’s rape shield law as unconstitutional<sup>10</sup> and numerous media reports suggested that the pendulum of the law has swung too far toward victim’s rights and now unduly prejudices defendants.<sup>11</sup> In a

6. SEBOLD, *supra* note 1, at 103.

7. *Id.* at 201 (“It was the maximum for rape and sodomy: eight and a third to twenty-five years.”).

8. *Id.* at 3. *Lucky* begins with the following paragraph:

“In the tunnel where I was raped, a tunnel that was ONCE an underground entry to an amphitheater, a place where actors burst forth from underneath the seats of a crowd, a girl had been murdered and dismembered. I was told the story by the police. In comparison, they said, I was lucky.”

*Id.*

9. See Kirk Johnson, *Bryant Case Alters Rape Counselors’ Work*, N.Y. TIMES, Aug. 22, 2004, at A11 (“issues raised by the case have seeped in so completely . . . they have altered . . . how sexual assault victims think about their choices, their prospects of recovery and themselves.”).

10. See Charlie Brennan, *Privacy Rights Next in Bryant Case; Much of Two-Day Hearing to be Held Behind Closed Doors*, ROCKY MOUNTAIN NEWS, Feb. 26, 2004, at 22A.

11. See, e.g., Cathy Young, *How Much Should We Know About the Sex Life of Kobe Bryant’s Accuser?*, SALON.COM, INC. (Mar. 26, 2004), at [http://www.salon.com/mw/feature/2004/03/26/rape\\_shield/index\\_np.html](http://www.salon.com/mw/feature/2004/03/26/rape_shield/index_np.html).

no-holds barred defense, issues critical to rape reform surfaced—including the relationship between force and consent<sup>12</sup>—as did the specter of racial bias influencing the prosecution and jury.<sup>13</sup>

Additionally, in this post-feminist, postmodern era, some critics on the “left” have also raised doubts about the strategic value and validity of rape trauma.<sup>14</sup> Queer theorists and other critical scholars have lamented that we live in a “trauma culture” and have suggested that feminist discourses of trauma serve to prolong, and even to produce, the suffering of rape victims.<sup>15</sup>

It is against this backdrop that I present this review of Sebold’s powerful narrative and my reflections on what it means for legal feminists who continue to struggle with their understanding of rape at a time when the law of rape is once again a matter of intense public debate and scrutiny. Our culture is full of rape narratives, mostly gleaned from reported cases and media stories of current trials. Sebold’s story stands out, however, because of its thick descriptions and psychological insights, detailing how she felt to be a rape victim, how others responded to her, and how the law constructed events. My particular focus is on the book’s contributions to feminist theoretical debates about rape, what it potentially adds to the portrait of rape and rape law that can be gleaned from feminist writings since the first reforms in the 1970s.

12. Under Colorado law, recently revised in 2000, a defendant commits the crime of sexual assault if “the actor causes submission of the victim by means of sufficient consequence reasonably calculated to cause submission against the victim’s will.” COLO. REV. STAT. § 18-3-402(1)(a) (2000). The crime is enhanced if the submission is caused by the “actual application of physical force or physical violence.” COLO. REV. STAT. § 18-3-402(4)(a). Notably, Colorado’s new statute does not explicitly require the prosecution to prove that the victim did not consent and does not require the application of physical force to convict on the underlying crime, without enhancement. Bryant has urged an interpretation of the statute that would allow proof of consent as an affirmative defense and would also require the prosecution to prove that Bryant knew that the victim did not consent. See Defendant’s Submission of Revised Elemental and Related Consent Instructions (June 7, 2004) (on file with author) and Defendant’s Correction to Submission of Revised Elemental and Related Consent Instructions (June 11, 2004) (on file with author). The prosecution has argued that it need only prove that defendant’s conduct was sufficient to cause the victim to submit, thereby avoiding use of the “consent” terminology. The prosecution also takes the position that Colorado law does not require proof of mens rea—that is, proof that Bryant knew that the victim was not consenting to intercourse. People’s Brief in Opposition to Defendant’s Proposed Element Instruction and In Support of the People’s Proposed Instructions (June 7, 2004) (on file with author).

13. See Barry Bortnick & Dan Mangan, *Team Kobe Plays the Race Card*, N.Y. POST, June 22, 2004, at 7.

14. See WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* (1995); MARK SELZER, *SERIAL KILLERS: DEATH AND LIFE IN AMERICA’S WOUND CULTURE* (1998); Lauren Berlant, *The Subject of True Feeling: Pain, Privacy, and Politics*, in LEFT LEGALISM/LEFT CRITIQUE 105 (Wendy Brown & Janet Halley eds., 2002). For an insightful critique of the postmodern stance toward rape, see Carine M. Mardorossian, *Toward a New Feminist Theory of Rape*, 27 SIGNS: J. OF WOMEN IN CULTURE AND SOC’Y 743, 756–66 (2002).

15. See Brenda Cossman et al., *Gender, Sexuality, and Power: Is Feminist Theory Enough?*, 12 COLUM. J. GENDER & L. 601, 613 (2003) (“I myself would want to get better after an injury of that kind, not to suffer it forever, so here, again, I want to Take a Break from these feminisms.”).

After initially presenting a summary of *Lucky* and what I extract as its major themes, I take up three issues that recur in feminist commentary on rape. The first treats the always-difficult issue of the intersection of race and rape. Like so many cases, race was central to Sebold's case, as much as she might have wished it were not. It affected how the police investigated the case, how the attorney for the accused structured his defense, and the credibility of Sebold as the victim, even in this stranger-rape prosecution where consent was not at issue. Interestingly enough, *Lucky* indicates that the high potential for racial bias in our criminal justice system can negatively affect not only minority defendants but white victims as well, whose accounts are, not surprisingly, often viewed as tainted by racism.

The second issue I explore is the continuing controversy surrounding the proper categorization of rape as a crime of violence as opposed to a sex crime. A popular refrain of early feminist reformers in the 1970s was that rape was violence, not sex,<sup>16</sup> and that confusing the two minimized the harm of rape and contributed to a culture with a penchant for blaming the victim and normalizing rape. A main objective of this wave of reform was to "de-sexualize" rape and to expose its high incidence in the United States. This simple emphasis on violence was challenged in the 1980s by Catharine MacKinnon's influential, feminist account of rape as a manifestation of eroticized dominance and as inseparable from prevailing conceptions of sex.<sup>17</sup> MacKinnon's account highlighted that many encounters, particularly of the date and acquaintance variety, that may have passed for "consensual sex" were forced and unwanted from the perspective of the woman. MacKinnon's unearthing of the force beneath many "ordinary" sexual encounters and her refusal to conceptualize sex and violence as dichotomous, however, also tended to reinforce early feminists' claims that rape was a serious offense that caused harm rather than pleasure to its victims. At least when it came to stranger rape, where there is no preexisting relationship between the parties, one might have thought that, by the 1980s, the older notion that rape was fundamentally "about sex" had been laid to rest. Sebold's story shows, however, how traditional cultural views that conflate sex and rape are still with us and may affect not only the recovery process for a rape victim, but also the shape of the legal issues and strategy in a rape prosecution. This reiteration of the sex/violence debate is particularly salient, given that postmodern critics of sex regulation are beginning to talk about rape and sexual harassment as "sex crimes" once again.<sup>18</sup>

The third issue generated by *Lucky* goes to the core of the subject and seeks to deepen our knowledge of the harms of rape. For Sebold, reading Dr. Judith Herman's *Trauma and Recovery*<sup>19</sup> was pivotal to her understanding and theorizing of her own

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16. See ANN J. CAHILL, *RETHINKING RAPE 2* (2001) (discussing the "violence, not sex" school of feminist philosophy generated by Susan Brownmiller's book, *Against Our Will: Men, Women and Rape* (1975)).

17. See CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 173 (1989) ("Rape is not less sexual for being violent. To the extent that coercion has become integral to male sexuality, rape may even be sexual to the degree that, and because, it is violent.")

18. See Marc Spindelman, *Discriminating Pleasures*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* 201 (Catharine A. MacKinnon & Reva Siegel eds.) (critiquing Janet Halley's views on sexual harassment law).

19. JUDITH LEWIS HERMAN, M.D., *TRAUMA AND RECOVERY* (1992).

experience as a rape victim. In her famous book, Herman likens the trauma of rape victims to that experienced by combat soldiers, involving complex psychological and relational dynamics that often affect persons years after the events. Since the 1980s, we have had available the labels of Post Traumatic Stress Syndrome (“PTSD”) and Rape Trauma Syndrome to support our understanding of rape as a grievous harm.<sup>20</sup> This new understanding has served to justify severe penalties for the crime of rape in the United States today when there is no longer a consensus that a woman’s worth or honor is linked to her virginity/chastity and thus invariably destroyed by rape. Contemporary philosophical accounts of rape now often describe rape as a violation of a person’s sexual autonomy,<sup>21</sup> discarding older notions of honor or purity. As some feminist critics have long noted, however, these autonomy accounts do not seem to capture the full dimension of the harm.<sup>22</sup> For me, *Lucky* begins to answer the question of why rape is such a big deal, now that the stigma of the rape victim as “damaged goods” or “unmarriageable” has been so thoroughly discredited. It elucidates a harm to identity that, while socially constructed, can not easily be shaken off and can prove devastating to victims, males and females alike.<sup>23</sup>

### I. THE MEMOIR

Many readers, like myself, probably discovered *Lucky* only after they had read Alice Sebold’s acclaimed first novel, *The Lovely Bones*.<sup>24</sup> The narrator in that novel is a raped and murdered 14-year-old girl who describes and interprets events as she looks down from heaven. She possesses a kind of all-knowing victim’s perspective, rare in its comprehension of the ramifications of violence on the lives of those connected to her. *Lucky* displays the same keen victim insight as in *The Lovely Bones* and leads us to understand how Sebold came to be so expert at describing trauma and cataloguing social reactions to rape victims.

20. Post-Traumatic Stress Disorder (“PTSD”) first appeared in the American Psychiatric Association’s *Diagnostic and Statistical Manual* (3d ed.) (“DSM-III-R”), in 1980. Alan A. Stone, M.D., *Post-Traumatic Stress Disorder and the Law: Critical Review of the New Frontier*, 21 BULL. AM. ACAD. PSYCHIATRY & THE LAW 23 (1993). Rape trauma syndrome refers to the “acute phase of a clinically recognized PTSD subtype.” *Id.* at 27.

21. See, e.g., DAVID ARCHARD, *SEXUAL CONSENT* (1998); STEPHEN J. SCHULHOPHER, *UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW* (1998).

22. See, e.g., ROBIN WEST, *CARING FOR JUSTICE* 100–09 (1997). See generally Lynne Henderson, *Rape and Responsibility*, 11 LAW & PHIL. 127 (1992); Emily C. Shanahan, *Stranger and Nonstranger Rape: One Crime, One Penalty*, 36 AM. CRIM. L. REV. 1371 (1999).

23. See CAHILL, *supra* note 16. Cahill writes:

“By locating the body as central to a woman’s identity, while not demanding that such identity be unified or determined, contemporary feminist theories of the body will approach rape as a crime not limited to an assault on women’s sexuality, but as an assault on various but fundamental aspects of her embodied selfhood.”

*Id.*; see also Marc Spindelman, *Surviving Lawrence v. Texas*, 102 MICH L. REV. 1615 (2004) (discussing sexual violence against men).

24. ALICE SEBOLD, *THE LOVELY BONES* (2002).

### A. The Attack

*Lucky* begins with an unusually vivid description of Sebold's own rape. The rape took place as Sebold was walking home one night from a party, just after classes had ended for the spring semester at Syracuse. Sebold recalls that she was grabbed from behind by a man with a knife who threatened to kill her if she screamed. Despite the warning, Sebold initially screamed, kicked, and struggled to get away. But her resistance only seemed to make her assailant angrier: in response to her attempt to escape, the man pushed her down, pounded her head into the brick path, and strangled her so that she momentarily lost consciousness. Grabbing her by the hair, he then pulled her into a tunnel that was once an underground entrance to an amphitheater.<sup>25</sup>

At this point, Sebold gave up her physical resistance and sought to assuage the attacker with words.<sup>26</sup> Sebold's recounting of what happened next is exceptionally disturbing for what it reveals about the "negotiations" between an attacker and his victim and the intertwining of violence and sex. Sebold's experience of the rape was so structured by a fear of death that the legally significant act of penetration became just another action in a sequence of horrors and indignities that she was forced to endure.<sup>27</sup> Her strategy was to survive, and she was forced to improvise in ways that might not be immediately understandable, until she explained them. For example, when the rapist was having trouble getting her belt undone, Sebold volunteered to do it, in a sad and futile attempt "[t]o have him let go of me, for him to leave me alone."<sup>28</sup> Prefacing why she complied with the rapist's demands to undress, lie down and generally submit to him in the tunnel, Sebold tells us that "I became one with this man. He held my life in his hand. Those who say they would rather fight to the death than be raped are fools. I would rather be raped a thousand times. You do what you have to do."<sup>29</sup>

In reading Sebold's rape narrative, I was especially struck by how the rapist demanded not simply that she be passive and silent while he entered her, but also required her to participate in her own violation and take on responsibility for sustaining his erection and getting him to achieve orgasm. At one point, the rapist insisted that Sebold "kiss back;" at another point, when he failed to have an orgasm after the first penetration, he forced Sebold to give him a blow job and got angry when she told him that she did not know how. His hostility and scorn for her were palpable until he finally came—he repeatedly called her "bitch" and told her that she was "the worst bitch he has even done this to," a remark Sebold heard as being "said in disgust" and also, coldly, "said in analysis ... [when] [h]e saw what he bagged and didn't like his catch."<sup>30</sup>

Part of Sebold's survival strategy for the more than one hour she was in the tunnel was to use her mind to escape. She explained how she went into her brain in search of poems to recite, even mouthing the words, and mercifully felt numbness in the lower

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25. SEBOLD, *supra* note 1, at 5.

26. *Id.* at 6.

27. See also NANCY VENABLE RAINE, *AFTER SILENCE* 11 (1998). Raine offers another description of rape in which penetration is not experienced as the central act or harm: "In the scheme of things, his penis, although employed as a bludgeon, did not make much of an impression. What he did with it was the least of my worries." *Id.*

28. SEBOLD, *supra* note 1, at 8.

29. *Id.* at 7.

30. *Id.* at 8.

half of her body. For Sebold, every part of her was taken and owned by the rapist, "until all that remained unpossessed was [her] brain."<sup>31</sup> Echoing other victim accounts of a phenomenon known as dissociation,<sup>32</sup> Sebold noted that, in a disembodied fashion, her brain "looked and watched and catalogued the details of it all."<sup>33</sup>

An important part of Sebold's memory involves the response of the rapist. Up until the time he achieved orgasm, he was angry. Immediately thereafter, he indicated remorse, said he was sorry, called her a "good girl," and even cried at one point.<sup>34</sup> From his demeanor and tone, it was clear that ejaculation was a significant moment to him, likely the point of the attack. Tellingly, Sebold cites his parting request that she kiss him good-bye as indicating that "[i]t was a date to him."<sup>35</sup> However, right up to the end, when she was finally allowed to dress and leave, Sebold could focus only on preventing more violence and trying to placate her attacker in any way she could, including telling him that she forgave him. As she explained the "bargain," she "would die by pieces to save myself from real death."<sup>36</sup>

### B. The Aftermath

Like so many other significant experiences in life, the meaning of a rape is not fixed at the moment of the attack but evolves over time, as the victim responds to what has happened to her and witnesses others' reactions to her and the rape. Sebold's memoir reveals the personal and social meaning of rape through its numerous descriptions of how Sebold felt at various periods after the attack, how the rape affected others' perceptions of her, and how such social reactions in turn influenced Sebold's self-perception. As the title of the memoir suggests, in some respects, Sebold was a fortunate victim: she had parents who supported her and tried to help, friends who stuck by her, teachers who cared, and dedicated police officers and lawyers who prosecuted her case. However, if there is message in *Lucky* that stands out, it is that this was almost not enough.

Throughout the narrative, Sebold speaks of a "before" and an "after." To say that she felt like she was not the same person after the rape is an understatement. Life was not just different for Sebold after the rape; rather, the rupture produced by the rape was so profound it was as if the young woman Sebold had been before the rape had suddenly died (or been murdered) and been replaced by another being.<sup>37</sup> In trying to articulate this grievous harm to identity, Sebold makes the point that the dictionary definition of rape as "forcible intercourse" is woefully inadequate, exclaiming that the dictionary should "tell the truth" and disclose that "rape means to inhabit and destroy

31. *Id.* at 11.

32. See Lori A. Zoellner et al., *Peritraumatic Dissociative Experiences, Trauma Narratives and Trauma Pathology*, 15 J. TRAUMATIC STRESS 49 (2002).

33. SEBOLD, *supra* note 1, at 11.

34. *Id.* at 12.

35. *Id.* at 13.

36. *Id.*

37. *Id.* at 33 ("My life was over; my life had just begun."); *Id.* at 113 ("In my mind, the rapist had murdered me on the day of the rape.")

everything."<sup>38</sup> A tragic irony for Sebold is that her single-minded focus on survival during the rape did not protect her from its deadening after-effects.

Additionally, the realization that the rape had shattered her sense of self was incredibly painful to Sebold, so much so that she tried to deny it at every turn. When she first arrived back at home, for example, she acted tough and cracked a joke about the rape, in a vain effort to convince herself and her parents that "I'm still me."<sup>39</sup> And when her sister acted concerned that she might be upset by what was on television, Sebold became angry because she desperately wanted to believe that "I was still the same person I'd always been."<sup>40</sup> Despite these attempts at recapturing her old life, the trauma of the rape had an intensely separating effect on Sebold: she felt like she lived on a "different planet"<sup>41</sup> than her family. Subsequently, in an interview, Sebold expressed the view that "tabooed violence like a rape . . . is one of the most alienating experiences that . . . you can have."<sup>42</sup>

After the rape, Sebold began to see the world through the eyes of a rape victim, dividing the terrain into "the safe and the not safe."<sup>43</sup> Like a cancer victim who scans a room wondering who else has the disease,<sup>44</sup> Sebold saw violence everywhere,<sup>45</sup> and felt most connected to those who had also been the victims of violent acts.<sup>46</sup> The violence loomed so large that, oddly and tragically, Sebold remained psychologically linked to the rapist himself. Sebold eventually came to the realization that she shared her life "not with the girls and boys I grew up with, or the students I went to Syracuse with, or even the friends and people I've known since. I share my life with my rapist. He is the husband to my fate."<sup>47</sup>

The alienation produced by the rape was compounded for Sebold by the distancing reactions of many persons around her once they learned that she had been raped. Not unlike the response to someone who has a terminal disease or has just suffered a death in the family, Sebold sensed that people were often uncomfortable around her, which she interpreted as a statement that "I was no longer like her but was other than."<sup>48</sup> The experience of the rape also generated a feeling of self-loathing: Sebold believed she was ugly and untouchable and kept involuntarily recalling the rapist's words that she was "the worst bitch" he had ever had.<sup>49</sup>

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38. *Id.* at 123.

39. *Id.* at 51.

40. *Id.* at 60.

41. *Id.* at 68.

42. *A Conversation with Alice Sebold* (NPR radio broadcast, July 10, 2002) (transcript on file with the Indiana Law Journal) [hereinafter *Conversation*].

43. SEBOLD, *supra* note 1, at 90.

44. See Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other-Isms)*, 40 DUKE L.J. 397, 397-98 (1991).

45. See SEBOLD, *supra* note 1, at 80 ("In my world, I saw violence everywhere.")

46. *Id.* at 67 ("But what I remember is suddenly being in the presence of someone who 'got it.' Not just knew the facts, but—as near as she could—understood what I felt.")

47. *Id.* at 53.

48. *Id.* at 20.

49. *Id.* at 21.



Throughout the memoir, Sebold recounts how time-worn stereotypes about rape and rape victims colored the reactions of people towards her. For example, Sebold had to counter the myth that it is physically impossible to rape a woman who is unwilling, unless the rapist uses a weapon. Thus when Sebold's father learned that at the moment of penetration the rapist no longer had a knife, he became confused and could not understand how the rape could have occurred. Sebold took her father aside and patiently explained that when a rape is going on, even if the rapist has a weapon, the probabilities are that "the weapon is not there, in her face."<sup>50</sup> She got her father to understand that she had submitted out of fear, after she had been overpowered and beaten up. Her father then appreciated that it was indeed possible for a woman to be raped under such circumstances and saw the rationality in Sebold's insistence that "I couldn't want something like that, it's impossible."<sup>51</sup>

Perhaps most strikingly, several persons seemed to equate Sebold's rape with "having sex" and made assumptions about Sebold based on that categorization. The most explicit statement in this vein came from Sebold's therapist, a self-identified feminist, who joked that "I guess this will make you less inhibited about sex now."<sup>52</sup> More subtly, an older family friend who had been brutally attacked and beaten, but not raped, remarked that her experience was different from Sebold's because "[n]o one [was] interested in [her] in that way."<sup>53</sup> This prompted Sebold to protest that she had been *raped*, to underscore the similarity in their experiences.

The old portrait of a raped woman as forever ruined or spoiled also surfaced—one woman, for example, tried to comfort Sebold by saying "it wasn't such a bad thing growing up to be an old maid,"<sup>54</sup> implying that no one would want to marry Sebold now. Sebold admitted that she internalized these stereotypes and worried that no "nice boy" would want her.<sup>55</sup> Even Sebold's boyfriend, who in some ways treated her lovingly, was caught up with the idea of saving her, as if she were "a whore who, by virtue of his imagination and sense of justice, he could raise to the height of a lady."<sup>56</sup> The fallen woman image also lurked behind the response of the local priest who prayed for Sebold's soul as if she were lost because she had done something wrong.<sup>57</sup> Similarly, people expected Sebold to exhibit shame, like a proper victim. Sebold was stunned when some of her classmates at Syracuse seemed angry at her for returning to school after the summer break, as if by returning she had done something wrong.<sup>58</sup>

Interestingly enough, some people were attracted to Sebold precisely because she was a rape victim. A few students at Syracuse, whom Sebold barely knew, acted as if she were their best friend. Sebold speculated that "[k]nowing a victim is like knowing a celebrity[,] [p]articularly when the crime is clouded with taboo."<sup>59</sup> In another instance

50. *Id.* at 59.

51. *Id.*

52. *Id.* at 77.

53. *Id.* at 68.

54. *Id.* at 67.

55. *Id.* at 69.

56. *Id.* at 80.

57. *Id.* at 65.

58. *Id.* at 95.

59. *Id.* at 25.

of treating rape as if it were only sex, the celebrity seekers suggested that by being raped, Sebold had engaged in a transgressive, sexual act.

Much of the frustration and pain Sebold experienced from the reaction of even well-meaning family, friends, and acquaintances stemmed from their readiness to minimize the event. Because Sebold was thought to be a strong person, some assumed that she would simply get over the rape in time. Sebold's father even made the insensitive remark that he was glad that if it had to happen, it happened to her and not her sister, whom he apparently thought was too weak to withstand such a trauma.<sup>60</sup> The message sent by many was that Sebold should consider herself lucky because, after all, she was alive and had merely been raped.

### *C. The Prosecution*

Unlike most rape victims, Sebold never seemed to harbor doubts as to whether she should report the rape and assist in the prosecution. After an initial period of extreme disorientation following the attack,<sup>61</sup> she managed to walk back to her dorm, attempt to contact her best friend, and eventually ask the resident advisor to call the police. Sebold was first examined at the hospital and given Demerol, which made her very groggy. When she was subsequently interviewed by the police, she had a great deal of trouble staying awake and did not appear credible to the investigating officer. The officer's original report left out many of the details of the attack which he brusquely dismissed as "inconsequential" to the charges.<sup>62</sup> Sebold remembers that she "took each reprimand [by the officer] for what it was: an awareness that the specificity of my rape did not matter, but only how and if it conformed to an established charge."<sup>63</sup> Her case was put in the inactive file, apparently because the police did not believe her story and did not think she would return to Syracuse after the summer.<sup>64</sup>

The case was prosecuted only because of the fortuity that Sebold happened to see her rapist on the street one day after she returned to college from summer break. He recognized her and smirked, asking her, "[H]ey girl, . . . don't I know you from somewhere?"<sup>65</sup> When she rushed away, he was brazen enough to begin speaking to a policeman who was standing not far away. Sebold tried to memorize what he was wearing but was too stunned and afraid to approach the policeman at that point. Thereafter, she reported the sighting to the police, who immediately went into high gear in their search for the assailant.

Race factored heavily into the identification and apprehension of Gregory Madison, the man ultimately arrested and convicted of Sebold's rape. Even before she saw him on the street, Sebold was aware in her mind that she had linked the rapist to black men in general and at first sight of him from behind thought that it was "just a more intense

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60. *Id.* at 57.

61. *See id.* at 14 ("I wasn't there. I heard them outside of me, but like a stroke victim, I was locked inside my body.").

62. *See id.* at 31 ("How he twisted my breasts, or shoved his fist up inside me, my virginity: inconsequential.").

63. *Id.* at 31.

64. *Id.* at 144-45.

65. *Id.* at 103.

version of the fear I had felt around certain black men ever since the rape."<sup>66</sup> She only became sure of her identification after he approached her and spoke to her.

By that time, Sebold had already realized that her rape by a black man had the capacity to stimulate racist reactions on the part of those who wanted to protect her. Shortly after the rape, she heard her father refer to the black men he saw on the streets of Philadelphia as "animals," a remark that seemed wildly out of character for him.<sup>67</sup> Most dramatically, the police officer who searched for Madison after the sighting took time out to chase and beat up three innocent black students he saw on the street, even though Sebold had told him that they were too tall to be the rapist.<sup>68</sup>

As the case unfolded, the main issue was that of identification, as is common in stranger-rape cases where the issue of consent is not likely to provide a plausible defense. On this crucial issue, Sebold tripped up when she failed to identify Madison in a lineup. As she subsequently explained her mistake, Sebold felt intimidated by the close quarters of the lineup room<sup>69</sup> and was thrown off when a man who looked a lot like Madison stared right at her through the glass, while Madison kept his head down. Sebold's lawyer later told her that the "ringer[]" for Madison was actually his friend, whom Madison had used in other lineups to psyche out the victim.<sup>70</sup> The misidentification could have dealt a fatal blow to the prosecution if the forensic evidence had been weaker—it turned out, however, that a pubic hair, recovered from Sebold as part of the rape kit, perfectly matched a sample taken from Madison.<sup>71</sup>

Sebold testified at trial and in front of the grand jury. Both of these experiences were grueling for her, even though, as a virgin, she had no sexual past that the defense could exploit to impugn her integrity. What made Sebold particularly tense is that she knew her performance as a witness could make the difference between acquittal and conviction.<sup>72</sup> She felt exposed and shamed when she recited what happened during the rape, and even when she admitted that she had never had sexual intercourse before. Additionally, during the process, Sebold figured out that she could not tell the whole truth and expect to win. Instead, she chose to compromise and tell small strategic lies, particularly about her thoughts and motivations. For example, in response to a grand juror's question as to why she was walking in the park late at night, she quickly accepted blame, said she was stupid and promised to warn other girls about the park.<sup>73</sup> In fact, the very question had "made her numb;" she believed that the jurors were just not "getting it" if they could imply that she, rather than the rapist, was somehow responsible for the attack.<sup>74</sup>

66. *Id.*

67. *Id.* at 54.

68. *Id.* at 109.

69. *Id.* at 136 ("[T]he rooms I'd seen on cop shows were nothing like this one. . . . [W]hen they entered and turned, the front of their bodies would be almost flush against the mirror.").

70. *Id.* at 140.

71. *Id.* at 148.

72. *Id.* at 174 ("It was saying the words out loud and knowing it was *how* I said them that could win or lose the case.") (emphasis in original).

73. *Id.* at 144.

74. *Id.* at 143.

In many respects, Sebold's case was favorable to the prosecution. In fact, Madison chose a nonjury trial because, as Sebold's lawyer put it, the "superficials" of the case might sway a jury to convict.<sup>75</sup> Because Sebold's case was the prototypical stranger-rape case, it gave the defense fewer opportunities to shift the blame to the victim by suggesting either that she welcomed or should have prevented the attack. Even before trial, Sebold concluded that what was important was that:

I was a virgin. He was a stranger. It happened outside. It was night. I wore loose clothes and could not be proven to have acted provocatively. There were no drugs or alcohol in my system. I had no former involvement with the police of any kind, not even a traffic ticket. He was black and I was white. There was an obvious physical struggle. I had been injured internally—stitches had to be taken. I was young and a student at a private university that brought revenue to the city. He had a record and had done time.<sup>76</sup>

Sebold, however, was not pleased that these factors, which she dubbed the "cosmetics of rape,"<sup>77</sup> would be central to proving her case. To a large extent, she considered those factors irrelevant to what happened to her in the tunnel and the enormous effect it had on her life.

At trial, the defense strategy was aimed at showing that Sebold was wrong in her identification of Madison, and it hinged largely on race. Not surprisingly, the attorney for Madison honed in on Sebold's misidentification at the lineup. His line of questioning suggested that Sebold had trouble telling black people apart and had panicked when she saw a black man on the street who spoke familiarly to her.<sup>78</sup> The theory of the defense was that Sebold had simply connected Madison in her mind to the rapist, the kind of involuntary cognitive association that Sebold herself had noticed. To bring home the salience of race to the case, Madison's attorney asked her if she had identified Madison at any time other than on the street. When she replied that she had identified him earlier that day in court, the attorney asked: "How many black people do you see in this room?"<sup>79</sup> The question was meant to underscore that Madison was the only black person in court.

The discussion of Madison's race had the effect of compounding Sebold's guilt and made her feel powerless. She felt "guilty for the race of my rapist, guilty for the lack of representation of them in the legal profession in the City of Syracuse, guilty that he was the only black man in the room."<sup>80</sup> The questioning eventually wore her down; she claimed that "this wouldn't be the first time, or the last, that I wished my rapist had been white."<sup>81</sup>

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75. *Id.* at 168.

76. *Id.*

77. *Id.* at 23.

78. *See id.* at 139.

79. *Id.* at 195.

80. *Id.*

81. *Id.* at 198.

#### *D. Long-Term Effects*

After the trial, everyone—most of all Sebold—wanted her to put the rape behind her and for a time it seemed that she might be able to do just that. She stayed in school, went out with friends, had a boyfriend, and believed that, unlike one of her classmates who had been sexually abused growing up, she would not “wear the rape eternally.”<sup>82</sup> She was determined to “lose” her virginity by her own choice, but her first sexual encounter after the rape was marred by the resemblance it bore to the rape. Her partner seemed interested only in his pleasure and was irritated when she did not respond in a way he liked.<sup>83</sup> Overall, the main message of the last portion of Sebold’s book is that, despite her desire and efforts, she could not shed the damaging effects of the rape.

By her own estimation, Sebold did not begin the process of recovery in earnest until over a decade after the rape. Events in her life certainly did not help to speed up the process. Most significantly, in her final year of college, Sebold’s roommate was also raped. Although she tried her best to support her friend, Sebold was deeply hurt when her friend decided not to press charges, to change roommates, and to stop speaking to Sebold, treating her as if she had a disease that was “catching.”<sup>84</sup>

Throughout this period, Sebold was extremely concerned about being safe. She quit a job that required her to work at night, stopped going to poetry readings, and often found herself in a state of “hypervigilance” where she imagined that someone was lurking in the dark waiting to pounce. She had nightmares and began drinking a lot. To reach the desired state of “oblivion,” Sebold also began using heroin.<sup>85</sup> She became depressed, stayed in bed and began eating and gaining weight.

It was not that Sebold was totally unable to function during this period. She taught writing as an adjunct instructor at Hunter College and felt a genuine connection to her students. She even began talking about her rape publicly, and published a first-person account in the *New York Times Magazine* in 1989.<sup>86</sup> But it was not until she read *Trauma and Recovery* that she realized that she had been suffering from post-traumatic stress disorder and had exhibited many of the same symptoms as combat veterans returning from Vietnam. She went into therapy and gradually began to feel hopeful.

For Sebold, writing the memoir of her rape was an essential step to becoming a novelist. She stated that she felt a need to record the facts of her own rape first, in order to free herself from having to use fiction to “tell the real deal about every detail of rape and violence.”<sup>87</sup> Although several years had passed since her rape, Sebold’s narrative is told in a confident tone with a sense of immediacy. To stimulate her memory, she went back and read the journals she wrote shortly after the rape. Interestingly, however, she believed that her memory of the rape and the trial were better 5–7 years after the event, and even up to 10 years after, than it was in the 3–4 years afterwards.<sup>88</sup> I read Sebold

82. *Id.* at 205.

83. *Id.* at 157 (saying at one point, “[l]et’s get the show on the road”).

84. *Id.* at 224.

85. *Id.* at 152.

86. Alice Sebold, *Speaking of the Unspeakable*, *N.Y. TIMES*, Feb. 26, 1989, § 6 (Magazine), at 16.

87. *Conversation*, *supra* note 42.

88. *Id.* at 6.

as believing that as long as trauma blocks one's memory, there can be little understanding, and little chance for recovery.

## II. RAPE TRIALS AND RACISM

In one important respect, although Sebold's story recounts a crime that took place in the early 1980s, *Lucky* is very much a contemporary rape narrative. *Lucky* is current because it takes account of race in a nonsuperficial way and attempts to trace the effects of race on everyone involved. Sebold was fully aware that race was relevant in her case, not only in the courtroom but also through her own and others' responses to the rape.

By the time Sebold wrote her memoir, the topic of the interplay of race and rape had received sustained and deep attention by scholars, social scientists, and activists.<sup>89</sup> In fact, perhaps the most lasting lesson of the black feminist critique of feminism in the 1980s has been that the history of rape in the United States, particularly the legal history of rape, is inseparable from the history of racism.<sup>90</sup>

Our understanding of how racism affects rape and rape trials has come in small pieces. At first, women of color and other diversity-minded feminists stressed that skepticism toward rape victims and their presumptive lack of credibility did not apply with equal force in cases where the victim was white and the accused was black.<sup>91</sup> In such situations, the tables could be turned, such that juries and prosecutors might be too eager to credit the victim's account, raising the risk that an innocent man might be falsely accused. One need only recall the famous Scottsboro Boys case and the lynching of Emmett Till to realize that the ideology of racism made it easier for whites to believe the myths that black men were prone to rape and that white women would not voluntarily consent to have sex with black men.<sup>92</sup> Even in a post-civil rights society, with racially integrated juries, such racist stereotypes proved resilient: social scientists have documented that stricter sentences are meted out to black defendants and those convicted of raping white women, showing that the race of the victim as well as the race of the defendant still matters.<sup>93</sup> Most dramatically, initiatives like the Innocence Project have resulted in the release of black men who had served long

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89. See, e.g., Angela Y. Davis, *Race, Racism, and the Capitalist Setting*, 9 THE BLACK SCHOLAR 25 (1978); Jennifer Wriggins, *Rape, Racism, and the Law*, 6 HARV. WOMEN'S L. J. 103 (1983).

90. See, e.g., GARY D. LAFREE, RAPE AND CRIMINAL JUSTICE 114-47 (1989).

91. See PATRICIA HILL COLLINS, BLACK FEMINIST THOUGHT 177 (1990); Davis, *supra* note 89, at 25 (discussing the myth of the black rapist).

92. See JAMES GOODMAN, STORIES OF SCOTTSBORO, at xii (1994); JUAN WILLIAMS, EYES ON THE PRIZE: AMERICA'S CIVIL RIGHTS YEARS 1954-1965, at 39-52 (1987); Rebecca Wanzo, *Say It Ain't So Ko! Kobe Bryant, the Presumption of Innocence, and the Possibility of Guilt* (unpublished manuscript on file with author).

93. See LAFREE, *supra* note 90, at 132 (black men convicted of rape tend to receive harsher punishments); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241, 1269 (1991) (citing Dallas study showing that the average prison term for a man convicted of raping a black woman was two years, as compared to five years for the rape of a Latina and ten years for the rape of an Anglo woman).

prison sentences for rapes that they could now prove they did not commit, demonstrating the horrible consequences of the system getting it wrong.<sup>94</sup>

The second piece of the diversity perspective on rape, which emerged most forcefully after Anita Hill testified before Congress, focused on women of color as victims of rape and sexual harassment. Writers such as Jenny Wriggins and Angela Harris explained that racism not only resulted in disparately harsh treatment of minority defendants, but also in less protection for minority victims.<sup>95</sup> Because women of color were stigmatized as being promiscuous by nature, they were often regarded as unrapable, regardless of whether the accused was a stranger or an acquaintance. The skepticism that selectively affected white rape victims could harden into a near insuperable obstacle for women of color who were sexually assaulted. They were perceived as departing too far from the prototypical rape victim to make their stories believable.<sup>96</sup> In cases in which the accused was also black, moreover, victims might be extremely reluctant to report the crime, both because of their mistrust of the criminal justice system and also because they wished to avoid being perceived as a traitor who lacked racial solidarity.<sup>97</sup>

The next and ongoing step in the diversity critique has been to construct an intersectional theory of rape that explains the different ways sexism and racism work together to affect individual experience and social understanding, and to alter results in rape trials.<sup>98</sup> In this more complex approach to rape, single-pronged explanations, such as Estrich's emphasis on acquaintance versus stranger rape, are subject to criticism for being reductionist and implicitly centering the experience of white women.<sup>99</sup> In this second generation of feminist theorizing on rape, there has been an effort to identify with more precision the specific mechanisms of bias that filter into social interactions and legal proceedings. Particularly with the help of narrative, writers have attempted to tease out the content of various stereotypes, myths, and other social perceptions that surround sexual violence and injury.

In this vein, Sebold's book gives a complicated account of how her whiteness simultaneously privileged and disadvantaged her legal case. Sebold readily admits that because hers was a stranger-rape case with a white victim and a black defendant, the odds favored the prosecution. This racial element was one of the important "superficials" of the case, likely a key factor in persuading Madison to waive his right

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94. See Morgan Falconer, *The Picture of Innocence: When Justice Goes Awry, People Can Spend Years in Prison for Crimes*, THE INDEPENDENT, June 28, 2004, at 12–13; Samantha Weinberg, *Crime Trials and Errors*, THE OBSERVER, May 4, 2003, at 22.

95. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Wriggins, *supra* note 89.

96. See Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 SO. CAL. L. REV. 747, 782–789 (2001) (discussing rape prototypes).

97. See Kimberle Crenshaw, *Whose Story Is It Anyway? Feminist and Antiracist Appropriations of Anita Hill*, in RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY 415 (Toni Morrison ed., 1992).

98. *Id.* at 402.

99. See generally Harris, *supra* note 95.

to a jury trial.<sup>100</sup> Even if the decision had no determinative effect on the ultimate outcome, it did spare Sebold the particular ordeal of testifying in front of a trial jury. Particularly since Sebold thought that the experience of testifying before a judge was extraordinarily difficult, she may have been lucky not to have had to endure a jury trial. As mentioned above, some questions posed by the grand jurors indicated that they were not immune from blaming a victim for failing to prevent her own rape.<sup>101</sup> From this perspective, Madison's race may have afforded Sebold a strategic advantage by channeling the defendant into making choices to minimize the risk of racial bias, even if it took some pressure off his legal adversary, the rape victim.

Sebold's race may have also been a factor in the considerable effort put forth by the police investigating the case, at least after their initial skepticism toward her story. Once Sebold spotted Madison on the street six months after the rape, the police seemed determined to find and arrest her attacker. Sebold's case even inspired the fury of one officer because she reminded him of his niece who had recently been gang-raped.<sup>102</sup> It is doubtful that there would have been this level of identification with, or desire to, avenge a nonwhite victim. Of course, other confounding factors—particularly medical evidence of Sebold's virginity—may also have been influential in shaping the police response.<sup>103</sup>

Although Sebold does not shy away from suggesting ways her race-privilege potentially affected her case, she may not always have been aware of the extent of that privilege. As critical race theorists have pointed out, white privilege is often invisible, particularly when whiteness seems primarily to function as a background color which is taken as the norm.<sup>104</sup> For example, when Sebold expressed anger at feeling guilty for accusing the only black man in the courtroom, and wished that her attacker had been white,<sup>105</sup> she did not have occasion to ask what it might be like to be a woman of color in her position, to be the only other person who looked like the defendant in the whiteness of that courtroom. Despite her feelings of racial discomfort and guilt, Sebold's race may have subtly lessened her sense of alienation as she negotiated the legal process, even if she believed that, as the rape victim, she was indelibly separated out and marked.

Sebold is most incisive when she details how Madison's race hurt her case, or at least how it made the case harder to prosecute. Her analysis goes beyond a simplistic assertion that Madison's attorney "played the race card," although her book implicitly makes that claim. Instead, Sebold explains how the fact that Madison was black served

100. SEBOLD, *supra* note 1, at 168.

101. *Id.* at 144.

102. *See id.* at 108.

103. *See id.* at 145 ("[W]hen the serology reports proved . . . that I had been a virgin . . . he [officer Lorenz] could not respect me enough.").

104. *See, e.g.,* Barbara J. Flagg, *Was Blind But Now I See: White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 956 (1993) (discussing "transparency" of white-specific norms); Martha R. Mahoney, *Segregation, Whiteness, and Transformation*, 143 U. PA. L. REV. 1659 (1995) (discussing social construction of meaning of whiteness); Stephanie M. Wildman & Adrienne D. Davis, *Language and Silence: Making Systems of Privilege Visible*, 35 SANTA CLARA L. REV. 881 (1995) (discussing the "normalization" of privilege).

105. SEBOLD, *supra* note 1, at 198.



to diminish her credibility as a complaining witness and provided Madison with a defense in an otherwise indefensible case.

Unlike many contemporary backlash narratives which start from the premise that discrimination is now visited primarily upon whites, however, Sebold appears to embrace the view that white supremacy still exists and primarily harms minorities. As I read her account, the problems in her case did not stem from either a drive for black revenge against whites or a misguided impulse of political correctness. Instead, predictable distortions in the process surfaced as the actors tried, with varying degrees of good faith, to compensate for racism in our society.

Whether the rape being prosecuted is a stranger or an acquaintance rape, the outcome often turns on the credibility of the alleged rape victim.<sup>106</sup> Despite attempts at rape reform aimed at refocusing attention away from the victim and onto the actions of the defendant,<sup>107</sup> critical issues still emerge during rape trials which depend on whether the accuser is telling the truth and is giving an accurate account of events. The importance of a victim's credibility is easiest to see in acquaintance-rape cases, in which the defendant asserts that there was no rape because the woman consented. But as Sebold's narrative so aptly demonstrates, credibility can be crucial in stranger-rape cases as well.

As mentioned earlier, Sebold's case did not involve a defense of consent. At first, Sebold's attorney worried that the defense might try to argue that Sebold lost her virginity by having consensual sex with someone other than Madison, subsequently regretting it, and then deciding to blame "any black man" she ran into on the street.<sup>108</sup> However, as the criminal proceedings progressed, it became clear that the defense would not contest that Sebold had indeed been raped, but would instead argue that this was a case of misidentification.

Tellingly, whether a consent defense is asserted or not, the race of the defendant can nevertheless enter into the equation. In the consent scenario above, the victim assertedly fabricates the story of rape to cover up her own indiscretion and immoral behavior. This is a familiar script that rape victims of an earlier era often confronted.<sup>109</sup> It was then thought that sex outside of marriage was so stigmatizing for a woman that it was not surprising that women would cry rape to save themselves from disgrace. Now that the stigma of premarital sex has lessened, the script seems to have been updated to inject a racist response from a victim. The twenty-first century version of the script is that a white victim selects a black man—any black man—to pin the crime on, presumably because of the stereotypical association of black men and crime. The possibility of such racist opportunism on the part of rape victims has been rendered

106. See MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 228–31 (2d ed. 2003) (discussing the credibility of rape victims and causal attributions for rape).

107. See STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 29–33 (1998) (discussing feminist reforms of rape laws).

108. SEBOLD, *supra* note 1, at 141.

109. See, e.g., Susan Estrich, *Palm Beach Stories*, 11 LAW & PHIL. 5, 11 (1992) ("No myth is more powerful in the tradition of rape law than the lying woman: the spurned lover who seeks revenge; the deflowered virgin who refuses to accept responsibility for her sexual activities; the vicious and spiteful woman who would lie about a rape charge.").

plausible by some high profile murder cases.<sup>110</sup> The possibility of such a “racial hoax” was planted in the public consciousness by the infamous Stuart murder case which took place in Boston.<sup>111</sup> In that case, a husband tried to cover up the murder of his pregnant wife by claiming that a black stranger was the perpetrator. The chilling case of Susan Smith, who drowned her children and initially pointed the finger at an anonymous black man, is a similar narrative.<sup>112</sup> The principal difficulty with deploying this theory in a rape case is that it still requires the defense to come up with a reason why the victim would lie about having consensual sex,<sup>113</sup> even if it explains why she might single out a black defendant to blame.

In Sebold’s case, where the issue became one of accuracy of identification, the defense did not need to prove Sebold was a liar, but only that she was mistaken. As explained by her attorney, the defense strategy would be to portray Sebold as confused and panicky.<sup>114</sup> Race would then come into play to supply a reason why Sebold might make a mistake about something as important as the identity of her attacker. In the misidentification scenario, the story was that Sebold was attacked by a black man and in her mind connected black men, in general, with the rapist. The defense then would attempt to convince the judge that Sebold’s memory of the rape could not be trusted, that she singled out Madison because he was a black man who spoke familiarly to her on the street.<sup>115</sup> In Sebold’s particular case, of course, her failure to identify Madison in the lineup bolstered the defense theory; presumably, if she could make a mistake at the lineup, she could also be wrong about Madison being the rapist.

What Sebold’s narrative reveals is how intricately race can be implicated in basic questions of accuracy and credibility in a rape trial. It should be emphasized that Sebold felt sure of her identification—she had been with Madison in the tunnel for an hour; he had spoken to her throughout the attack; and details of his body, his features, were firmly etched in her memory.<sup>116</sup> According to Sebold, the fact that she had been tricked and intimidated at the lineup only served to worsen Madison’s crime against her. The lineup, however, did not shake her faith in her own assessment of what had happened.

At the same time, Sebold realized that, since the rape, she was more fearful of “certain black men,”<sup>117</sup> and, in that sense, Sebold *had* made a mental association between race and rape. Sebold’s reaction is not surprising given that social psychologists tell us that race is one of those highly salient personal characteristics that tends to stick in one’s memory, often playing a leading role in the causal scripts that

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110. See, e.g., *People v. Adams*, 721 N.E.2d 1182 (Ill. App. Ct. 1999); *Routier v. State*, 112 S.W.3d 554 (Tex. Crim. App. 2003).

111. KATHERYN K. RUSSELL, *THE COLOR OF CRIME: RACIAL HOAXES, WHITE FEAR, BLACK PROTECTIONISM, POLICE HARASSMENT, AND OTHER MICROAGGRESSIONS* 70 (1998).

112. See *id.* at 69.

113. The defense attorney might argue that the alleged victim is mentally unstable, reminiscent of old arguments which linked allegations of rape to mental disorders.

114. See SEBOLD, *supra* note 1, at 139.

115. See *id.*

116. *But see* Jennifer Thompson, *I was Certain but I was Wrong*, N.Y. TIMES, June 18, 2000 at 15 (victim’s identification discovered to be wrong on the basis of DNA taken after the accused served eleven years in prison).

117. *Id.* at 103.

people commonly rely on to explain events.<sup>118</sup> The more difficult question was whether this racialized fear induced by the rape would manifest itself in confusion and inaccuracy when it came to making a personal identification.<sup>119</sup>

In addition to highlighting the potential racial residue of the rape, race was potentially implicated in Sebold's case in three other ways. First, the defense suggested that because Sebold was white, she might have less familiarity with black men and thus would be less able to make an accurate identification of a black man. In essence, this claim is that, to a white woman, particularly a woman who had suffered the trauma of a sexual assault, black men tend to look alike. Madison's attorney tried to make it seem that Sebold felt certain of her identification only because the defendant was the sole black man in the courtroom. Subsequently, Sebold's attorney "rehabilitated" her testimony by eliciting testimony to the effect that Sebold came into contact with many black men during the course of her everyday life at college.<sup>120</sup> If the case were tried today, Madison's attorney might also have sought to introduce an expert witness to testify about the risks posed by cross-racial identification, and, in a jury trial, to ask for a cautionary instruction about the unreliability of such identifications.<sup>121</sup>

The second way that race played into Sebold's case was that it affected the actions of those involved in the case. After the rape, Sebold witnessed how her father suddenly grew angry at the sight of black men on the street,<sup>122</sup> as if the cause of his daughter's rape was society's failure to control black criminality. The Syracuse police officers also took out their anger by beating up innocent black students,<sup>123</sup> again seeming to link Sebold's rape to a general propensity on the part of black men to engage in sexual violence. These racist responses were not introduced as evidence in the case. The testimony stuck more closely to facts relevant to Sebold's credibility as a witness and did not delve into the motives and actions of the police. By including these facts in her narrative, however, Sebold provides support for a defense theory that Madison was plausibly a victim of racial injustice.

Finally, from Sebold's account of her own testimony, the defense may have tried to construct a particular racialized portrait of Sebold to undermine her credibility. As mentioned above, the defense hoped to cast doubt on Sebold's identification by portraying her as a confused, panicked, young girl who could not be trusted to be accurate. During cross-examination, in particular, the defense attorney questioned Sebold extensively about her actions following the rape and her sighting of Madison on the street.<sup>124</sup> Although she was the rare victim who reported the rape very shortly after it happened, and notified the police after she saw Madison on the street, the questioning was designed to ridicule Sebold for first calling her parents, and consulting

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118. See Susan T. Fiske, *Stereotyping, Prejudice, and Discrimination*, in HANDBOOK OF SOCIAL PSYCHOLOGY 357 (4th ed. 1998).

119. See JODY DAVID ARMOUR, NEGROPHOBIA AND REASONABLE RACISM 61 (1997) (discussing "the profoundly personal level" at which the link between race and rape can be forged in the mind of crime victims).

120. SEBOLD, *supra* note 1, at 198.

121. See Joy L. Lindo, Note, *New Jersey Jurors Are No Longer Color-Blind Regarding Eyewitness Identification*, 30 SETON HALL L. REV. 1224 (2000).

122. See SEBOLD, *supra* note 1, at 54.

123. *Id.* at 110.

124. *Id.* at 186-98.

friends in the dorm before going to the police.<sup>125</sup> In addition to making Sebold feel uncomfortable on the stand, the suggestion that her reactions were that of an immature girl seemed to spillover and to trivialize her injury. Similarly, several questions were directed at what Sebold was wearing at the time of the rape. After Sebold testified that she was wearing "Calvin Klein jeans, blue work shirt and a heavy beige cable-knit cardigan sweater,"<sup>126</sup> the defense attorney made it a point to repeat "Calvin Klein" when referring to her pants, apparently in an attempt to conjure up an image of the kind of girl who would wear Calvin Klein jeans.<sup>127</sup> Overall, the tone and line of questioning created the impression of a flighty, young, privileged white girl who shouldn't be taken too seriously. It is interesting that this portrait tracks what feminist theorist Catharine MacKinnon describes as the stereotypical image of a white woman: "effete, pampered, privileged, protected . . . and self-indulgent . . . who alternates between fantasizing about fucking black men with accusing them of raping her."<sup>128</sup>

In her book, Sebold does not attempt to add up the race-linked advantages and disadvantages to her case and calculate a net gain or loss. Instead, the evaluation of race that implicitly emerges from her narrative is a complex one that has the ring of truth. Sebold seems to accept that Madison's race potentially affected the legal process. Being a black man accused of raping a white woman, Madison had to deal with the social perception that black men have a propensity to rape and to counter the contrast the prosecution would inevitably draw between him and the young, white, female victim. Sebold's story reveals that her accusation itself stimulated race prejudice among the police and others and that Sebold herself could not be color-blind, even if she wished it were not so.

The major challenge for Sebold as the victim in this case was to present herself and her testimony in such a way as to counter the apprehension that racism had infected the legal process. She could not just tell her story and have confidence that the truth would prevail, although she stated that she got through some tough parts of the questioning by "listening to what I knew to be the truth and I spoke from that place."<sup>129</sup> Instead, she was also forced to counter a racialized stereotype of herself as a false accuser and to try to persuade the judge that her story was trustworthy. It is not easy for a rape victim to have to defend her position at the same time she is being reminded of the humiliation and crushing fear of the attack. Sebold's frustration at having to defend herself against an implicit charge of racism indicates that she, as well as Madison, might have been better off if racism in the criminal justice system were not such a pervasive reality.

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125. *See id.* at 194.

126. *Id.* at 125.

127. *Id.* at 125-26, 194. Recall the Brooke Shields advertisement for Calvin Klein jeans: "Nothing comes between me and my Calvins." *See* David Cole, *Playing by Pornography's Rules: The Regulation of Sexual Expression*, 143 U. PA. L. REV. 111, 178 n.137 (1994).

128. Catharine A. MacKinnon, *From Practice to Theory, or What Is a White Woman Anyway?*, 4 YALE J. L. & FEMINISM 13, 18-19 (1991) (describing the image as one of "sexualized infantilization").

129. SEBOLD, *supra* note 1, at 185.

### III. THE SEX/VIOLENCE DICHOTOMY

A great virtue of narrative over theory is its ability to transcend false “either/and” dichotomies and present a nuanced “both/and” picture of social phenomena. Thus, in her narrative, Sebold did not have to take a position on whether her rape was more like our familiar prototypes of “violence” than “sex” or how closely her experience resembled that of victims of crimes that do not have a sexual dimension. Instead, her story provides details of how rape as a particular form of sexualized violence felt to her, how others perceived it, and the various social meanings attached to it.

At the outset I should say, however, that because Sebold found nothing pleasurable, instructive, or exciting about her rape, her descriptions resonate mostly as violence, with sex modifying the type of violence, rather than the other way around. I believe that Sebold would find it insulting to describe her rape as violent sex.

When 1970s feminist reformers insisted that rape was violence, not sex, they were making a strategic move in response to the traditional attitude that found it difficult to see the harm in rape because of its superficial resemblance to sexual intercourse. Equating rape to sex has so many ramifications that it is impossible to specify them all. Among the most noticed are: how it eclipses the way in which rape often harms its victims in a pattern similar to other violent crimes and traumatic experiences; how it makes it extremely difficult for sexually experienced women to convince others that they have been victimized by rape; how it provides a reason to believe that women secretly wish to be raped, even if they later deny it; and how it serves to normalize violence in intimate relationships. Many activists in the anti-rape movement proceeded under the assumption that unless the connection between rape and sex were severed, there would be little hope of treating rape as a serious crime and little chance that women would not be blamed for provoking or failing to prevent rape. One rape survivor has stated, for example, that rape is one of the “most insidious” crimes precisely because “[i]t is the only crime of violence that masquerades as sex.”<sup>130</sup>

One staple in feminist analyses of rape is that, to understand rape, it is important to listen to the accounts of victims and to grasp the experience from the victim’s perspective.<sup>131</sup> The sexist prototype of rape as a species of sex stems largely from interpreting the encounter from the eyes of the perpetrator, who might indeed label the event as “baving sex.” In this regard, Sebold’s narrative is particularly instructive; her attempt to remember and recount exactly what happened during the rape reveals the absence of anything resembling sexual desire or excitement on her part, but a very different response from Madison.

As I read her gut-wrenching account, Sebold was fixed on survival. Her overriding emotional reaction to the attack was fear for her life. There is nothing in Sebold’s account, for example, to suggest that she was primarily interested in protecting her virginity or preventing penetration. From the moment the attack began, Sebold was afraid that Madison would kill her and tried everything she could think of to stop him from doing that. Tellingly, if Sebold were forced to single out the most painful part of the attack, I doubt she would select the moment of penetration. Her narrative indicates

130. RAINE, *supra* note 27, at 225.

131. See, e.g., Patricia A. Cain, *Feminist Jurisprudence: Growing the Theories*, 4 BERKELEY WOMEN’S L.J. 191, 195 (1989–90) (“Listening to women and believing their stories is central to feminist method.”).

that what the law (and the police) found to be most significant and consequential did not correspond to her assessment of the harm.

In contrast, Madison's conduct revealed that he was focused on having an orgasm. His demeanor changed markedly after he came; the violence then subsided, and he expressed concern for Sebold's well being, calling her a "good" and a "beautiful" girl.<sup>132</sup> Sebold's lawyer explained to her that Madison fit the profile of a "power rapist."<sup>133</sup> According to studies, power rapists are generally incapable of sustaining an orgasm, and to do so, they must feel that they have completely dominated their victim, physically and emotionally.<sup>134</sup> For Madison, the violence was entwined with his sexual pleasure and orgasm. To call Madison's experience "violent sex" thus seems far more fitting than applying the same term to what Sebold endured. The choice of language seems to matter here, suggesting an implicit alignment with either the victim (violence) or the perpetrator (sex).

As if to underscore that Sebold did not regard the rape as a sexual encounter, she resisted the characterization that she had "lost" her virginity as a result of the rape and instead insisted that it had been taken from her. She "called what [she] still had to lose" her "real virginity,"<sup>135</sup> expressing in that phrase the hope that she would have sex for the first time some day. A similar reaction was reported by Nancy Venable Raine in the memoir of her rape when she explained that "I didn't feel like I'd had 'sex' with the rapist. I simply felt my body, including my sex organs, had been attacked."<sup>136</sup> A decade earlier, legal theorist Lynne Henderson had made the same impassioned distinction between rape and sex by asserting that: "Rape does involve sexual organs, and is overwhelmingly a crime of one gender against the other, but it is ludicrous to call it sexual . . . . A crime which confronts its victims with death is *not sex*."<sup>137</sup>

The adamancy with which these particular rape survivors strive to separate sex, on the one hand, from violence and rape, on the other, suggests that there is more at stake here than a possible category error. Their insistence also makes me question the stock answer that the violence/sex dichotomy is a just another false dichotomy of social experience that must be discarded. What seems crucial here—and what Sebold's book helps to illuminate—is just what it is about these rapes that threatens to be obscured when we think about them as sex or perhaps even sexualized violence.

In Sebold's painstaking replay of precisely what happened during the rape, she noted that although some of Madison's actions did not have independent legal significance, they were of overriding importance to her. For example, Sebold was struck that when the police officer took her statement about the rape, he did not seem to care that Madison had twisted her breasts or shoved his fist up inside her.<sup>138</sup> These actions were not just physically painful to Sebold; she had sustained other injuries to her face and body from the struggle and overpowering that she did not specifically mention to the officer. I believe that for Sebold these actions were of particular

132. SEBOLD, *supra* note 1, at 13.

133. *Id.* at 166.

134. *Id.* at 166–67.

135. *Id.* at 150.

136. RAINE, *supra* note 27, at 223.

137. Lynne N. Henderson, *Review Essay: What Makes Rape a Crime?*, 3 BERKELEY WOMEN'S L.J. 193, 225 (1987–88) (book review) (emphasis in original).

138. SEBOLD, *supra* note 1, at 31.

importance because they proved that Madison had treated her as something less than a person,<sup>139</sup> as an object over which he had complete control. To be subjected to this extreme form of objectification is shocking to an individual and creates an acute kind of vulnerability.

Sebold also made a point of recounting that she found kissing Madison—and the memory of kissing Madison—to be particularly painful. When she was asked about it on the stand, Sebold felt that the question went “right to my heart.”<sup>140</sup> In a memorable passage, Sebold revealed that “[t]he kissing hurts still[,]” and confessed that “the fact that it was only under my rapist’s order that I kissed back often seems not to matter. The intimacy of it stings.”<sup>141</sup> Her intense negative reaction to something so ordinary as a kiss suggests that the action took on a radically different meaning in the context of the rape. As she explains, it was not the kiss alone that hurt, but the fact that she was forced to kiss back. The injury is not simply an unconsented-to touching, like the definition of battery in tort, but includes being forced to participate in one’s own injury. Indeed, one stark theme that emerges from Sebold’s description of her rape is that Madison succeeded in making her feel complicit in her own rape. Sebold was not only forced to kiss Madison, give him a blow job, and help him keep his erection, she also found herself lying to him—telling him that he was “strong” and even saying that she forgave him—in an effort to appease him and save her life.<sup>142</sup> It is striking that if there were a tape recording of the words spoken during the rape, it might seem as if Sebold had consented or perhaps was even enjoying the encounter.

For Sebold, to give in to Madison in this way was to “die by pieces.”<sup>143</sup> It was not only that she was rendered powerless to act in a way she desired, but that the source of her injury was another human being who intentionally hurt her.<sup>144</sup> To be disabled from offering physical resistance and to be forced to participate against one’s will is itself injurious and a harm that is often overlooked or discounted when women are victims. Although Sebold’s rape was certainly humiliating and degrading, that description does not begin to capture the injury that Madison’s domination produced in this case.

Over time, Sebold’s injury may have been compounded by the profound misunderstanding of her experience by many of those around her. It was here that the culturally dominant prototype of rape as sex was most pronounced, preventing even well-meaning people from being of much help. One assumption that was particularly galling to Sebold was that the rape had somehow transformed her from a virgin to a sexually experienced (and less inhibited) woman.<sup>145</sup> Although it was technically true that Sebold was no longer a virgin—she had bled during the rape and her hymen had

139. See also Henderson, *supra* note 137, at 223 (“I had never confronted the utter helplessness of rape, of knowing that it just *did not matter* that I existed; that I did not want this; that I was a human being; not a thing to be invaded, punched, or possibly killed.”) (emphasis in original); RAINE, *supra* note 27, at 257 (“The rapist treated me as a worthless nothing.”).

140. SEBOLD, *supra* note 1, at 123.

141. *Id.*

142. *Id.* at 12–13.

143. *Id.* at 13.

144. See also RAINE, *supra* note 27, at 254–55 (“As in torture, the source of the injury [of rape] is *another human being acting intentionally*, not an inanimate object or an accident of nature or man.”) (emphasis in original).

145. SEBOLD, *supra* note 1, at 50.

indeed been broken—the assumption was infuriating to Sebold because it suggested that she had gained something worthwhile from the rape, that the rape had altered her status from novice to experienced. This conception of what took place falsely implied agency on Sebold's part, given that most people gain experience only through exerting effort.

Additionally, those who treated Sebold as if she were a "fallen" woman implied that Sebold had been seduced or tricked into having intercourse, and was a victim of her own bad choices, rather than a victim of a violent rape.<sup>146</sup> In addition to erroneously placing Sebold in the same category as women who had chosen to have sex, the assumptions overemphasized the sexual aspects of the attack and, by doing so, risked obscuring the violence. Thus, Sebold's insistence on comparing her experience to that of a family friend who had been brutally attacked, but not raped, can be seen as her attempt to re-center the focus on violence, whenever the sex/violence dichotomy surfaced.<sup>147</sup> Finally, the reactions of some students at Syracuse who treated Sebold like a celebrity<sup>148</sup>—a response that seems quite contemporary and does not draw upon nineteenth-century images of fallen women—nevertheless arose from thinking about rape as exotic, as a form of sex that not many people have the opportunity to experience. I believe that this view, like the older images, did not sit well with Sebold because they afforded a positive valence to rape and shifted the focus away from the harm and injury.

Even in this case of violent stranger rape, there is a danger that force will be mistaken for choice if the encounter is viewed through the lens of sex. It is entirely possible that the lies and stratagems that Sebold employed in an effort to save her life could be reinterpreted as the kind of "negotiations" that are thought to go on between men and women in ordinary sexual encounters, for example, deciding whether Sebold or Madison would take off her belt.<sup>149</sup> Particularly when many take a commodified view of sexual relations generally<sup>150</sup>—under the model that men desirous of sex "bargain" with women to "give it up"—it is not a far cry to regard rape as just another bad deal. Rejecting both the discourses of commerce and sex, Sebold's narrative goes to great lengths to convey the idea that there is a world of difference between having a low level of bargaining power and being completely powerless as a rape victim.

Reading Sebold's account of the aftermath of her rape, I get the impression that it would not have been easy to be a friend to her in those days. Even if one appreciated that to Sebold, her rape was not just "bad sex," or the result of a constrained choice, it might have been difficult to talk to her about it. There is a Catch-22 here, because anything that reminded Sebold of her powerlessness could also make her feel ashamed. Like so many victims of discrimination or crime, Sebold resented being put into the category of "victim." Interestingly, Sebold felt very distant from the counselors at the rape crisis center, in part because of "their use of generalities" and their reporting of

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146. *See id.* at 79–80.

147. *Id.* at 68.

148. *Id.* at 25.

149. *See id.* at 8.

150. *See, e.g.,* Donald A. Dripps, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 COLUM. L. REV. 1780 (1992). *See generally* CHAMALLAS, *supra* note 106, at 231–37 (discussing commodification discourses in rape literature).



dismal statistics on the success of rape prosecutions.<sup>151</sup> At that moment, Sebold felt that, to survive, she had to resist being “one of a group or compared with others.”<sup>152</sup> This coping strategy, even though it may have been a form of denial, shielded Sebold from the debilitating realization that her terrifying experience was not so unique.

What we can glean from Sebold’s narrative, of course, is not enough to end the debate among feminists as to whether maintaining the dichotomy between sex and violence is strategically useful. But it is clear from her memoir that Sebold seems to want to hang onto the distinction. It is not that Sebold’s rape did not affect her subsequent sexual relationships or alter her sense of her own sexuality. Indeed, Sebold admits that for a long time after the rape, sex was not a pleasurable experience for her and that she stayed focused on her partner’s pleasure to get her through it.<sup>153</sup> In part because of flashbacks to the rape and the association of sex with the rape, Sebold had to concentrate hard to prevent pain, “like gritting your teeth on a frightening carnival ride that those around you appear to enjoy.”<sup>154</sup> In these descriptions of “bad sex,” Sebold aligns herself with Lynne Henderson, who also wishes to put rape in a category by itself, as qualitatively different from “bad sex,” which she views as “not particularly pleasurable[,]” but “not scary, or deadening or shaming.”<sup>155</sup> The key difference for each seems to be, as Henderson puts it, that “women who have experienced bad sex do not feel raped, because they were exercising some agency, and their partner did not abuse them, ignore them, or deny their humanity.”<sup>156</sup>

Because it focuses only on her own experience, Sebold’s narrative does not explore what sex might feel like to women who are pressured to have sex by their employers, teachers, dates, or acquaintances, but who are not physically overpowered by a man they believe is intent on killing them. In an effort to circumvent the sex/violence dichotomy, some theorists envision a continuum of “consent” that ranges from the kind of violent stranger rape that Sebold experienced; to date and acquaintance rapes that are “ringed” by violence; to blatant forms of sexual harassment and exploitation where sex is extracted by means of economic pressure; to instances of “bad sex,” where women decide to have intercourse for reasons other than their own sexual pleasure; to sex characterized by mutuality and respectful communication.<sup>157</sup> But even with such a continuum, there is still the temptation to draw a line at a particular point, placing violence on one side and sex on the other.

Catharine MacKinnon argues against drawing a distinction between violence and sex because she believes that normal heterosexual relationships, rarely classified as violent, often *do* violate women.<sup>158</sup> Her biggest concern is that unless the sex/violence dichotomy is disrupted, we will not be able to redefine “violence” and “violation” from a woman’s perspective, and that the force and coercion in ordinary relationships will

151. SEBOLD, *supra* note 1, at 133–34.

152. *Id.* at 133 (“It somehow blinded my sense that I was going to survive.”).

153. *Id.* at 207.

154. *Id.*

155. See Lynne Henderson, *Getting to Know: Honoring Women in Law and in Fact*, 2 TEX. J. WOMEN & L. 41, 59 (1993).

156. *Id.*

157. See, e.g., *id.* at 58–59.

158. CATHARINE A. MACKINNON, *Sex and Violence: A Perspective*, in FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 86 (1987).

remain hidden. In this respect, her concern is the obverse of Sebold's, who was more interested in assuring that her rape not be assimilated to ordinary sex.

In an early essay, MacKinnon speculated that the reason some feminists held onto the sex/violence dichotomy was that they were afraid to be "against sex," and that the specter of Freud was still potent enough to make them concerned with being labeled "repressed Victorians."<sup>159</sup> Although it may still be politically unwise to be seen as "against sex," it is MacKinnon's, not Freud's, shadow who looms larger these days. The strong backlash against feminism, particularly the backlash against dominance feminism associated with the philosophy of MacKinnon,<sup>160</sup> has produced a misreading of MacKinnon that is so widely recited it is sometimes the only thing people know about feminist legal theory. The popular notion is that MacKinnon believes that all intercourse is rape. As I interpret the reaction to this popular "wisdom," it is that MacKinnon must be wrong, so wrong in fact, that much "rape" must really be sex after all. Put another way, MacKinnon's insistence that there is no bright line between violence and sex—designed to uncover the force in normal heterosexual intercourse—can be twisted to cast doubt on the harm of rape of all sorts and to prove that we have gone too far to regulate sex.

It is not surprising that, as skepticism toward rape victims is again increasing, feminists might wish to dust off the violence/sex dichotomy. A similar move to desexualize sexual harassment has been made by scholars such as Vicki Schultz, who fear that the worst abuses of gender harassment in the workplace are not being addressed because harassment has become too closely identified with sexual propositioning and sexual advances.<sup>161</sup> In the context of sexual harassment, the concern is that an emphasis on the "sexual" overshadows other kinds of gender bias (e.g., refusals to train, sabotage of work, sexist evaluations of performance) that call women's competency and fitness to work into question. That harassment may take both sexualized and non-sexualized forms, and that the two are often intertwined, can easily get lost in litigation. Reminiscent of the sex/violence dichotomy debate, the refrain here is that harassment as a form of discrimination and abuse should be distinguished from conduct motivated by sexual desire.

Sebold's memoir underscores for me that MacKinnon had a point when she argued that it is not enough to insist that violence against women be noticed and appreciated (and not mistaken for sex), without also taking on the difficult task of redefining violence from the victim's perspective. Despite Sebold's description of her experience as one of violence (not sex), much of what was so devastating about her rape was the sexualized domination imposed by Madison. Madison treated Sebold as an object for sexual domination, took no account of her feelings or desires, and insisted that she become an active participant in the rape. It would be hard to deny that the intense feeling of powerlessness Sebold experienced during the rape, and the shame and hurt

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159. *Id.* at 85.

160. See Martha Chamallas, *The Backlash against Feminist Legal Theory*, in *THEORIZING BACKLASH: PHILOSOPHICAL REFLECTIONS ON THE RESISTANCE TO FEMINISM* 75–78 (Anita M. Superson & Ann E. Cudd eds., 2002).

161. See Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 *YALE L. J.* 1683 (1998); see also Ruth Colker, *Whores, Fags, Dumb-Ass Women, Surly Blacks, and Competent Heterosexual White Men: The Sexual and Racial Morality Underlying Anti-Discrimination Doctrine*, 7 *YALE J. L. & FEMINISM* 195 (1995).

associated with the memory of that feeling, were not linked to Sebold's being a woman and a rape victim. In this respect, Sebold's story very much resembles the eroticized dominance that MacKinnon sees as emblematic of heterosexual relationships. Indeed, one reason Sebold's narrative is so powerful is because it describes the injuries produced by eroticized domination so well, even if it cannot answer critics of MacKinnon who insist that ordinary sex looks nothing like this.

#### IV. TRAUMA AND IDENTITY

Just under the surface of the violence/sex debate over rape lies the related question of the nature of the harm and whether it makes sense to think about rape as a distinctive harm, separate from other forms of violent assault. Despite the feminist push to treat rape as violence, there has also been a feminist resistance to approaches that classify rape as mere ordinary violence. Perhaps the most famous of these approaches is Michel Foucault's comment on the problem of punishing rape.<sup>162</sup> Like many contemporary postmodern theorists, Foucault was primarily concerned with deregulating sexuality and only secondarily with articulating a justification for continuing to punish rape within that deregulated framework. At a 1977 roundtable, Foucault remarked that:

when one punishes rape one should be punishing physical violence and nothing but that. And to say that it is nothing more than an act of aggression: that there is no difference, in principle, between sticking one's fist into someone's face or one's penis into their sex . . . . It isn't a matter of sexuality, it's the physical violence that would be punished, without bringing in the fact that sexuality was involved.<sup>163</sup>

The very idea of equating rape to a punch in the face probably would have seemed ludicrous prior to the second wave of feminism in the United States. For much of our history, the harm of rape had been tightly linked to women's honor and to the honor of husbands and families of the rape victims. Within this conceptual frame, women were thought to be dishonored by rape, because rape signaled that women had engaged in illicit sexual intercourse, were no longer innocent or chaste, and as a result, had lost their value as sexual objects, and hence as wives and daughters. Husbands and families of rape victims were similarly dishonored by rape because it was thought that they had been robbed of their valuable property, and had lost out in the competition for status and power waged among men.<sup>164</sup> For many women, of course, the dishonor of rape is a present reality. Critical race feminist Adrien Wing has explained, for example, that in more traditionally patriarchal societies, rape victims continue to be perceived as "soiled and unmarriageable" and often become a "target of societal ostracism."<sup>165</sup> In extreme cases, raped women who have been impregnated by the rape have even been

162. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* (1979).

163. MICHEL FOUCAULT, *POLITICS, PHILOSOPHY, CULTURE: INTERVIEWS AND OTHER WRITINGS 200–02* (L.D. Kritzman ed., 1988), *quoted in* CAHILL, *supra* note 16, at 144.

164. Cahill, *supra* note 16, at 168–69; *See also* SUSAN BROWNMILLER, *AGAINST OUR WILL: MEN, WOMEN, AND RAPE 376–77* (1975).

165. *See* Adrien Katherine Wing & Sylke Merchan, *Rape, Ethnicity, and Culture: Spirit Injury from Bosnia to Black America*, 25 Colum. Hum. Rts. L. Rev. 1, 4 (1993).

prosecuted for fornication, while the rapist goes free because of a lack of male witnesses to the crime.<sup>166</sup> Most dramatically, the war in the former Yugoslavia has served to focus the world's attention on the plight of Bosnian women in that sexually conservative Muslim society, in which being raped often leads to social rejection and being compelled to live a life without marriage and children.<sup>167</sup>

Viewing rape as a harm principally to women's honor, however, seems to be on the decline in the U.S., at least in the old version of honor. One significant objective of the rape reform movement in the United States has been to try to erase this particular stigma from rape. And it does seem that we hear less these days about rape victims being spoiled for marriage or the shame that rape causes the victim's families. While a woman's reputation can still be hurt by being raped, particularly if her account is not fully credited, the shame and injury of rape to its victims can no longer be captured by the concept of dishonor. With dishonor displaced as the prime injury of rape, Foucault's "move" to conceptualize rape as mere physical aggression has more purchase and, not surprisingly, has caused a stir among intellectuals.<sup>168</sup>

I read Sebold's memoir as an eloquent rejection of the view that rape boils down to mere physical aggression. Her narrative is compelling and emotionally powerful precisely because the injury of her rape was not as easy to explain as a punch in the face and had a far greater impact on her life than, say, a car accident that caused similar physical injuries. In addition to the psychic injury produced by Madison's brutal domination of her during the rape, Sebold experienced the rape as a life altering event that left its imprint years after the attack. The single word that best captures what Sebold describes is "trauma."

The significance of rape in the lives of its victims can be seen by the fact that many survivors take special note of the "anniversary" of their rape. It is not that the occasion is meant to be celebrated. Rather, Nancy Venable Raine explains that the date of her rape took on a meaning akin to that of a birthday because it marked the beginning of her life as a different person, replacing the life of the woman she had been before the rape.<sup>169</sup> Sebold had a similar response to her rape. In some important way, Sebold believed that "[m]y life was over; my life had just begun" as a result of the rape.<sup>170</sup>

Statements, such as Sebold's, that emphasize a "before" and an "after" are useful to symbolize the enormity of the event in the eyes of the victim. They indicate that, although the vocabulary of honor may no longer be widespread, the injury of rape still manages to go to the core of a person and is felt so deeply that it requires the image of death to convey a sense of its dire effects. It may be that we no longer believe that rape is so dishonorable to a woman that it is better to die than to be raped. Sadly, however, many women feel like they have died as a result of rape and must constantly struggle to

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166. See CATHARINE A. MACKINNON, *SEX EQUALITY* 773 (2001) (describing the case of Safia Bibi of Pakistan).

167. See Roy Gutman, *Foreword* to *MASS RAPE: THE WAR AGAINST WOMEN IN BOSNIA-HERZEGOVINA*, at x (Alexandra Stiglmayer ed., 1994).

168. CAHILL, *supra* note 16, at 144-45; see also Vicki Bell, *Beyond the "Thorny Question": Feminism, Foucault and the Desexualisation of Rape*, in *RAPE AND THE CRIMINAL JUSTICE SYSTEM* 365 (1995); Laura Hengehold, *An Immodest Proposal: Foucault, Hysterization, and the "Second Rape"* 9 *HYPATIA* 88 (1994).

169. RAINE, *supra* note 27, at 2.

170. SEBOLD, *supra* note 1, at 33.

remake their lives after rape. Indeed, the term “survivor” as used to describe a rape victim is meant to convey this sense of rape as a life threatening event, and not simply that many rape victims are actually killed by their attackers.

Robin West has theorized that rape as a form of violence is both distinctive and deeply gendered. She claims that one reason that the experience of rape is difficult to make “intelligible” is that there is “simply no correlate in (most) men’s lives.”<sup>171</sup> Her argument is that rape is different from ordinary violence in that it involves a harmful invasion of the woman’s body by the man’s penis and simultaneously creates a threat of further violence that terrorizes the victim. For West, “[t]his coupling of unwanted and painful sexual penetration *with the experience of terror* . . . is the most gender-specific aspect of the experience of rape.”<sup>172</sup> Other scholars have continued to emphasize the significance of penetration, but have expanded the concept of penetration by asserting that penetration need not involve the penetration of the vagina by a penis. Under this view, penetration of any orifice by a penis or other object will suffice to constitute rape. For Ann Cahill, for example, rape is distinctive not because it typically involves female victimization but because “to penetrate the body of an unwilling other is by definition a more invasive, more destructive act than any that stops at the surface of the body.”<sup>173</sup>

As I read Sebold’s description of her rape, it is not clear whether she would endorse either West’s or Cahill’s definitions of what is distinctive about rape. The invasion and terror that both theorists describe certainly does seem to fit Sebold’s narrative. However, because Sebold places less emphasis on the penetration aspect of her assault, it leaves me wondering whether the inclination of some feminists to question the significance of penetration as the defining act of rape deserves renewed attention.<sup>174</sup> It is also possible, moreover, that the social meaning of rape—one that is hard to separate from penetration—affected the terror Sebold experienced, even if she did not specifically dread penetration more than other aspects of the assault.

What seems abundantly clear is that, for Sebold, the rape brought with it a radical change in perspective. After the attack, it seems fair to say that Sebold saw the world through the lens of a victim of violence: she categorized places, situations, and people, first and foremost, as either safe or unsafe. She became preoccupied with the prospect of violence in the knowing way of someone who has been there before. The rape also changed how Sebold related to other people. Mostly, it set her apart from others and produced a sense of profound alienation. When she did feel a connection to other people, it was likely to be to a person who had also experienced rape or violence.

I would describe the sea change in Sebold’s life associated with the rape as constituting a change in her identity.<sup>175</sup> Her memoir relates how the trauma of the rape shattered her sense of self and changed her alignments to people in her world. This harm to identity appears to have both an internal and external dimension—it involves personal feelings and suffering, but also a social side, affecting Sebold’s interpersonal

171. WEST, *supra* note 22, at 101.

172. *Id.* at 102 (emphasis in original).

173. CAHILL, *supra* note 16, at 11.

174. See, e.g., MACKINNON, *supra* note 17, at 172–73.

175. See HERMAN, *supra* note 19, at 93 (“Even after release from captivity, the victim cannot assume her former identity. Whatever new identity she develops in freedom must include the memory of her enslaved self.”).

relations and her presence in the community. Because it straddles the personal and social, as well as the public and private, identity as a construct does a better job of capturing the harm of rape than merely labeling it a form of physical aggression. It may be the closest thing we have these days to honor.

It is also important to note that Sebold describes herself as having suffered post-traumatic stress disorder (“PTSD”) as a result of the rape.<sup>176</sup> She claims that this realization came slowly to her, only after she had undergone therapy, had published an essay about her rape, and then finally recognized herself in “the case histories of the sick,”<sup>177</sup> found in *Trauma and Recovery*. In her own behavior, Sebold identified many of the classic symptoms of PTSD—hypervigilance, nightmares, sleep disorders, ultra-sensitivity to noise—and felt it significant that Herman had cited her New York Times essay in the “trauma,” but not in the “recovery” portion of her book.<sup>178</sup> Sebold was particularly struck by the links Herman made between Vietnam veterans and rape victims. In her memoir, Sebold mentions a good friend—a Vietnam veteran—who had been instrumental in getting her to see that she had not yet recovered from her rape. The friend had been surprised by the depth of his own delayed emotional response, many years after watching his buddies get blown-up in Viet Nam, and remarked to Sebold: “Who would have thought that something that long ago could have such power?”<sup>179</sup> Sebold identified so strongly with some veterans’ first-hand accounts that their stories opened up something in her that allowed her “to begin to feel.”<sup>180</sup> She saw them as courageous in battle, yet so shattered by trauma that “the hero could not hold.”<sup>181</sup>

Sebold also accepted a psychoanalytical explanation for why she decided to live in New York City for so many years after the rape, leading a constricted life in which she feared for her safety and “self-medicated” with drugs and alcohol to dull the pain. In this account of her life, New York served to re-create the environment of her rape because New York City meant violence to Sebold, and her wary responses seemed more normal there than in sunny California, where she eventually moved. The re-creation of the violent environment oddly “reassured” Sebold.<sup>182</sup> She felt that “she fit right in with it[,]” that it “made sense.”<sup>183</sup> Sebold thus appears to accept the idea that one way to gauge the continuing impact of a trauma such as rape is to see whether the victim feels compelled to re-create it, despite desperately wishing to leave it behind.

However, despite Sebold’s endorsement of Herman’s approach to trauma, it would be a mistake to read Sebold’s memoir as a statement that PTSD, or a similar medical diagnosis, tells the complete story of the harm of rape. What Sebold experienced cannot be captured by reciting the symptoms of PTSD. Indeed, her experience would

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176. See SEBOLD, *supra* note 1, at 240.

177. *Id.*

178. See *id.* at 239.

179. *Id.* at 237.

180. *Id.* at 239.

181. *Id.* at 240. This parallel is striking, since Sebold herself seems to be such a courageous woman. On the theme of courage and survivors of rape, see Samuel H. Pillsbury, *A Different Kind of Courage, A Different Kind of Peace*, 1 OHIO ST. L. J. 357 (2003) (reviewing four books, including *Lucky*).

182. *Id.* at 241.

183. *Id.* at 241–42.

be blunted by such a medicalized account of her injury. As her narrative attests, Sebold's story is far too specific and far too saturated with meanings beyond the realm of the individual and the psychological to be regarded simply as a case study of trauma in the clinical sense.<sup>184</sup>

*Lucky* looks for the meaning of trauma from multiple angles. It fits within the genre of recent feminist writings that call for an investigation of the social and cultural dimensions of trauma and that seek an "understanding [of] traumatic feelings not as a medical problem in search of a cure but as felt experiences that can be mobilized in a range of directions[.]"<sup>185</sup> Under this account, trauma is a useful discourse for feminists precisely because it resists being pinned down, and "challeng[es] distinctions between the mental and physical, the psychic and social, and the internal and external as locations or sources of pain."<sup>186</sup> In this broader sense, *Lucky* is a memoir of trauma that would still be a great book, even if PTSD had never been recognized as a mental disorder.

#### CONCLUSION

In *Lucky*, you will find a story of one woman's rape that provides the opening to think deeply and concretely about some of the most vexing and important issues that surround scholarly discussion of rape and rape law today. Now that many students think about the rape reforms of the 1970s as the product of "old school" feminism,<sup>187</sup> we are badly in need of a sequel of "real rape" for a new generation. Alice Sebold's memoir fills that need by speaking to race, sexual violence and trauma with the honesty and intensity the subject still so urgently requires.

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184. Cf. Michelle Fine, *Coping With Rape: Critical Perspectives on Consciousness, in* DISRUPTIVE VOICES: THE POSSIBILITIES OF FEMINIST RESEARCH 61 (1992) (criticizing psychological and individualistic responses to injustice).

185. ANN CVETKOVICH, AN ARCHIVE OF FEELINGS: TRAUMA, SEXUALITY, AND LESBIAN PUBLIC CULTURES 47 (2003).

186. *Id.* at 18.

187. For a crisp description of how some "third wave" feminists have challenged "second wave" feminists of the "old school," see Alyson M. Cole, "There Are No Victims in This Class": On Female Suffering and Anti-"Victim Feminism," 11 NWSA JOURNAL 72 (1999).