Rape Redefined*

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ABSTRACT

Rape is redefined in gender equality terms by eliminating consent, an intrinsically unequal concept, and reconceiving force to include inequalities. International developments recognizing sexual assault as gender crime reveal domestic law's failures and illuminate a path forward. A statutory proposal is offered.

I. RAPE AS SEX DISCRIMINATION

Rape is a crime of gender inequality.[1] The Supreme Court of the United States embraced this core notion in its 1986 ruling that sexual harassment is a form of sex-based discrimination in employment in a case of serial rape by a man of a woman.[2] It later extended this recognition of the place of gender in sexual violation to men sexually violated by other men at work.[3] The United States Congress passed the Violence Against Women Act in 1994, creating a civil action for "gender-motivated violence" as a form of sex discrimination, contemplated in its legislative history to include sexual as-

 The ideas discussed here were presented in a twelve minute speech in Malmö, Sweden at Nordiskt Forum, June 13, 2014. The thousands of women in that stadium, in which you could have heard a pin drop, were its inspiration. Many thanks to Professor Lori Watson for her references to Rousseau. The University of Michigan Law Library was, as usual, miraculous in its assistance. This article is partly in dialogue with The American Law Institute's ("ALI") process on revision of the Model Penal Code § 213 on Sexual Assault and Related Offenses since 2014. The superb research and illuminating writing by Stephen J. Schulhofer and Erin E. Murphy, Reporters—formulating an expanded, specified, and central role for consent in the law of sexual assault, building on the informed and incisive scholarship of Stephen J. Schulhofer over several decades—provided a rich resource for analysis and enabled streamlined citations, for which I am greatly in debt. As this article goes to press, the ALI process continues.

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[1] This concept is previously discussed in Catharine A. MacKinnon, *Unequal Sex: A Sex Equality Approach to Sexual Assault*, *in* WOMEN'S LIVES, MEN'S LAWS 240 (2005), and further explored in CATHARINE A. MACKINNON, SEX EQUALITY 880–956 (3d ed. 2016). In this article, the terms rape and sexual assault are used relatively interchangeably, although it is recognized that many legal systems choose one term over the other or give them specific, sometimes graded, meanings.

[2] Meritor Sav. Bank v. Vinson, 477 U.S. 57, 65 (1986).

[3] Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 78 (1998). Given the dramatic disparity in numbers of victims of sexual assault who are women or girls compared with men or boys, so far as is known, the archetypical victim will sometimes be referred to as "she" or "her" in this article. This generic is intended to refer to male as well as female victims. Since some people seem to think that a man sexually abusing another man expresses homosexuality, or even has something to do with the LGBT community, let it be clear that it does not. Gender, not sex, is the issue of sexual violation. Most men who sexually violate other men regard themselves as straight, not gay. Masculinity is the issue, not sexual orientation.

sault.[4] Conceptualizing rape as gender-based remained unquestioned when the civil remedy was invalidated.[5] Planted in the United States,[6] this seed has taken root and flourished internationally, where it has been embraced, documented, developed, and enforced.[7]

Authorities around the world increasingly recognize the reality that sexual violation is socially gender-based, whether that understanding is predicated on the large numbers and vast disproportion by sex between perpetrators and victims,[8] on gender roles and stereotypes of masculine and

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[4] STAFF OF S. COMM. ON THE JUDICIARY, 102d CONG., VIOLENCE AGAINST WOMEN: A WEEK IN THE LIFE OF AMERICA 28 (Comm. Print 1992).

[5] Violence Against Women Act, 42 U.S.C. § 13981 (1994). *See* United States v. Morrison, 529 U.S. 598, 626–27 (2000) (invalidating civil remedy provision as in excess of the legislative power).

[6] The U.S. Supreme Court held in 1977 that the capacity to be raped was based on female sex, such that women were targeted for rape "because they were women," based on their "very womanhood." Dothard v. Rawlinson, 433 U.S. 321, 335 (1997) (holding male bona fide occupational qualification valid for hiring for contract positions in male-only prisons). While based on the misprision that rape is sex-based in the biological sense, rather than gender-based in the social sense, it is nonetheless legal authority for the proposition that rape of women by men is sex-based. It remains staggering, however, that the rape of men by other men could have been blinkered out in this particular context.

[7] *See infra* notes 11–17 and accompanying text.

[8] In the United States alone, in which sexual assault is fairly well documented, one finds approximately one in four women reports being the victim of a completed rape. *See* Mary P. Koss et al., NO SAFE HAVEN: MALE VIOLENCE AGAINST WOMEN AT HOME, AT WORK, AND IN THE COMMUNITY 167–71 (1994) (analyzing major studies on rape prevalence done as of 1994, many showing approximately twenty percent of women raped, some lower, some higher); DIANA E.H. RUSSELL, SEXUAL EXPLOITATION: RAPE, CHILD SEXUAL ABUSE, AND WORKPLACE HARASSMENT 35 (1984) [hereinafter RUSSELL, SEXUAL EXPLOITATION] (reporting large probability sample finding twenty-four percent of women experience completed rape in lifetime); A WEEK IN THE LIFE, *supra* note 4, at 3; *see also Women and Violence: Hearings Before the S. Comm. on the Judiciary*, *Pt. 2.*, 101st Cong. 32–43 (1990) (statement of Dr. Mary P. Koss, American Psychological Association) (testifying that true incidence of rape in United States covered up by National Crime Survey). Fourteen percent of women in a large probability sample report having been raped in their marriages. *See* DIANA E.H. RUSSELL, RAPE IN MARRIAGE 2 (1990). Forty-four percent of women in the United States report having been subjected to a completed rape or attempted rape at least once in their lives. *See* RUSSELL, SEXUAL EXPLOITATION, *supra*, at 35. According to the Centers for Disease Control, among female victims of completed rape (completed forced penetration and completed alcohol-or-drug-facilitated penetration), an estimated 78.7% first experienced this form of sexual violence before age twenty-five, 40.4% before age eighteen, 28.3% at ages eleven through seventeen, and 12.1% at age ten or below. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., PREVALENCE AND CHARACTERISTICS OF SEXUAL VIOLENCE, STALKING, AND INTIMATE PARTNER VIOLENCE VICTIMIZATION—NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY, UNITED STATES, 2011 11–12 (2014), http://www.cdc.gov/mmwr/pdf/ss/ss6308.pdf [https://perma.cc/5WNX-N42Y]. Based on the same data source, "Nearly 1 in 2 women (44.6%) and 1 in 5 men (22.2%) experienced sexual violence victimization other than rape at some point in their lives. This equates to more than 53 million women and more than 25 million men in the United States." CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY, UNITED STATES: 2010 SUMMARY REPORT 19 (2011) (internal citations omitted), http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf [https://perma.cc/33KM-NVM3]. One study found intercourse "not voluntary" for 7.8% of all women ages fifteen to forty-four, and for approximately one in five women who first had it below age fifteen. *See* CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN

feminine sexuality, or on the hierarchically gendered social meanings and consequences of sexual victimization and perpetration. The Committee on the Elimination of All Forms of Discrimination Against Women influentially stated: "The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately."[9] The United Nations General Assembly in 1993 declared that violence against women, including sexual assault, is "a manifestation of historically unequal power relations between men and women, which has led to domination over and discrimination against women by men."[10] As the Supreme Court of Canada put the analysis: "sexual assault is in the vast majority of cases gender based. It is an

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SERVS., NO. 23-19, VITAL AND HEALTH STATISTICS: FERTILITY, FAMILY PLANNING, AND WOMEN'S HEALTH 5, 32 (1997), http://www.cdc.gov/nchs/data/series/sr_23/sr23_019.pdf [https://perma.cc/57H4-KJBA]. More recently, 6.2% of young women who were aged eighteen to twenty-four years old in 2011–13 and who had heterosexual sex before reaching age twenty reported that their first experience of intercourse was "not voluntary." CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., NATIONAL SURVEY OF FAMILY GROWTH, KEY STATISTICS FROM THE NATIONAL SURVEY OF FAMILY GROWTH (2015), http://www.cdc.gov/nchs/nsfg/key_statistics/n.htm#nonvoluntary [https://perma.cc/EF8C-Y4CK].

Combining intimate partner and non-partner sexual violence for all women fifteen years of age or older around the world, the World Health Organization found prevalence rates of 45.6% in Africa, 36.1% in the Americas, 36.4% in the Eastern Mediterranean (but no data was available for strangers), 27.2% in Europe, 40.2% in Southeast Asia, and 27.9% in the Western Pacific. WORLD HEALTH ORG., GLOBAL AND REGIONAL ESTIMATES OF VIOLENCE AGAINST WOMEN: PREVALENCE AND HEALTH EFFECTS OF INTIMATE PARTNER VIOLENCE AND NON-PARTNER SEXUAL VIOLENCE 20, tbl.5 (2013), http://apps.who.int/iris/bitstream/10665/85239/1/9789241564625_eng.pdf?ua=1 [https://perma.cc/3HAE-78UX]. High income countries in general had a prevalence rate of 32.7%. *Id.* at 20. In a study collecting data from random weighted population samples, Johnson and colleagues in thirteen countries, presumably with data of varying reliability, estimated an adult lifetime prevalence rate of sexual violence against women by any man as forty-one percent in Costa Rica, thirty-five percent in the Czech Republic, thirty-four percent in Australia, twenty-eight percent in Denmark, twenty-five percent in Switzerland, twenty-four percent in Mozambique, seventeen percent in Poland, fourteen percent in Hong Kong, and six percent in the Philippines. HOLLY JOHNSON ET AL., VIOLENCE AGAINST WOMEN: AN INTERNATIONAL PERSPECTIVE 39, fig.3.2 (2008).

Less is known about rape of men cross-culturally. In the United States, the CDC found that one in seventy-one men has been raped at some point in their lives, rape being defined as forced penetration attempted or completed or alcohol- or drug-facilitated completed sexual penetration. NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY, *supra,* at 18. The Bureau of Justice Statistics found that 15.7% of rape victims were male. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIME VICTIMIZATION, 2009 (2010). The Justice Department found that three percent of adult men had been victims of rape, attempted or completed, at least once in their lives. *See* NAT'L INST. OF JUSTICE, U.S. DEP'T OF JUSTICE, EXTENT, NATURE, AND CONSEQUENCES OF RAPE VICTIMIZATION: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 7–8 (2006). Underreporting must be presumed common.

[9] This definition is from the breakthrough jurisprudential statement of 1992 that systematically explained the ways in which sexual assault is integral to each form of discrimination against women in CEDAW. *See* Convention on the Elimination of All Forms of Discrimination Against Women, opened for signature Mar. 1, 1980, 27 U.S.T. 1909, 1249 U.N.T.S. 14 (entered into force Sept. 3, 1981); Comm. on the Elimination of Discrimination Against Women, General Recommendation No. 19, ¶ 6, U.N. Doc. CEDAW/C 1992/L.1/Add.15 (1992).

[10] G.A. Res 48/104, Declaration on the Elimination of Violence Against Women (Dec. 20, 1993).

assault upon human dignity and constitutes a denial of any concept of equality for women."[11] International human rights conventions have explicitly entrenched the same idea.[12] In international criminal law, rape is routinely referred to as a gender crime, meaning it happens to women or men because they are women or men and are violated based on their sex and/or gender.[13] In 2006, the Secretary General of the United Nations, in a conclusion to which "the link between violence against women and discrimination was key," observed that violence against women, including rape, had been estab-

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[11] R. v. Osolin [1993] 4 S.C.R. 595, 669 (Can.).

[12] *See, e.g.*, Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belem do Para), June 9, 1994 ("CONCERNED that violence against women is an offense against human dignity and a manifestation of the historically unequal power relations between women and men." Preamble. "For the purposes of this Convention, violence against women shall be understood as any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere." art. 1.); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (African Protocol), art. 1, July 11, 2003 (" 'Violence against women' means all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war."); Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, art. 3, May 11, 2011, C.E.T.S. No. 210 (" 'Violence against women' is understood as a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."); G.A. Res. 48/104, preamble, Declaration on the Elimination of Violence Against Women (Dec. 20, 1993) ("Recognizing that violence against women is a manifestation of historically unequal power relations between women and men, which have led to domination over, and discrimination against, women by men and to the prevention of the full advancement of women.").

[13] Men are far more likely than women to perpetrate sexual violation, and women and girls are far more likely to be its victims, yet men and boys too are sexually assaulted, most frequently by other men. In the United States, based on a national study conducted under the auspices of the Centers for Disease Control, "[f]or female rape victims, an estimated 99.0% had only male perpetrators. In addition, an estimated 94.7% of female victims of sexual violence other than rape had only male perpetrators. For male victims, the sex of the perpetrator varied by the type of sexual violence experienced. The vast majority of male rape victims (approximately 79.3%) had only male perpetrators." PREVALENCE AND CHARACTERISTICS OF SEXUAL VIOLENCE, STALKING, AND INTIMATE PARTNER VIOLENCE VICTIMIZATION—NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY, UNITED STATES, 2011, *supra* note 8, at 5.

For examples of gender crimes as prohibited by the International Criminal Court, which apply to women and men alike, see Rome Statute of the International Criminal Court Treaty, art. 7, ¶ 1(g), July 17, 1998, 2187 U.N.T.S. 3 (defining "crime against humanity" to include "[r]ape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity"); *id.* art. 7, ¶ 1(h) (recognizing persecution based on gender as a "crime against humanity"); *id.* art. 8, ¶ 2(b)(xxii) (defining "war crimes" perpetrated during international armed conflicts to include "rape, sexual slavery, enforced prostitution, forced pregnancy, as defined in article 7, paragraph 2(f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions"); *id.* art. 8, ¶ 2(e)(vi) (extending definition to encompass non-international armed conflicts); *id.* art. 6(b) (defining "genocide" to include "[c]ausing serious bodily or mental harm to members of [a] group," which has been interpreted to apply to sexual atrocities in genocides).

lished as "global, systemic and rooted in power imbalances and structural inequality between men and women."[14] Further, "[v]iolence against women constitutes a form of gender-based discrimination, and . . . discrimination is the major cause of such violence."[15] The recognition of the gender basis of sexual violation of men, slower in coming, is also being pioneered in the international community, most frequently in zones of conflict among men.[16]

No country has explicitly implemented this approach, so clearly grasped internationally, in its domestic rape law.[17] Despite international bodies moving decisively to converge human rights principles with criminal law imperatives in the legal arena of sexual assault, no domestic jurisdiction has yet expressly framed its laws against sexual assault in sex inequality terms. Even as the social acts that rape law criminalizes are increasingly seen as acts of sex discrimination, domestic rape law mostly goes on as before, unreconstructed to reflect or even mention sex equality principles or goals.

The same is true for academic commentary on sexual assault. The awareness of rape as a crime of gender inequality has not even extended to raising intellectual questions of rape law's basic design or calling into question the perspectives and values it has long furthered. Scholars debate granu-

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[14] U.N. Secretary-General, *In-Depth Study on All Forms of Violence Against Women*, ¶ 30, U.N. Doc. A/61/122/Add. 14 (July 6, 2006), https://documents-dds-ny.un.org/doc/UNDOC/GEN/N06/419/74/PDF/N0641974.pdf?OpenElement.

[15] *Id.*

[16] The recognition of sexual violence against men and boys is increasingly understood internationally as gender-based domination and sometimes linked contextually to sex inequality. *See, e.g.*, U.N. High Comm'r for Refugees, *Sexual and Gender-Based Violence Against Refugees, Returnees and Internally Displaced Persons: Guidelines for Prevention and Response*, at 10 (May 2003), http://www.unicef.org/emerg/files/gl_sgbv03.pdf [https://perma.cc/DR9J-U27Z] (stating "UNHCR employs an inclusive conception of sexual and gender-based violence that recognises that, although the majority of victims/survivors are women and children, boys and men are also targets of sexual and gender-based violence."); U.N. High Comm'r for Refugees, *Working with Men and Boy Survivors of Sexual and Gender-Based Violence in Forced Displacement*, at 3–4 (July 2012), http://www.refworld.org/docid/5006aa262.html [https://perma.cc/H2FF-D6PS] (observing "Where social and cultural norms reinforce gender inequality by casting men as inherently strong and expected to protect women and children, attacks on markers of gender identity are a powerful weapon of war" and can express and reinforce homophobia); *Guidelines for Investigating Conflict-Related Sexual and Gender-Based Violence Against Men and Boys*, Inst. for Int'l Criminal Investigations 1 (Feb. 29, 2016), http://www.refugeelawproject.org/files/others/IICI_Guidelines_for_Investigating_Conflict_Related_SGBV_against_Men_and_Boys.pdf [https://perma.cc/MG7T-BHN7] (containing guidelines for investigation of sexual and gender-based violence against men and boys that may violate international law); *Guidelines for Integrating Gender-Based Violence Interventions in Humanitarian Action: Reducing Risk, Promoting Resilience, and Aiding Recovery*, Inter-Agency Standing Comm. 5 (2015), http://gbvguidelines.org/wp-content/uploads/2015/09/2015-IASC-Gender-based-Violence-Guidelines_lo-res.pdf [https://perma.cc/KF7R-Z8F4] (defining gender-based violence as "an umbrella term for any harmful act that is perpetrated against a man or a woman's will, and that is based on socially ascribed (i.e. gender) differences between males and females. . . . in public or in private.).

[17] The law of sexual assault in Canada comes closest and could be said to be implicitly guided by sex equality principles to some degree. *See* Janine Benedet, *Marital Rape, Polygamy and Prostitution: Trading Sex Equality for Agency & Choice?*, 18 Rev. Const. Stud. 161, 164 (2013); Janine Benedet, *Sexual Assault Cases at the Alberta Court of Appeal: The Roots of Ewanchuk and the Unfinished Revolution*, 52 Alberta L. Rev. 127, 144 (2014).

lar details of the traditional elements of consent and force in sexual interactions in complex and esoteric ways, fracturing consent into a dozen forms with as many modifiers and force into multiple guises and levels,[18] seldom assessing these elements themselves in sex equality terms. No academic investigation of rape law has undertaken the basic task of inquiring into the implications of seeing rape as a crime of inequality that fundamentally includes gender.

If rape is less a question of unwanted sex than of unequal sex, if equality not autonomy is its primary issue, if internal psychology is less determinative of these criminal acts than leveraged external conditions and gendered social behaviors, the existing conceptual framework, together with its lexicon of examples, has been fundamentally beside the point all along. The unasked first question—one that every nation's constitution and treaty obligations of equality under law would pose to every sexual assault statute, legal decision, and rape prosecution or failure to prosecute, if this point was grasped—is: What do equality principles require of rape law? What would a sexual assault law that met sex equality standards look like?

II. The Vicissitudes of Consent

Rape is generally defined in Western countries[19] as sexual intercourse by force or without consent or both.[20] For a clear illustration, consider England and Wales, which define sexual assault as penile penetration of specific body parts without consent or reasonable belief in consent: "A person (A) commits an offence if—(a) he intentionally penetrates the vagina, anus or mouth of another person (B) with his penis, (b) B does not consent to the penetration, and (c) A does not reasonably believe that B consents."[21] By contrast, France defines rape as sexual penetration through four kinds of force: "Any act of sexual penetration, whatever its nature, committed against another person by violence, constraint, threat or surprise, is rape."[22] Neither definition has a record of effectiveness in application. The conviction rate for reported rape in the U.K. is around 6%;[23] in France, it is a

[18] One brilliant example is the draft revision of the Model Penal Code provision on sexual assault, with commentary by the ALI reporters. *See* Model Penal Code § 213, Sexual Assault and Related Offenses (Am. Law. Inst., Discussion Draft No. 2, Apr. 28, 2015).

[19] The concepts of rape discussed here have also been profoundly influential beyond (as well as throughout) the West, often (as in the U.S. and Canada) as a result of colonialism, but discussion of other legal systems (for example, the Islamic legal concept of Zina) is beyond the scope of this article.

[20] *See* Wayne LaFave, Criminal Law 894 (5th ed. 2010).

[21] Sexual Offenses Act 2003, c. 42, § 1 (UK).

[22] Code pénal [C. pén.] arts. 222–23 (Fr.).

[23] Liz Kelly, Jo Lovett & Linda Regan, Home Office Research Study, A Gap or a Chasm? Attrition in Reported Rape Cases 293 (2005), http://webarchive.nationalarchives.gov.uk/20110218135832/rds.homeoffice.gov.uk/rds/pdfs05/hors293.pdf [https://perma.cc/AUY5-2WRL] (reporting the study by Harris & Grace on page twenty-eight with this figure, among others). In the past fifteen years in Australia, Canada, England and Wales, Scotland,

breathtaking 2.6%.[24] Documented numbers of unreported, underestimated, and undercounted rapes put even these percentages into the vanishing range.[25]

Many jurisdictions within the United States and around the world follow Blackstone's common law definition of rape that conjoins the two elements: "carnal knowledge of a woman forcibly and against her will."[26] The

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and the United States, "victimization surveys show that 14% of sexual violence victims report the offense to the police. Of these, 30% proceed to prosecution, 20% are adjudicated in court, 12.5% are convicted of any sexual offense, and 6.5% are convicted of the original offense charged. In the past thirty-five years, average conviction rates have declined from 18% to 12.5%." Kathleen Daly & Brigitte Bouhours, *Rape and Attrition in the Legal Process: A Comparative Analysis of Five Countries*, 39 CRIME & JUST. 565, 565 (2010).

[24] MARCELO F. AEBI ET AL., EUR. INST. FOR CRIME PREVENTION & CONTROL, EUROPEAN SOURCEBOOK OF CRIME AND CRIMINAL JUSTICE STATISTICS 163 (5th ed. 2014), http://www.heuni.fi/material/attachments/heuni/reports/qrMWoCVTF/HEUNI_report_80_European_Sourcebook.pdf [https://perma.cc/2TLQ-EDKQ]; J.M. Jehle, *Attrition and Conviction Rates of Sexual Offences in Europe: Definitions and Criminal Justice Responses*, EUR. J. CRIM. POL. & RESEARCH 18, 145–61 (2012).

[25] Estimates of underreporting vary significantly depending upon many factors, including how the crime is defined. As to the United States, see CANDACE KRUTTSCHNITT ET AL., NAT'L RES. COUNCIL, ESTIMATING THE INCIDENCE OF RAPE AND SEXUAL ASSAULT 1 (2014). Compounding the persistent problems of victims' reluctance to report and police unfounding of cases that are reported is the fact that the methodologies employed by studies seeking to measure incidence and prevalence—most saliently the National Crime Victimization Survey (NCVS)—likely produce major undercounts of reported rapes, *id.* at 4, 161, which, by extension, would increase the underestimation of rapes that go unreported. For specific data on underreporting, see NAT'L VICTIM CTR., RAPE IN AMERICA: A REPORT TO THE NATION 5 (1992), https://www.musc.edu/ncvc/resources_prof/rape_in_america.pdf [https://perma.cc/7URE-PLZV] (finding sixteen percent of rapes reported); *see also* David P. Bryden & Sonja Lengnick, *Rape in the Criminal Justice System*, 87 J. CRIM. L. & CRIMINOLOGY 1194, 1220–21 n.170 (1997) (collecting studies with differing estimates); *id.* at 1210–11 ("Recent crime-victim survey data suggest that each year an estimated 500,000 women are victims of some form of rape or sexual assault."). Yet in 1994, only 102,096 rapes were reported to authorities, and ultimately there were only an estimated 36,610 arrests for forcible rape. FED. BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES, 1994 UNIFORM CRIME REPORTS 376 (1995); *see also* Joan McGregor, *Introduction to Philosophical Issues in Rape Law*, 11 Law & Phil. 1, 2 (1992) (estimating likelihood of rape complaint ending in conviction at two to five percent). These are studies of underreporting of rapes of women. On the problem of underreporting of rape of men by men, see I. Bennett Capers, *Real Rape Too*, 99 CAL. L. REV. 1259 (2011).

[26] Blackstone, 4 COMMENTARIES ON THE LAWS OF ENGLAND 210 (1765). Of course the role and definition of these elements vary by degrees of the crime and in application and interpretation. The picture in the United States is somewhat diverse. Excluding statutory rape, sexual harassment, inappropriate touching, or sexual contact other than rape, twenty-five states expressly require both consent and force as elements of rape by statute. Examples include Georgia, defining rape as "carnal knowledge of: (1) A female forcibly and against her will; or (2) A female who is less than ten years of age. Carnal knowledge in rape occurs when there is any penetration of the female sex organ by the male sex organ." GA. CODE ANN. § 16-6-1 (West, Westlaw current through Act 317 of the 2016 Reg. Sess. of the Georgia General Assembly); *see* Smith v. State, 737 S.E.2d 700 (Ga. Ct. App. 2013) (finding ten-year-old girl did not consent to oral, anal, and vaginal penetration by stepfather because of age and intimidation by her mother's punishments); Massachusetts, which defines rape as "(a) Whoever has sexual intercourse or unnatural sexual intercourse with a person, and compels such person to submit by force and against his will . . . ." MASS. GEN. LAWS ANN. ch. 265 § 22 (West, Westlaw current through Chapter 85 of the 2016 2d Ann. Sess.); and North Carolina, where "(a) A person is guilty of first-degree forcible rape if the person engages in vaginal intercourse with

conviction rate for reported rapes in the United States, depending on state and the study's methodology, is between twelve and twenty-five percent[27]

another person: (1) by force and against the will of the other person . . . ." N.C. GEN. STAT. ANN. § 14-27.22 (West, Westlaw current through the end of the 2015 Reg. Sess. and through 2016-3 of the 2016 Ex. Sess. of the Gen. Assem.).

Twenty-five states have rape statutes with some type of explicit nonconsent and force elements in the disjunctive, where one or the other is required, when the inclusion of elements in which the victim is mentally incapacitated (e.g., by drugs or alcohol) is included as a type of nonconsent element. Some states define lack of consent circularly with force, particularly those that use "forcible compulsion" as an element, so that lack of consent, while separately defined as an element, can be proved as resulting from forcible compulsion. *See, e.g.*, KY. REV. STAT. ANN. §§ 510.040(1)(a), 510.020(2)(a) (West, Westlaw Current with immediately eff. legislation signed through Ch. 134 of the 2016 Reg. Sess.). In addition, consent can be considered a defense to rape charges or a common law element of the crime of rape, so that determination of consent frequently enters case law even if never mentioned in the state's statute.

Alaska and Utah illustrate consent-only statutes. ALASKA STAT. ANN. § 11.41.410(a) (West, Westlaw current with chapters from the 2016 2nd Reg. Sess. of the 29th Legislature in effect through March 15, 2016) ("An offender commits the crime of sexual assault in the first degree if (1) the offender engages in sexual penetration with another person without the consent of that person . . . ."); UTAH CODE ANN. § 76-5-402(1) (West, Westlaw current through 2015 First Special Sess.) ("A person commits rape when the actor has sexual intercourse with another person without the victim's consent."). As does New Jersey. N.J. STAT. § 2C:14-1 *et seq*. (West, Westlaw current with laws effective through L.2016, c. 1); *State in the Interest of M.T.S.*, 609 A.2d 1266 (N.J. 1992); *S.D. v. M.J.R.*, 2 A.3d 412 (N.J. Super. Ct. App. Div. 2010); Megan's Law, 2013 N.J. SESS. LAW SERV. ch. 214 (Senate 2636) (West) (amending N.J. STAT. § 2C:14–2 to add incapacity of providing consent to sexual assault law). Nebraska does not list force or threat of force in the statutory provisions of the offense but does include it in the definitional section as one of several ways of proving nonconsent. NEB. REV. STAT. ANN. § 28-317 *et seq.* (West, Westlaw Current through legislation effective April 8, 2016, of the 2d Reg. Sess. of the 104th Legislature (2016)). In other words, courts determine nonconsent only, but the issue of force frequently appears in that connection.

Force-only states, in which there is no reference to a consent requirement in statutory or case law, are Connecticut and New Mexico. CONN. GEN. STAT. ANN. § 53a-65 *et seq.* (West, Westlaw current with enactments of Public Act 16-1 of the 2016 Feb. Reg. Sess. of the Conn. Gen. Assem.); *State v. White*, 740 A.2d 399, 403 n.3 (Conn. App. 1999) (noting lack of consent is not an element of first degree sexual assault, however "the lack of consent . . . 'is implicit' where forcible compulsion is established beyond a reasonable doubt." (quoting State v. Clinkscales, 574 A.2d 243, 248 (Conn. App. 1990))); N.M. STAT. ANN. § 30-9-11 (West, Westlaw current with emergency legislation effective through the end of the Second Reg. Sess. of the 52d Legislature (2016)); *State v. Jimenez*, 556 P.2d 60, 64 (N.M. 1976) (holding lack of consent not an element of the crime of sexual penetration).

The influence of the British legal definition, along with its common law and accompanying attitudes, was imprinted throughout the world by colonialism.

[27] *See* MAJORITY STAFF OF S. COMM. ON THE JUDICIARY, 103D CONG., THE RESPONSE TO RAPE: DETOURS ON THE ROAD TO EQUAL JUSTICE 1–13 (Comm. Print 1993), https://www.ncjrs.gov/pdffiles1/Digitization/145360NCJRS.pdf [https://perma.cc/WAR3-7U2B] [hereinafter THE RESPONSE TO RAPE] (providing statistics on attrition at each step). According to the White House Council on Women and Girls, while national prosecution data is not available, regional studies indicate that "two thirds of survivors [of rape] have had their legal cases dismissed, and more than 80% of the time, this contradicted her desire to prosecute. . . . Prosecutors were more likely to file charges when physical evidence connecting the suspect to the crime was present, if the suspect had a prior criminal record, and if there were no questions about the survivor's character or behavior." WHITE HOUSE COUNCIL ON WOMEN & GIRLS, RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION 17 (2014), https://www.whitehouse.gov/sites/default/files/docs/sexual_assault_report_1-21-14.pdf [https://perma.cc/Y63V-U9NW]. In the words of one investigator, "case attrition is staggering: For every 100 rape cases reported to law enforcement, on average 33 would be referred to prosecutors, 16 would be charged and moved into the court system, 12 would end in a successful conviction, and 7 would end in a

One out of about ten acts of rape or attempted rape that fit basic legal definitions in the United States is reported to authorities.[28] Dramatically fewer are prosecuted or result in convictions or incarceration, a process termed rape attrition.[29] Drawing on data from multiple jurisdictions, one congressional report concluded that ninety-eight percent of rape victims "never see their attacker caught, tried and imprisoned."[30] The lack of effectiveness of the law of sexual assault is no doubt overdetermined, flowing from many causes. But despite valid concerns with overcriminalization generally, including on the basis of race, the existing legal definitions of sexual assault do not appear to have described the criminalized experience in a way most victims or perpetrators recognize from their lived experience. Nor has it workably deterred or constrained the occurrence of this crime to any significant extent. In addition to rape law's underenforcement,[31] maybe one reason rape law is so ineffective is its failure to define the legal reality in terms of the social reality.

A Political Critique of Consent

In both law and scholarship, lack of consent—the widely adopted element of sexual assault that makes sex be rape[32]—ignores the inequality of

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prison sentence." Rebecca Campbell, *The Psychological Impact of Rape Victims' Experiences With the Legal, Medical, and Mental Health Systems*, 63 AM. PSYCHOLOGIST 702, 704 (2008). *See also Rape in the United States: The Chronic Failure to Report and Investigate Rape Cases: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong. (2010), https://www.gpo.gov/fdsys/pkg/CHRG-111shrg64687/pdf/CHRG-111shrg64687.pdf [https://perma.cc/XSR8-KWK7] (reporting inter alia that National Crime Victimization Survey found approximately twelve percent of the 283,200 annual rape or sexual assault victimizations between 2005 and 2010 resulted in an arrest).

[28] RUSSELL, SEXUAL EXPLOITATION, *supra* note 8, at 31 (documenting 9.5% of rapes reported); Mary P. Koss, *The Hidden Rape Victim: Personality, Attitudinal and Situational Characteristics*, 9 PSYCHOL. WOMEN Q. 193, 206 (1985) (determining that of thirty-eight percent of randomly selected college women whose experiences met the legal definition of rape or attempted rape, only four percent had reported the assault to the police); Crystal S. Mills & Barbara J. Granoff, *Date and Acquaintance Rape Among a Sample of College Students*, 37 SOC. WORK 504, 506 (1992) (noting among twenty student rape victims, none told police and only fifteen percent told anyone).

[29] Based on an analysis of data gathered by the U.S. Department of Justice between 2006 and 2012, the Rape, Abuse and Incest National Network ("RAINN") determined that "[o]nly three out of every 100 rapists will ever spend even a single day in jail." *97 of Every 100 Rapists Receive No Punishment, RAINN Analysis Shows*, RAINN, https://rainn.org/news-room/97-of-every-100-rapists-receive-no-punishment [https://perma.cc/SV5L-HMSE]. A careful look at the same reality in Canada in 2012 estimated that ultimate accountability for sexual assaults is around 0.3%. *See* Holly Johnson, *Limits of a Criminal Justice Response: Trends in Police and Court Processing of Sexual Assault*, *in* SEXUAL ASSAULT IN CANADA: LAW, LEGAL PRACTICE, AND WOMEN'S ACTIVISM 613, 632 (Elizabeth Sheehy ed., 2012).

[30] THE RESPONSE TO RAPE, *supra* note 27, at 2.

[31] *See* Deborah Tuerkheimer, *Underenforcement as Unequal Protection*, 57 B.C. L. REV. (forthcoming 2016).

[32] *See* RICHARD A. POSNER, SEX AND REASON 388 (1992) ("[A]ll that distinguishes [rape] from ordinary sexual intercourse is lack of consent . . . ."); ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS 1 (2003) ("A law professor is reported to have remarked that 'consent turns an act of rape into an act of lovemaking.'" (citing Jean Hampton, *Defining*

the sexes as context for, as well as potential content in, sexual interactions. The Oxford English Dictionary defines to consent as to "voluntarily acquiesce in what another proposes or desires."[33] Similarly, Black's Law Dictionary defines consent as "voluntarily yielding the will to the proposition of another."[34] In the law of rape, the social construction of the relations between the parties, including the immediate or extended conditions under which this yielding or acquiescence takes place, is at most a secondary focus. Consent as a concept describes a disparate interaction between two parties: active A initiates, passive B acquiesces in or yields to A's initiatives.

In sexual relations, the unequal stereotypical gender roles of A's masculinity and B's femininity,[35] his unilateral initiation followed by accession when the interaction achieves his envisioned outcome, are the obvious subtext, the underlying experiential reference points to the seemingly empty abstraction. In heterosexuality, the dominant form of sexual practice, these roles tend to map onto men and women respectively, making A often a man and B often a woman, although the same gender roles map onto sexual assault regardless of sex. In the life of inequality, much routine sad resignation or worse passes for "voluntariness" in the sexual setting. Consent covers multitudinous forms of A's hegemony that are typically so elided as not to be seen to infect or inflect, far less vitiate, B's freedom.

The presence of consent does not make an interaction equal. It makes it tolerated, or the less costly of alternatives out of the control or beyond the construction of the one who consents. Intrinsic to consent is the actor and the acted-upon, with no guarantee of any kind of equality between them, whether of circumstance or condition or interaction, or typically even any interest in inquiring into whether such equality is present or meaningful, at least in the major definition of the most serious crime. Put another way, the concept is inherently an unequal one, simultaneously silently presupposing that the parties to it are equals whether they are or not. It tacitly relies on a notion of the freedom of the acted-upon, on the meaningfulness of the "voluntary" balancing the initiative of "the other," under what are, in sex, typically invisible background, sometimes foreground, conditions of sex (meaning gender) inequality. It is as if one can be free without being equal—a proposition never explained or even seen as in need of explanation.

In an extensive analysis of consent in the context of the criminal law of rape, Peter Westen defines it as consisting "of all instances in which persons

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Wrong and Defining Rape, *in* A Most Detestable Crime: New Philosophical Essays on Rape 118, 134 (Keith Burgess-Jackson ed., Oxford 1990))).

[33] *Consent*, Oxford English Dictionary, Vol. 3, 760 (1989).

[34] *Consent*, Black's Law Dictionary, 805 (6th ed. 1990). The most recent edition is substantively unchanged. *See Consent*, Black's Law Dictionary 368 (10th ed. 2014) ("A voluntary yielding to what another proposes or desires.").

[35] For general discussion of this relatively uncontroversial proposition, see Sex Equality, *supra* note 1, at 191–98; Judith Lorber, Paradoxes of Gender 55–79 (1994); Irene H. Frieze et al., Women and Sex Roles: A Social Psychological Perspective 210–31 (1978). Also illuminating is Anne Fausto-Sterling, Sexing the Body: Gender Politics and the Construction of Sexuality (2000).

are found or desire to acquiesce to, or choose for themselves, what other persons do to them."[36] Acquiescence happens in sex, no doubt about it. It is often done by some to others. Many "are found" acquiescing in "what other persons do to them." Mutual, wanted, joyous, enthusiastic sexual interactions of intimate connection also happen, presumably termed by Westen desired or chosen. But are these really two forms of the same thing? Seriously, do they belong under the same umbrella?

Like one wing flapping, consent analysis focuses endlessly on B—what she has in her mind or lets someone "do to" her body. Inequality analysis, even in narrow form, starts where the interactions in question temporally start: with A, and what he does with his power. Entered from the point of view of the actor—who after all is being accused of a crime—rather than the acted upon, the doer rather than the done-to, Robert Dahl's classic "intuitive" definition of power observes: "A has power over B to the extent that he can get B to do something that B would not otherwise do."[37] Dahl's concept and a subset of Westen's are talking about the same type of interactions: those that occur without B's authentic concurrence, although they happen anyway. The two scholars are just focusing on different participants and with different concrete referents primarily in mind. Westen focuses narrowly on B permitting what A does to her or him. Dahl encompasses such interactions within a wider universe of what A gets out of B that B would not otherwise provide to A, but for A's power. He is also interested in why. Westen presumes B might want what A wants to "do to" her. Dahl is interested in how A gets what he wants from B when B, on her own, does *not* want the same thing A wants from her. With Dahl, at least B is doing. Westen sees B as done-to, determined to theorize how that sometimes occurs willingly; Dahl focuses on how A gets what he wants from B, when B does not want it on her own.

Obviously, the most convenient, efficient, and reliable method of ensuring that A gets what A wants out of the interaction with B, whatever B wants, is to arrange things so that B lets A do what he wants, or B does what A wants, whether B wants it or not. Voilá: consent to sex, a/k/a acquiescence to power. So much the better if this outcome, in which power prevails, can be made to appear as, or arguably even be, B's own "choice." Steven Lukes broaches this aspect of the inequality analysis when he observes that "A may exercise power over B by getting him to do what he does not want to do, but he also exercises power over him by influencing, shaping or determining his very wants."[38] One effective method of exerting this kind of power over the will, apart from socialization to gendered identity, is to be in the position to determine the alternatives and their consequences. Social hierarchy serves this function.

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[36] Peter Westen, The Logic of Consent: The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct 3 (2004).

[37] Robert Dahl, *The Concept of Power*, 2 Sys. Res. & Behavioral Sci. 202–03 (1957).

[38] Steven Lukes, Power: A Radical View 27 (2005).

So long as A's power over or relative to B, i.e., their inequality, is kept out of the picture, including in constructing B's options or even desires (internalized oppression to the women's movement, adaptive preferences to the sociologists[39]), the interaction between A and B may break no law, even if B says A raped or otherwise violated her. The inequality perspective, by contrast, is interested in both sides of this proposal-(alleged)-disposal relation in its wider social context. Consent theory scrutinizes the forms in which submission or subordination can occur to or by or be attributed to B, routinely inferring back from the outcome to a mental state consistent with that outcome—also termed she let it happen so she must have wanted it. Power theory, widening its lens, is at least as interested in A's forms of dominance and how its ends are achieved. *Why* B came to acquiesce in an act on or in her own body that she did not initiate—including why she would yield her will over her intimate self, say, to something she did not really want and never would have chosen without A using his power to impose it on her—opens as a question. In this light, the core logic of consent begins to emerge as assimilating accommodation to inequality to freedom for women in sex. More narrowly, it assimilates accommodation to inequality to noncriminal sexual intercourse under the consent standard.

An equality perspective considers sexual interactions claimed to be rape in the context of historically unequal power relations, in which members of one group have more power than members of another. On this deeper and broader inspection, consent emerges as an intrinsically unequal concept whether in real life, philosophically, historically, or in legal practice, as well as a legally impractical tool through which to pursue sex equality in a sex-unequal context, despite creative attempts to rehabilitate it.[40]

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[39] *See* Mary Leahy & James Doughney, *Women, Work and Preference Formation: A Critique of Catherine Hakim's Preference Theory*, 1 J. BUS. SYS., GOVERNANCE & ETHICS 37, 38 (2014) (defining "adaptive preferences" as the process "whereby women adjust their preferences in response to persistent gender inequality"); Nelarine Cornelius & Denise Skinner, *The Careers of Senior Men and Women—A Capabilities Theory Perspective*, 19 BRIT. J. MGMT. 141, 143 (2008) (noting that disadvantaged groups develop adaptive preferences whereby they change expectations based on experiences that are themselves shaped by their disadvantage).

[40] Among the more creative and comprehensive attempts in law to make consent respond to the realities of sexual assault under conditions of inequality is Canadian rape law, defining what consent is not:

> When no consent obtained (3) No consent is obtained, for the purposes of this section, if (*a*) the agreement is expressed by the words or conduct of a person other than the complainant; (*b*) the complainant is incapable of consenting to the activity; (*c*) the accused counsels or incites the complainant to engage in the activity by abusing a position of trust, power or authority; (*d*) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or (*e*) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity. Subsection (3) not limiting (4) Nothing in subsection (3) shall be construed as limiting the circumstances in which no consent is obtained.

Canada Criminal Code, R.S.C. 1985, c. C-46, § 273.1. Subsection (c) is particularly pertinent to this article, despite its lack of specifying inequality as such a position.

Rape Law's Consent

Consent as a legal standard in the law of sexual assault commonly exonerates sexual interactions that are one-sided, nonmutual, unwanted, nonvoluntary, nonreciprocal, constrained, compelled, and coerced.[41] Consent in sexual assault law is consistent with economic, psychological, and social hierarchical threats, so long as severe physical injury (rape itself is usually not considered a physical injury[42]) or life (that one fears HIV if no condom is used may not be included[43]) are not threatened. Sex imposed by an employer on an employee by threats to someone's job, for example, is consensual sex in the criminal law, because submission under threat to economic survival does not satisfy standards that require that for rape, sex be compelled under threat of bodily harm to oneself or others.[44]

Legally valid consent in the law of sexual assault ranges from desire to despair to defeat to death. Desire, presumably, can be present even if rape is later charged, although its marks are seldom perceptible in the facts of cases.[45] It operates mainly hypothetically. Despair, in which a woman resigns herself to sexual intercourse she abhors because fighting is futile or dangerous or otherwise expensive, is ubiquitous.[46] So is defeat, when resistance is overcome or the consequences of refusal are judged worse than the consequences of acquiescence.[47]

Death becomes the end of this continuum of passivity because, as cogently expressed by one Michigan court, "A dead body has no will to over-

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[41] Descriptions of prosecutorial difficulty or impossibility of proving nonconsent beyond a reasonable doubt can be found, for example, in Bryden & Lengnick, *supra* note 25, at 1216–17; Katherine Baker, *Sex, Rape, and Shame*, 79 B.U. L. Rev. 663, 690 (1999) (discussing why proof of nonconsent beyond a reasonable doubt is especially difficult in so-called date rape cases); Katherine Baker, *Why Rape Should Not (Always) Be a Crime*, 100 Minn. L. Rev. 221, 235–45 (2015) (showing that criminal law is unable to prosecute a tremendous amount of nonconsensual sexual activity).

[42] Canada, exceptionally, holds that it is. *See* R. v. McCraw, [1991] 3 S.C.R. 72 (Can.) (holding that rape is threat of bodily harm).

[43] A Texas grand jury initially refused to indict in such a case, with one grand juror saying that the woman's submission to sexual intercourse after the defendant, a stranger, broke into her bedroom wielding a knife, constituted consent. *See* Ross E. Milloy, *Furor Over a Decision Not to Indict in a Rape Case*, N.Y. Times, Oct. 25, 1992, at 30. Another grand jury subsequently indicted and the defendant was convicted. *See Jury Indicts Man in Rape Case: He Says Condom Implied Consent*, Detroit Free Press, Oct. 28, 1992, at 3A (denying a new trial).

[44] This legal fact is substantially why sexual harassment in employment was created as a legal claim.

[45] Should it matter to this point, false reporting of rapes in the United States has been found to range between two percent and ten percent of reports, as with other crimes. *See* David Lisak et al., *False Allegation of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 Violence Against Women 1318, 1318 (2010); Joanne Belknap, *Rape: Too Hard to Report and Too Easy to Discredit Victims*, 16 Violence Against Women 1335, 1335 (2010).

[46] Such cases are typically not charged at all.

[47] One illustration can be found in *Michael M. v. Superior Court*, 450 U.S. 464 (1981), in which a 16 year old girl "submitted to sexual intercourse" after being struck in the face. *Id.* at 467. In his concurring opinion, however, Justice Blackmun stated that the victim "appears not to have been an unwilling participant . . . ." *Id.* at 468. For further discussion, see text accompanying note 134, *infra*.

come."[48] One cannot not consent when dead, serving to reveal a tacit presumption in some instances that if sex happened, the woman consented to it, so the prosecution has to prove she did not. Depending upon the extent to which consent must be actively expressed or is legally sufficient if passively permitted, sex with a dead body can be rendered de facto consensual sex, so not rape, even if it may violate a law against necrophilia and consent is never mentioned. A corpse is certainly acquiescent—seemingly the sexual appeal of rape-murders—as are comatose or drugged or sleeping or otherwise unconscious[49] women. A lifeless body is utterly powerless, death being the ultimate overcoming by the power of the living.

Consent has been found valid when sex has occurred in a wide range of unequal settings. Classically, one reason rape in marriage was not a crime, for example, was because women were deemed permanently consenting to sex with the men they married.[50] In reality, a wife may consider submission

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[48] People v. Hunter, 30 N.W. 2d 174, 176 (Mich. Ct. App. 1995). Legal authority divides sharply by state as to whether a victim must be proven alive when sexually penetrated for a rape charge to exist. *See* John E. Theuman, Annotation, *Fact That Murder-Rape Victim Was Dead at Time of Penetration as Affecting Conviction for Rape*, 76 A.L.R. 4th 1147 (1989). Only Wisconsin appears to have explicitly held that sexual assault of a corpse is rape regardless of whether the assailant had a hand in the victim's death. *See* State v. Grunke, 752 N.W. 2d 769, 775–76 (Wis. 2008) (holding that state's sexual assault statute "applies whether a victim is dead or alive at the time of the sexual contact or sexual intercourse" and that proof of nonconsent "is subject to a simple proof when the victim is a corpse"). Georgia holds that given that absence of consent is satisfied with drugged, sleeping, unconscious, or comatose victims, "we see no reason why it should be any less applicable in a case in which the defendant has rendered the victim permanently unconscious by killing her." Lipham v. State, 364 S.E.2d 840, 842 (Ga. 1988). Some states similarly find that force and lack of consent with a dead victim are implied in law because incapacitated victims were regarded at common law as incapable of giving consent. *See* State v. Moorman, 358 S.E.2d 502, 505–06 (N.C. 1987).

However, many states take the view that a victim must be alive at the time of rape, regardless of whether the victim's rapist killed them. California, for instance, has held "that intercourse with a dead body does not constitute the crime of rape, and that it constitutes the crime of attempted rape only if the perpetrator was unaware at the time that the victim was dead." Tyler Trent Ochoa & Christine Newman Jones, *Defiling the Dead: Necrophilia and the Law*, 18 Whittier L. Rev. 539, 550 (1997). *See* People v. Booker, 245 P.3d 366, 398 (Cal. 2011). The reasons are murky and include the notion that "the 'feelings' of a female cannot be offended nor does the victim suffer 'outrage' where she is dead when sexual penetration has occurred." People v. Stanworth, 522 P.2d 1058, 1070 n.15 (Cal. 1974). Not that her feelings usually seem to count for much otherwise.

[49] An illuminating divergence of views on consent to sex while unconscious opened in the Supreme Court of Canada, the majority of which held, in a case in which a woman said she agreed to being made unconscious as part of sex but not to being bound and anally penetrated, as she found herself being upon awakening, that one has to be conscious, with a " 'capable' or operating mind" throughout sex acts to be consenting to them by Canadian standards. R. v. J.A., [2011] 2 S.C.R. 440, ¶¶ 4–9, 43. The complainant, after making the allegations, withdrew them, saying they were false and had been made because her husband was threatening to seek sole custody of their children. *Id* ¶ 9. A sharp dissent, predicated on autonomy, contended one can give advance consent to sex acts that will occur while unconscious, criticizing the majority's view as meaning that "yes in fact means no in law." *Id.* ¶ 71 (emphasis omitted). J.A.'s trial conviction, overturned on appeal, was reinstated. *Id.* ¶ 67.

[50] *See* 1 Sir Matthew Hale, The History of the Pleas of the Crown 629 (Sollom Emlyn ed., 1778) ("The husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract."); Jill Elaine Hasday, *Contest*

to her husband to be her duty, or subordination can be habitual and routinized, grounded in the historic institutional sex inequality between husband and wife in marriage. As perceptively described by Robin West, such consent may have nothing to do with what a woman wants:

> The will of the married woman who learns to accept routinized rape is no longer ruled by or even connected to her desires. Eventually, her desires are no longer a product of what she enjoys or what she has learned to enjoy. What the victim of routinized rape within marriage does, sexually, is a product not of what the victim wills but of what her attacker demands. As an immediate consequence, her will becomes a function not of her desires but of his desires. Eventually her desires become a function not of her pleasures, but of his pleasures; she wants literally to please him rather than herself because to please herself is too dangerous. The victim of marital rape gains survival, but she sacrifices self-sovereignty.[51]

Her will becomes a function of his desires. A similar awareness animates the analysis of Marc Spindelman, concerned about gay couples assimilating to the legal regime of heterosexual marriage: "How about consented-to, but unwanted, sex, as in, for example, sex given to stave off non-sexual but physical, domestic abuse? (This happens.)."[52] The question becomes: what limits these unequal dynamics to marriage?

Sex has been considered not rape when women said no to sex or otherwise expressed disinclination, making clear that women expressing their lack of desire for a sexual interaction has not necessarily been considered inconsistent with a finding of consent.[53] Not taking women's profession of

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and Consent: A Legal History of Marital Rape, 88 CAL. L. REV. 1373, 1375 (2000). This consent rationale in the marital context was repudiated, with others, in the breakthrough state case of *People v. Liberta*, 474 N.E.2d 567, 573 (1984) ("Any argument based on a supposed consent . . . is untenable."). The husband's legal immunity from rape of his wife was eliminated in the U.K. in *R v. R.* [1991] 1 AC 599 (HL) 602 (appeal taken from Eng.). How meaningful this is while consent remains definitive of rape is a separate question.

[51] Robin West, *Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment*, 42 U. FLA. L. REV. 45, 69 (1990) (arguing that excluding rape in marriage from rape law violates the Equal Protection clause because it requires the wife to sacrifice her selfhood).

[52] Marc Spindelman, *Homosexuality's Horizon*, 54 EMORY L.J. 1361, 1388 (2005).

[53] The trend may be toward "no" meaning lack of consent, although the verbal "no" from the victim is usually discussed with evidence of physical resistance and threats as well. *See, e.g.*, State v. Gatewood, 965 S.W.2d 852, 857 (Mo. Ct. App. W.D. 1998). An early analysis of the question concluded, "[i]n most states, verbal resistance—saying 'no'—still isn't sufficient to bring criminal law safeguards into play." STEPHEN J. SCHULHOFER, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW 11 (1998).

As of 2003, the pattern on the statutory spread of "no means no" was spotty but expanding, sometimes only at the lower levels of offenses, sometimes only at the higher levels. One survey of state rape statutes showed "no means no" strictly in some Alabama lower level charges, some sexual offenses in California, only misdemeanor unlawful sexual conduct in Colorado, most sexual offenses in Delaware, misdemeanor sexual abuse only in D.C., the two most serious felony sexual assault statutes in Florida, for rape but not assault with intent to rape in Massachusetts, higher level sexual felonies in Nebraska, the highest rape felony in New

views seriously as a statement of their preferences is ubiquitous under sex inequality. Any immigrant intimidated into having sex by means of threats of deportation may also be deemed consenting,[54] as can a woman whom a police officer picks up in his squad car and demands she fellate him.[55] The use of the power of the state—typically in the hands of men, deployed to get the drop on others sexually so that they must acquiesce—amounts to the use of institutional male power as individual male power. So, too, when lack of consent is found not shown when a private whose drill sergeant used his superior status and military power to threaten her, including to make her life hell, and ordered her to have sex with him, which she did, and his rape

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Hampshire, third-degree rape and misdemeanor sexual misconduct only in New York, sexual battery only in Oklahoma, and almost all sexual assaults in Utah. Saying no means consent was lacking or the sexual activity was "against the will" of the complainant was recognized under some additional state statutes: Missouri, North Carolina, Oregon, Pennsylvania, Tennessee, Texas, Vermont, Virginia, West Virginia, and Wyoming. *See State Rape Statutes*, AM. PROSECUTORS RES. INST., https://web.archive.org/web/20071027034508/http://www.ndaa-apri.org/pdf/vaw_rape_statute.pdf [https://perma.cc/6YNQ-ESD3].

For discussion of the potential scope of "no means no" in application, see the comparison of New York, where the victim must express lack of consent clearly and such that the reasonable person in the accused's situation would understand it as such; with Nebraska, where the victim can prove she said "no" but the statute allows the defendant to argue that this is not, in context, what she meant; with Massachusetts, where, once the victim says no, any other implication as to her consent must be considered legally irrelevant. MODEL PENAL CODE, Statutory Commentary, Sexual Assault and Related Offenses at 26–27 & n.68 (AM. LAW INST., Preliminary Draft No. 4, Oct. 3, 2014) [hereinafter ALI Preliminary Draft No. 4].

[54] Usually, such cases are not brought at all, particularly not as rape. For example, "[i]n Florida, Jonathan Bleiweiss of the Broward Sheriff's Office was sentenced to a five year prison term . . . for bullying about 20 immigrant men into sex acts. Prosecutors said he used implied threats of deportation to intimidate the men," Matt Sedensky & Nomaan Merchant, *AP: Hundreds of Officers Lose Licenses over Sex Misconduct*, ASSOCIATED PRESS: THE BIG STORY (Nov. 1, 2015, 12:02 AM), http://bigstory.ap.org/article/5a66f08987f445d9ba9253ba3d706691/ap-hundreds-officers-lose-licenses-over-sex-misconduct [https://perma.cc/A7S2-72WT]. In another case of forced sexual acts by a police officer, the defendant was found guilty of battery, stalking, and false imprisonment. *See* Jason Silverstein, *Florida Cop Who Was Once 'Employee of the Year' Pleads Guilty to Forced Sex Acts with Undocumented Immigrants*, N.Y. DAILY NEWS (Feb. 21, 2015, 6:08 AM), http://www.nydailynews.com/news/national/employee-year-fla-prison-sentence-article-1.2123778 [https://perma.cc/P5BA-8HFX].

[55] Sexual assault in multiple forms and iterations was charged, and much of it found, in the Holtzclaw case in Oklahoma, where the defendant police officer repeatedly used his power to intimidate Black women into sexual acts. *See* Jessica Testa, *The 13 Women Who Accused a Cop of Sexual Assault, in Their Own Words*, BUZZFEED NEWS (Dec. 9, 2015, 1:21 PM), http://www.buzzfeed.com/jtes/daniel-holtzclaw-women-in-their-ow#.fqezA4y22 [https://perma.cc/83HW-3WTL]; Oklahoma v. Holtzclaw, CF 2014-5869 (Okla. Dist. Ct. Jan. 21, 2016) (Bloomberg Law). If charged with anything, as observed *supra* in note 54, it is not uncommon for police officers to be accused and convicted for acts other than rape for using their authority to force others to engage in sex acts with them. *See, e.g.*, State v. Moffitt, 801 P.2d 855, 856 (Or. Ct. App. 1990) (defendant who picked up woman and drove her to a location where he demanded she fellate him claimed she initiated the sexual contact and was convicted of sodomy and official misconduct); State v. Gove, 875 P.2d 534, 535 (Or. Ct. App. 1994) (finding, in facts similar to *Moffitt*, officer guilty of official misconduct); State v. Felton, 339 So.2d 797, 800 (La. 1976) (finding police officer charged with extortion for forcing a woman through threats to have sexual intercourse or to perform a sexual act is not unconstitutional); *see also* Alexander v. DeAngelo, 329 F.3d 912, 916–17 (7th Cir. 2003) (finding threats by police officers to "put her away" for forty years if woman refused to give oral sex to another male police officer supports charge of battery, with dictum it could also be rape, for which officer was not charged).

convictions are reversed.[56] The absence of consideration of gender inequality in these contexts eliminates from rape law the basis in sex that proves sex discrimination, a quality that vividly animates these facts.

Similarly, a woman who insisted that a strange man who climbed through her window brandishing a knife use a condom before he raped her because she feared HIV infection was regarded as having consented by an initial grand jury.[57] Coerced submission can merge with consent not because juries make mistakes but because forced and threatening conditions are so standard a feature of relations between women and men under conditions of sex inequality that they can look like sex. Indeed, forced trade-offs are so customary for women in sexual settings that such choices may be considered to be voluntary—choices that, in any other setting, would be inconsistent with meaningful freedom. If one awakes in a burning house, jumping out a seventh-story window or staying to burn to death may be framed as choices, but neither is consent to arson.

In legal operation, consent to sex, or failure of proof of nonconsent, is routinely found in situations of despairing acquiescence, frozen fright, terror, absence of realistic options, and socially situated vulnerability.[58] Each of these routinely occurs in positions of inequality or is a well-documented response to enforced conditions of inequality. As Judith Herman describes rape survivors:

> When a person is completely powerless, and any form of resistance is futile, she may go into a state of surrender. The system of self-defense shuts down entirely. The helpless person escapes from her situation not by action in the real world but rather by altering her state of consciousness. . . . These are responses of captured prey to predator.[59]

These can also be rendered reactions of consent in law. Dissociation, particularly well-documented as a consequence of repeated sexual abuse,[60] including the trauma of multiple acts of violent sex inequality, can be expressed in the world as passivity and acquiescence, which perpetrators and triers of fact alike convert into consent to sex.

Prostituted sex, a favorite example of scholars as providing the definitive example of consent to sex,[61] is considered consensual because it is paid.

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[56] United States v. Bright, 66 M.J. 359, 362–66 (C.C.A.F. 2008).

[57] See discussion at note 43, *supra*.

[58] Stephen Schulhofer's excellent investigation, UNWANTED SEX: THE CULTURE OF INTIMIDATION AND THE FAILURE OF LAW (1998), is full of such examples. More are also discussed in *Unequal Sex*, *supra* note 1.

[59] JUDITH HERMAN, TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC VIOLENCE TO POLITICAL TERROR 42 (1992).

[60] *Id.*

[61] A range of views on this question are visible in the ALI process. The Reporters propose that when an act of sex otherwise violates its prohibitions, the fact it is commercial, defined as an act "in exchange for which any money, property, or services are given to or received by any person," results in an offense one degree higher than otherwise provided. MODEL PENAL CODE §§ 213.0(2), 213.8, Sexual Assault and Related Offenses at Appendix 18, 21 (AM. LAW INST.,

In fact, women are disproportionately bought and sold in prostitution by men as a cornerstone of combined economic, racial, age-based, and gendered inequality, in which money functions as a form of force in sex because the women are not permitted to survive any other way.[62] And the pimps and traffickers keep the lion's share of the earnings.[63] That prostituted women were typically sexually abused in childhood previously, and most enter the sex industry as children, where they are frequently deemed by law as voluntarily engaging in crime, and then are arrested so they have a criminal record and cannot get a real job, underlines the layers of inequality involved in this technically consensual sexual activity.[64] Thus is prostituted sex, the most multiply coerced sex on the planet, cherished as the ultimate example of consensual sex.[65]

Preliminary Draft No. 6, Feb. 29, 2016) [hereinafter ALI Preliminary Draft No. 6]. This proposal amounts essentially to a sentencing enhancement, not a redefinition of forced sex in inequality terms. Dissenters from the basic approach of the Reporters to an expanded role for consent noted in passing, while arguing that agreement and willingness are not the same, that, as in contracts, "'agreement' typically includes such further requirements as consideration and intent to be bound, all of which are inappropriate for intimate relations outside of prostitution." Letter from Undersigned ALI Members and Advisers to ALI Director, Deputy Director, Project Reporters, Council and Members (Jan. 20, 2016) (on file with author).

For further information on the place of prostituted women in rape law bearing on consent, see, e.g., Bryden & Lengnick, *supra* note 25, at 1360 ("Judges often admit evidence that the rape complainant was a prostitute, on the theory that it is relevant on the issue of consent."). For analysis of the differential impact of this assumption on prostituted women of color, intersecting racial and gender inequality, see Karin S. Portlock, *Status on Trial*: *The Racial Ramifications of Admitting Prostitution Evidence Under State Rape Shield Legislation*, 107 COLUM. L. REV. 1404 (2007) (finding differential exceptions in New York law to preclusion of sexual history under consent rationales for alleged rape of prostituted or formerly prostituted women of color). Concerning prostituted girls in particular, the assumption of consent overcomes even the age inequality. *See* Michèle Alexandre, *"Girls Gone Wild" and Rape Law: Revising the Contractual Concept of Consent & Ensuring an Unbiased Application of "Reasonable Doubt" When the Victim Is Non-Traditional*, 17 AM. U. J. GENDER SOC. POL'Y & L. 41, 62 (2009) (discussing ways rape shield laws have been circumvented in cases of alleged rape of prostituted women).

Cynthia Godsoe, *Punishment As Protection*, 52 HOUS. L. REV. 1313 (2015) looks at the conflict between prosecuting underage girls in prostitution and under statutory rape laws, observing that prostituted girls are no "less vulnerable or coerced than girls in statutory rape cases—if anything, the reverse is true." *Id.* at 1323. She finds that, for prostituted girls, their sexual "misbehavior" makes them considered capable of consent, regardless of their age. Accordingly, "while girls under eighteen are incapable of consenting to prostitution under federal law, and those under sixteen or seventeen are incapable of consenting to sex under most state laws, consent is deemed irrelevant to the conviction of girls as young as twelve or thirteen for prostitution. . . . Many police officers and others do not see these children as victims, even those as young as ten and eleven years old, instead viewing them as 'consenting participants.'" *Id.* at 1370–71.

[62] See sources cited in Catharine A. MacKinnon, *Trafficking, Prostitution, and Inequality*, 46 HARV. C.R.-C.L. L. REV. 271 (2011) [hereinafter *Trafficking*]. Often, they are not permitted to survive this way either.

[63] *Id.* at 274.

[64] *Id.* at 280–83.

[65] This can remain true even when women attempt to leave the life. Two illustrative cases are usefully discussed in Michelle J. Anderson, *Prostitution and Trauma in U.S. Rape Law*, 2:3-4 J. OF TRAUMA PRAC. 75, 80–82 (2008) (analyzing United States v. Harris, 41 M.J. 890, 893–94 (A. Ct. Crim. App. 1995), *aff'd in part, rev'd in part*, 53 M.J. 86 (C.A.A.F. 2000), which held that a seven-year-old conviction for prostitution was "relevant because of its strong

All this is what consent actually means legally. It defines valid consent in law, not errors as to what consent legally means. Recognition that consent has not worked in the law for sexually assaulted women is not especially controversial.[66]

The accompanying doctrine of mistaken belief in consent[67] further means that if A is found to have believed B consented to sex with him, when she did not, the sex that occurred was not rape. Never mind that in societies

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tendency to prove the appellant's defense of consent" to a rape charge, and People v. Slovinski, 420 N.W.2d 145, 153–54 (Mich. Ct. App. 1988), holding complainant's prior prostitution record admissible in case of extreme stranger violence to prove consent in a rape charge because of its tendency to show that the woman "entered into a financial arrangement with the defendant for sexual acts"). Michelle Anderson also reports interviews with women prostituting on the street in which "the women pointed out that it was not uncommon for a man to pick a prostitute up, refuse to pay her, force sexual acts on her against her will, and then give her money once those acts were complete, as if the money legitimized the violence and as if the man was entitled to purchase the experience of rape." *Id.* at 89–90. In other words, the johns see money as purchasing consent to rape.

Connecting prostitution with consent prior to rape shield provisions, see Brewer v. United States, 559 A.2d 317, 321 (D.C. 1989) (holding in appeal of conviction of rape and other sexual assault, "[h]ad Brewer offered proof that Jones consented to perform services as a prostitute with him on the night in question, such evidence would have been relevant to the issues of consent and Brewer's intent"); People v. Varona, 192 Cal. Rptr. 44, 46 (Cal. Ct. App. 1983) (admitting evidence in rape allegation that prosecutrix was a prostitute in the area in question and specialized in oral copulation, although "[w]e do not, here, hold that in every rape case where the prosecutrix is a prostitute, that evidence of that fact must be admitted to show consent").

Contrary holdings also exist, showing persistent attempts of defendants to admit evidence of prostitution going to consent, particularly after rape shield laws were enacted. *See, e.g.*, Farris v. Ryan, No. CIV S-04-0989LKKEFBP, 2009 WL 256563, at *7 (E.D. Cal. Feb. 3, 2009) (ruling under California Evidence Code sections 1103 and 782, "[t]he identification of a victim as a prostitute necessarily suggests the victim is willing to engage in sex for a living . . . [which] necessarily provides evidence of the victim's sexual conduct . . . [which] raises the impermissible inference of the victim's consent"); United States v. Saunders, 943 F.2d 388, 392 (4th Cir. 1991) (holding "[w]hen consent is the issue . . . section (b)(1)(B) . . . . manifests the policy that it is unreasonable for a defendant to base his belief of consent on the victim's past sexual experiences with third persons, since it is intolerable to suggest that because the victim is a prostitute, she automatically is assumed to have consented with anyone at any time.").

[66] The valiant attempts by the ALI Reporters in 2014–2016 to rewrite rape law to make consent meaningful, referenced throughout this article, are perhaps the best, certainly the most recent, illustrations of this recognition.

[67] Canada wrestles with this issue this way:

> When belief in consent not a defence (5) It is not a defence to a charge under this section that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge if (a) the accused's belief arose from the accused's (i) self-induced intoxication, or (ii) recklessness or wilful blindness; or (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.
>
> Accused's belief as to consent (6) If an accused alleges that he or she believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.

Canada Criminal Code, R.S.C. 1985, c. C-46, § 153.1 (Can.).

saturated with pornography, a lead pipe over the head or its equivalent can sincerely be believed to produce consent to sex. Reasonable belief—what juries or judges think a so-called reasonable person in the position of the accused would have believed[68]—is a marginally higher standard for the accused to meet than honest belief—what the accused actually believed. But the underlying equality question remains: in societies of sex inequality, why should the defendant's beliefs, constructed in a rape culture that glorifies and normalizes male force in sexual relations,[69] rather than his actions, determine his culpability?

Consent versus Welcomeness

The concept of consent relies for its social appeal on the assumption that it stands in for desire. Whenever its use in the sexual arena is questioned, which is mighty seldom, the response is to wave the flag of desire. This is consent's credibility cover. Consent can be considered to include authentic desire, but the term is never used in that context in real life, and nothing limits it to that in law. In social reality, the crucible of meaning, sex that is actually desired or wanted or welcomed is never termed consensual. It does not need to be; its mutuality is written all over it in enthusiasm. Consenting is not what women do when they want to be having sex. Sex women want is never described by them or anyone else as consensual. No one says, "We had a great hot night, she (or I or we) consented."

The reason welcomeness, not consent, is the standard for sex that does not violate the law of sexual harassment, a sex equality law, is because con-

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[68] For the standard approach that the defendant's reasonable, albeit mistaken, belief that the victim consented to sex may constitute a defense to rape, see WAYNE LAFAVE & AUSTIN SCOTT, JR., HANDBOOK ON CRIMINAL LAW, § 47 357–58 (1972).

[69] On the concept of rape culture generally, see EMILIE BUCHWALD ET AL., TRANSFORMING A RAPE CULTURE (1993); PEGGY REEVES SANDAY, FRATERNITY GANG RAPE: SEX, BROTHERHOOD, AND PRIVILEGE ON CAMPUS (2d ed. 2007). Peggy Sanday, who studies sexual ideologies cross-culturally, distinguished rape-prone societies—those in which the reported incidence of rape is high, and is either excused as a ceremonial measure of masculinity or permitted by men to threaten or punish women—from rape-free societies—those in which the reported incidence of rape is low and in which sexual aggression is disapproved and punished. Peggy Reeves Sanday, *The Socio-Cultural Context of Rape: A Cross-Cultural Study,* 37 J. SOC. ISSUES 5, 15–18 (1981). On some United States campuses, where rape cultures have been particularly well-documented, Sanday found rape-prone cultures characterized by attitudes and behaviors "adopted by insecure young men who bond through homophobia and 'getting sex.' The homoeroticism of their bonding leads them to display their masculinity through heterosexist displays of sexual performance." Peggy Reeves Sanday, *Rape-Prone Versus Rape-Free Campus Cultures*, 2 VIOLENCE AGAINST WOMEN 191, 194 (1996). This clearly gender-based behavior is not confined to college campuses. In rape cultures, men receive their information about women and sex from pornography, target women at parties for sex and watch their buddies rape them (live pornography), and take advantage of drunk women routinely on an accepted, even planned, basis. *Id.* at 194–95. Campuses on which 55.7% of male students report obtaining sex by verbal harassment, or in which one quarter of male students report using drugs or alcohol to obtain sex and 8.6% report at least one use of force or threatened force to obtain sex, qualify empirically as having rape cultures. *See* Scot B. Boeringer, *Influences of Fraternity Membership, Athletics, and Male Living Arrangements on Sexual Aggression*, 2 VIOLENCE AGAINST WOMEN 134, 139 (1996).

sent, including the "voluntary," is inconsistent with equality. As the United States Supreme Court squarely recognized, "voluntariness in the sense of consent is not a defense to" a sexual harassment claim:[70]

> [T]he fact that sex-related conduct was "voluntary," in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit brought under Title VII. . . . The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.[71]

One does not meaningfully consent to the imposition of conditions of inequality. No one who accepts unequal pay is regarded as consenting to it, so it is no longer unequal.[72]

The welcomed is a world away from the acquiesced in, even in the hierarchical settings in which this standard currently applies. Surprisingly, given the massive obstacle consent has proven to be for survivors in rape law, welcomeness is only occasionally, indeed almost never, an issue in reported sexual harassment cases, despite the frequent requirement that an employee risk the consequences of expressing unwelcomeness as a predicate to suit.[73] Sometimes one even sees the judicial miracle of a woman being believed when she testifies to having had a welcome sexual relationship with one person at work followed by a coerced one with another person, or a nonmutual ending of an initially welcome relationship followed by negative workplace consequences to her from her former partner.[74]

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[70] Meritor Sav. Bank v. Vinson, 477 U.S. 57, 69 (1986) (internal quotations omitted).

[71] *Id.* at 68.

[72] The analogy has limits, since unequal pay provides the benefit of some pay, while any amount of unwelcome sex provides no benefits.

[73] *See* SEX EQUALITY, *supra* note 1, at 1074–78. Despite rape shield laws, the degree and extent to which the unwelcomeness doctrine is used as leverage against sexual harassment plaintiffs in pretrial settings, such as supporting overly broad defense inquiries into a plaintiff's sex life, wanted and unwanted, is not empirically known.

[74] *See, e.g.*, as to other sexual partners, Winsor v. Hinckley Dodge, Inc., 79 F.3d 996, 1001 (10th Cir. 1996) ("[P]rivate and consensual sexual activities do not constitute a waiver of his or her legal protections against unwelcome and unsolicited sexual harassment."); Williams v. Muhammad's Holy Temple of Islam, Inc., No. 00 CV 1251(RML), 2006 WL 297448, at *1, *4 (E.D.N.Y. Feb. 8, 2006) (finding plaintiff's alleged sexual behavior toward another person irrelevant as to defendant and forbidden by Rule 412); E.E.O.C. v. Wal-Mart Stores, Inc., 198 F.3d 257 (Table), Nos. 97-2229, 97-2252, 1999 WL 1032963 (10th Cir. Nov. 15, 1999) (forbidding as irrelevant entering of testimony regarding plaintiff's sexual relationships with other co-workers to show she welcomed relationship with defendant). As to prior sexual relationships with an alleged harasser, see Rietschel v. Maimonides Med. Ctr., 921 N.Y.S.2d 290 (N.Y. App. Div. 2011) (finding prior consensual sexual relationship between plaintiff and harasser does not warrant dismissal of complaint); *see also* Sclafani v. P.C. Richard & Son, 668 F. Supp. 2d 423, 433 (E.D.N.Y 2009) (stressing importance of preserving sex equality rights following failed sexual relationship).

The Impracticality of Consent under Unequal Conditions

Consent presents practical legal problems beyond its inherent logic in a socially unequal context. Socially speaking, if sex happened, or if a woman had ever had sex before, especially with the accused, her consent is effectively assumed. She has to disprove it. In unequal societies in which women are sexually defined, it is a social burden of proof women enter into the law of sexual assault already carrying. The setup, social and legal, is: sex happened; prove you did not let it happen. Consensual is a fall-back stand-in for "it wasn't so bad" in societies in which sex by definition fulfills rather than violates women, because sex is what women are for. In technical terms, when nonconsent is an element of the crime, the prosecution must prove that consent did not occur: a negative. It is obviously more difficult to prove that something was not present than that it was, especially when its presence is socially presupposed from facts on the ground, namely that sex happened.

In such instances, a woman must be believed concerning a sexual fact that, among other things, is ultimately subjective.[75] Will is a mental state. It can be legally defined in terms of its external manifestations—evidence of B's outward expressions of her will—although that approach risks reinstantiating the resistance requirement.[76] Either way, consent's ultimate referent is to a subjective state: what did B want at the time in question? Put differently, philosophically consent is subjective (what did she want or feel?) although legally it can be made objective (what did she say or do?). Socially, in trials for instance, judges and juries want to know her state of mind as indicated by what she said or did, which devolves into an inquiry into the meaning of her evidenced expressions, usually including what he could have thought she meant by what she said or did (or wore, or drank, or ever did before). This makes the inquiry more politically hermeneutic than either epistemic or even ontological.

Whether defined as against her will in the negative, or in terms of her willingness in the positive, *consent is the reason the rape complainant is put on trial.* This is what makes the complaining witness's sexual definition—hers as a woman, his as a gay man, for instance, and their sexual histories, despite legal barriers to their introduction—seem, even be, relevant to the accused perpetrator's defense. The distinction between whether someone was raped or just had sex, when seen in consent terms, is ultimately defined by how B felt about it, rather than in terms of what A did to B.

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[75] Considerable philosophical controversy exists on the underlying question. Helpful work is provided by Larry Alexander, *The Ontology of Consent*, 55 Analytic Phil. 102 (2014); *see also* Heidi M. Hurd, *The Moral Magic of Consent*, 2 Legal Theory 121 (1996); Larry Alexander, *The Moral Magic of Consent (II)*, 2 Legal Theory 165, 165 (1996) ("I agree entirely with Professor Hurd that consent, to be an expression of autonomy, must be the exercise of will and, thus, a subjective mental state.").

[76] *See* Michelle J. Anderson, *Reviving Resistance in Rape Law*, 1998 U. Ill. L. Rev. 953, 1005 (1998).

Suppose people charge rape because they were violated and therefore felt violated, or felt violated and therefore were. Consent definitions of sexual assault attribute victimization to the victimized, ultimately to their state of mind, even if that is legally measured by their behavior. If she felt differently about it, including acting differently because she felt differently, it was not rape. Consent makes the legal case turn on what the alleged victim was thinking and feeling at the time, or on what she said or did as an expression of what she thought or felt, as if the accused can have said and done exactly the same things—used the same amount of aggression, for example—and the interaction could have been sex, not assault.

In the case of reasonable but mistaken belief in consent, all is the same except the issue is shifted to what A thought B was thinking, rather what society judges A could reasonably conclude B meant by what she did or said, not what A did. So rape occurs in the mind of B if it was nonconsensual, or in the mind of A if he wrongly thought B consented, not by or in or on anyone's body in the world. Few victims confine their injuries to this. With nonconsent as an element, or consent available as a defense, A's criminality turns on how B felt, not on what A did. It also makes a systemic problem into an exceptional individual interaction. In societies in which sex is regarded as what women are for, with jurors rightly looking for reasonable doubt, as well as wrongly, but in a setting of gender hierarchy inevitably, measuring their views of her nature and worth against the consequences for him and his worth of holding him accountable for his alleged actions in what legally comes down to disregarding her feelings, it is no wonder the conviction rates are so low.

Inadequacies of Existing Attempts at Change

Some attempts to address these problems have been made in commentaries and in law. Principally, words—many words—have been added to try to make consent into the meaningful guarantee of sexual freedom it purports to be, and many want it to be. Just as anatomizing consent's forms into factual, constructive, imputed, expressive, attitudinal, or prescriptive, specifying what in actuality are forms of accommodation to unequal power by grafting onto consent prefatory terms like positive, chosen, affirmative, autonomous, unequivocal, and freely-willed[77] can seem a step in the right direction. "Against her will" becomes "willingness."[78] Yet even when "force, fear, restraint, threat, coercion, or exploitation" are prohibited as preconditions to consent,[79] the basic term is left potentially framed by inequality.

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[77] *See, e.g.*, State *ex rel.* M.T.S., 609 A.2d 1266, 1277 (N.J. 1992).

[78] As passed on May 17, 2016, the ALI's revised definition is: "'Consent' means a person's willingness to engage in a specific act of sexual penetration or sexual contact." MODEL PENAL CODE § 213.0(3)(a), Sexual Assault and Related Offenses (AM. LAW INST., Approved May 17, 2016) [hereinafter ALI Consent Definition].

[79] ALI Preliminary Draft No. 6 at Appendix 15, § 213.0(3)(d).

Sometimes consent is replaced with or defined in terms of more active-sounding terms like permission and agreement.[80] From a sex equality perspective, considering sex to which a woman does not affirmatively agree to be rape is an improvement over regarding sex in which she unequivocally declines to participate as not rape. Yes meaning yes is definitely better than no meaning yes.[81] And there certainly is a lot of not-yes-saying out there as well. But shielding all situations in which a woman says yes but claims assault from inequality scrutiny is like saying anyone who signs a contract is in an equal relationship. If a woman can be made to suck an employer's penis to keep her job, or to have sex with a dog while being pimped, presumably she can be made to say yes or to sign a contract. Pornography is full of yes. It is also full of women who have no desire to be there, doing what they are doing, having done to them what is being done.[82]

The so-called affirmative consent standard, understood as meaning that only when a woman freely says yes to sex is it not rape,[83] is imagined to solve these problems. Affirmative consent is an attempt to back consent into sufficient activity to transform passive acquiescence into something like mutuality. It imagines that if affirmative consent is the legal standard, what the woman says, even what she felt whether she said it or not, will be believed and will carry the day, determining in a criminal trial that the sex she says was rape, was. It promises power to the woman in sex and in court.

Apart from the problem of relying for incarceration on a victim's subjective state of mind, expressed or unexpressed, under continuing conditions of inequality—which include multiple inequalities in a racist and broken criminal justice system—believing the woman as to her state of mind on her testimony alone is so unlikely, other than for racist reasons (meaning there is no assurance at all that the accused is guilty), as to be unrealistic. That such

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[80] Canada's basic definition of consent is "the voluntary agreement of the complainant to engage in the sexual activity in question." Canada Criminal Code, R.S.C. 1985, c. C-46, § 273.1 (Can.).

[81] Illustrating that no means yes is far from an aberration in liberal theory; Jean-Jacques Rousseau expressed the idea with inimitable elegance and clarity: "It is not yet enough to be loved; desires shared do not alone give the right to satisfy them; the consent of the will is also needed. . . . To win this silent consent is to make use of all the violence permitted in love. To read it in the eyes, to see it in the ways in spite of the mouth's denial, that is the art of he who knows how to love. If he then completes his happiness, he is not brutal, he is decent." JEAN-JACQUES ROUSSEAU, POLITICS AND THE ARTS: LETTER TO M. D'ALEMBERT ON THE THEATRE 85, n.* (Allan Bloom trans., Cornell 1968) (1758).

[82] Documentation includes IN HARM'S WAY: THE PORNOGRAPHY CIVIL RIGHTS HEARINGS 60–66, 140–42 (Catharine A. MacKinnon & Andrea Dworkin eds., 1997). Women in pornography are the same group as women in prostitution, of whom an average of ninety-two percent want to leave the sex industry but do not know how. *See* Melissa Farley et al., *Prostitution in Five Countries: Violence and Post-Traumatic Stress Disorder*, 8 FEMINISM & PSYCHOL. 405, 420–22 (1998); SEX EQUALITY, *supra* note 1, at 1721–28.

[83] One example is California's requirement that colleges and universities that receive state funds implement an affirmative consent standard in their policies. *See* CAL. EDUC. CODE § 67386(a) (West, Westlaw through Ch. 1 of 2016 Reg. Sess. and Ch. 1 of 2015–2016 2d Ex. Sess.); *see also* CAL. PENAL CODE § 261.6 (West, Westlaw through Ch. 3 of 2016 Reg. Sess. and Ch. 1 of 2015–2016 2d Ex. Sess.) (defining consent to sex to require "positive cooperation").

a standard might make some sense under social equality (would rape exist there? here is your utopian moment) does not mean that it makes sense under conditions of inequality. It certainly does not mean that equality nears or arrives when we pretend we are already there. These modifiers, despite the best intentions of their supporters, do not and cannot adequately overcome the acquiescence to inequality that is what the concept of consent to sex fundamentally means and permits.

A responsive attempt to these concerns in defining consent, "the principal concept used to distinguish lawful from unlawful sexual conduct,"[84] is the ALI's reconfiguration of "willingness" in terms of "contextual consent:"[85] "Consent may be expressed or it may be inferred from behavior, including words and conduct—both action and inaction—in the context of all the circumstances."[86] This consent must be present, apparently, rather than nonconsent being proven absent—it is a willingness not an unwillingness standard—and was said to refer to "behavior communicating a state of mind, not . . . that state of mind."[87] Conduct by defendants that negates consent, proposed as force or coercion, was reserved; earlier proposals required that coercion involve serious bodily injury or exploitation.[88] As passed, no resistance is required for lack of consent, although its absence may be contextually considered in determining it.[89] Consent may be withdrawn anytime; "clear verbal refusal" suffices to establish nonconsent.[90]

The exact advances made here are minimal although not nonexistent. Most crucially for present purposes is the scope and content of context. The circumstances of the interactions could be interpreted atomistically or more broadly to encompass inequalities between the parties. (Context replaced a prior "totality of the circumstances" proposal,[91] which joined hands more explicitly with a civil rights approach.) An adopting legislature or trier of fact could interpret the new contextual dimension to situate the individuals within their larger social settings. Lacking the benefit of an express inequality context to animate and educate its application, "willingness" in a narrow individualistic setting would otherwise continue to fall far short of the realism and transformative potential provided by an equality standard, particularly given consent's conceptually and socially unequal structure.

The further step of subjecting the initiator of all unwelcome sex to incarceration may be what "affirmative consent" rejected by the ALI—which basically means yes you can do this to me—is leaning toward without arriving at. This is the sense it is bending over backwards to try to capture without doing so, in a struggle to arrive finally at an active concept through

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[84] ALI Preliminary Draft No. 6 § 213.0(3) at 1 (cmt.).
[85] *Id.*
[86] ALI Consent Definition § 213.0(3)(a).
[87] ALI Preliminary Draft No. 6 § 213.0(3) at 1 (cmt.).
[88] ALI Consent Definition § 213.0(3)(b); ALI Preliminary Draft No. 6 § 213.0(3)(d).
[89] ALI Consent Definition § 213.0(3)(c).
[90] *Id.* §§ 213.0(3)(d) (revocation), 213.0(3)(e) (no means no).
[91] ALI Preliminary Draft No. 6 § 213.0(3) at 2 (cmt.).

consent's inherently passive route.[92] The contorted determination, even obsession, to ignore inequality in the sexual context, yet respond to its specific gravity, results in a tenacious ideological adherence to a seductive fantasy of autonomy under unequal conditions that are never squarely faced as fundamentally undermining.

A Historical Interlude

A brief excursion into the intellectual history of consent, shaped to this context, provides unexpectedly strong support for this critique. In early English statutes on rape, termed ravishment, an abducted woman who consented to sex after being raped could be punished along with her ravisher.[93] That a woman who is abducted might be in no position not to acquiesce in the demands of her captor did not make consent any less attributable to her. Consent was consistent with the force of captivity.

It is conventionally thought that consent as a general concept developed along two lines, one political between the government and the governed, the other in civil society between individuals, as in contract. It is also acknowledged that these two streams have variously overlapped, crossed, and flowed together.[94] Social contract theory, foundational in modern liberalism, might be seen as blurring the distinction.[95] With roots in Greek, Roman, and medieval law, the concept of consent was extensively debated and developed in its political role, addressing whether and how the consent of the governed legitimated the rule of the government, specifically grounding the obligation of obedience to law.[96]

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[92] Affirmative consent is rendered by the ALI Reporters' Memorandum as "often understood to require a specific word ("yes") or act (active cooperation) to communicate a party's willingness to engage in the specific sexual act." ALI Preliminary Draft No. 6 at Reporters' Memorandum xi. Regarding Council Draft No. 3, the Reporters' Memorandum states that given "the risk of overbreadth in penal statutes, the revised Draft rejects these 'affirmative consent' formulations." *Id.* at xi.

[93] *See* The Statutes of Westminster 1275, 3 Edw. 1 c. 13, 1 STATUTES OF THE REALM 26, 29 (Eng.); Statute Made at Westminster in the Sixth Year 1382, 6 Rich. 2 c. 6, 2 STATUTES OF THE REALM 26, 27 (Eng.) (taking away her inheritance as punishment for consent while abducted).

[94] For a helpful overview, despite not mentioning sexuality, see DAVID JOHNSTON, *A History of Consent in Western Thought*, *in* THE ETHICS OF CONSENT: THEORY AND PRACTICE 26 (Franklin G. Miller & Alan Wertheimer, eds., 2010) ("The way in which acts of consent among private parties have been conceived has been linked in a variety of ways to the notion of consent to governments or to other public institutions.").

[95] *See* CAROLE PATEMAN, THE SEXUAL CONTRACT 232 (1988). Pateman brilliantly criticizes liberal theory's social contract as predicated upon an underlying sexual contract through which men sexually dominate women.

[96] Democratic government being based on the consent of the governed is unquestioned in political philosophy. *See, e.g.*, JOHNSTON, *supra* note 94, at 26–34; GILLIAN BROWN, THE CONSENT OF THE GOVERNED: THE LOCKEAN LEGACY IN EARLY AMERICAN CULTURE 4 (Cambridge 2001) ("The idea of persons ruling themselves, whether through a monarch or another form of leadership, notably arises in the British political philosophy and experience. In this narrative dating back at least to the sixteenth century, government emerges from the consent of the governed."). Yet briefly revisiting some highlights of its history, with its detail and qualifications, in the present context proves unexpectedly revealing. Sabine notes that "[e]ven the

The notion that government is based on agreement of the governed is often traced to the ancient Israelites' covenant with God as conveyed by Moses.[97] In the Bible, this concept of consent is illustrated by reference to an example presumably already understood, a template already in place:

> For, as a young man weds a maiden,
> so you shall wed him who rebuilds you,
> and your God shall rejoice over you
> as a bridegroom rejoices over the bride.[98]

God is to the people who consent to his government as a young man is to a young woman he marries. The idea is pre-gendered, before civil society and

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most powerful and the most despotic government cannot hold a society together by sheer force; to that extent there was a limited truth in the old belief that governments are produced by consent. Government, [Thomas Hill] Green said, depends on will and not on force, because the tie that binds a human being to society is the compulsion of his own nature and not the penalties of the law or the calculation of ulterior advantages." GEORGE SABINE, A HISTORY OF POLITICAL THEORY 731 (3d ed. 1961). In addition, see, e.g., Cynthia Farrar, *Power to the People*, *in* ORIGINS OF DEMOCRACY IN ANCIENT GREECE 170, 182 (Kurt A. Raaflaub et al. 2007) ("The doctrine of consent is a central feature of the natural rights theory that underlies liberal democracy. . . . Natural rights theorists (Locke, for example) view every man as by nature free; he gives up a measure of this freedom by entering political society, and he must therefore be seen (or plausibly assumed) to consent to rule."); KARL LOEWENSTEIN, THE GOVERNANCE OF ROME 488, 488 (The Hague 1973) ("Beyond the impact radiating from Rome's political institutions, her indelible bequest to the government of man lies in the spiritual values that were imbedded in the practice of constitutional government; to wit, that the legality of the exercise of political power is conditioned on the observance of general rules binding power-holders and power addressees alike. Legitimate government is founded in the consent of the governed."); Sabine, *supra* at 204, 206 ("In the ninth century similar assertions [regarding the consent of the governed] are continually found, so frequently in fact that law seems regularly to have been issued in the name of the whole people definitely with the sense that their consent is an important factor in its validity. The term "consent," however, probably referred less to an act of will than to an acknowledgment that the law is really as stated. . . . The belief that law belongs to the people and is applied or modified with their approval and consent was therefore universally accepted [in 13th Century England]. The belief was, however, very vague, so far as concerned the procedure of government."); A. John Simmons, *Political Obligation and Consent*, *in* THE ETHICS OF CONSENT: THEORY AND PRACTICE 305–06 (Franklin Miller & Allan Wertheimer eds. 2010) (describing the history of the "consent theory of political obligation" from Plato's *Crito* to the social contract in John Locke, noting that "[i]n the political context, the idea is that, in consenting to be governed, citizens agree to obey the laws of the land (and so forth) and convey to their government (governors, fellow citizens, political community) the right to govern them (by, for example, making and enforcing law), thus justifying or legitimating (with respect to them) the actions of their government" and noting that "[t]he U.S. Declaration of Independence argues that the just powers of government derive solely from "the consent of the governed."); *id.* at 319 (discussing "government by consent" and how it might "actually manifest itself in real political life"). The precise place and role of consent of the governed was, of course, disputed in the original American context, especially in connection with representative government. *See, e.g.*, JOHN CROSS LIVINGSTON & ROBERT GEORGE THOMPSON, THE CONSENT OF THE GOVERNED 17 (1963). ("But in *The Federalist* (No. 35), Alexander Hamilton argues that the Constitution embodied a quite different theory of the consent of the governed. To him, individuals consent to a government, not primarily by a vote which holds their representatives responsible to their wishes and desires, but by having their economic interests represented by those who are the natural representatives of the economic classes to which they belong.").

[97] *See, e.g.*, JOHNSTON, *supra* note 94, at 26–27.

[98] *Isaiah* 62:5 (New English).

contract theory in the liberal sense came into being. God dictated the terms; Moses did not negotiate this one-sided covenant. If God is to the state as groom is to bride, groom is to bride as God is to the state. In this parallel, there is no doubt who is in the position of God, and it is not the maiden. Women (or maidens who have sex with men upon marriage), consider that, at least by analogy in this rejoicing, you are imagined to be having sex with God.

In a similar hierarchy, the consenting parties to government in eighteenth century English liberalism were not the state's equal, although they (generally not including women) were considered equals among themselves, and the power of the state they created by their consent was not unrestrained or unlimited.[99] Superseding the divine right of kings, popular sovereignty achieved by consent was posited as the basis for legitimizing the obligation to obey the laws of the state. Even as a fiction,[100] it never envisioned equality between the state and the citizen. It existed and exists today to rationalize the exercise of dominant power, the state, over its subordinates, the governed. The whole point was and is to legitimize state power over people.

Applying this political concept of consent to sexual politics, in which coitus "provides [patriarchy's] most fundamental concept of power,"[101] A is in the position of the government, B the governed. His word is her law. The purpose of consent is to attribute and justify the obedience of the powerless to the rule of the powerful, her obeisance to him, specifically in the present context, to what he does to her sexually. It is about compliance, compliance of the compliant presumptively legitimizing otherwise illegitimate acts of power.

The parallels of some of the details of consent doctrine in liberalism, fundamental to Western law, with consent in rape law[102] are striking. In classical liberalism, one is regarded as tacitly consenting to the state when-

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[99] Rousseau's view was that authority constituted by popular consent was essentially unlimited. Jean-Jacques Rousseau, *On the Social Contract*, *in* THE BASIC POLITICAL WRITINGS (Donald A. Cress ed. & trans., Hackett 1987). Other liberals opposed this view and saw this authority as limited, including Adam Smith, who opposed division of society into relations of domination and submission even if legitimated by consent of equal individuals. *See* ADAM SMITH, WEALTH OF NATIONS Book I, ch. 2:15 & Book III, ch. 4:385 (however women are not mentioned); *see also* JOHN STUART MILL, ON LIBERTY 10–11 (David Spitz ed., Norton, 1975) (1859), who thought that harm to others justifies the exercise of sovereign power over someone against their will.

[100] David Hume was vividly clear on this. *See* DAVID HUME, *Of the Original Contract*, *in* ESSAYS: MORAL, POLITICAL, AND LITERARY 465, 473–74 (Eugene F. Miller ed., Liberty Classics 1985) (1777).

[101] KATE MILLETT, SEXUAL POLITICS 25 (1970).

[102] The history of consent in the law of rape is traced and discussed in JOHNSTON, *supra* note 94; JAMES A. BRUNDAGE, LAW, SEX AND CHRISTIAN SOCIETY IN MEDIEVAL EUROPE (1987); Angeliki E. Laiou, *Sex, Consent & Coercion in Byzantium*, *in* CONSENT AND COERCION TO SEX AND MARRIAGE IN ANCIENT AND MEDIEVAL SOCIETIES (Angeliki E. Laiou ed., 1993); CAROLINE DUNN, STOLEN WOMEN IN MEDIEVAL ENGLAND: RAPE, ABDUCTION AND ADULTERY, 1100–1500 (2013). However, no source was found that specified the original time, place, and initiator of the idea that consent as a concept, long developed in political thought, see *supra* note 94, belonged in the definition of rape, legal or social. Or perhaps these developments occurred the other way around?

ever one does not leave,[103] whether leaving is a realistic option or one has anywhere to go. Women, like citizens consenting to government, are often found to consent to sex essentially because they were there. Benefits said to be conferred by the state on citizens and by men on women are frequently regarded as constituting consent to government and sex, respectively, when the purported consenters neither shaped the options nor could survive without complying. Prostitution is a good example. Silence in sex, as in governing, has been deemed consent, not dissent.[104] Then, having consented, one is deemed free.

Forced Consent

That sex with force is wanted is the real assumption behind the dual requirements of force and nonconsent for sexual assault, as prevails in many laws. As the state is defined as having a monopoly on the legitimate means of coercion (although obviously it does not), it is also not unusual for consent to sex to be found in situations where considerable force was used, building into sexual assault law the assumption that women want to be forced into sexual relations. The same assumptions tend to be attributed to gay men when claiming rape by a man, as the victim is reduced to gendered he-wanted-it non-rapeability. That a person is sexually fulfilled when sexually forced gives a whole new turn of the screw to Rousseau's evocative notion that unwilling subjects must be "forced to be free."[105]

Consent consistently and intrinsically permits defenses of "rough sex," originally a defense to homicide or an argument that assault and battery should be considered less blameworthy[106] when a murder defendant contended the deceased consented to aggressive sex that inadvertently ended up killing her—a version of the "she asked for it" standard consent defense in rape cases.[107] It has seldom been explicitly argued in this setting that being killed was consensual. In sexual assault cases, however, the "rough sex" defense, which is not uncommon,[108] is typically proffered as a defense to

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[103] *See* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 349 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). For a distinct but related doctrine, see THOMAS HOBBES, LEVIATHAN: OR THE MATTER, FORME & POWER OF A COMMONWEALTH, ECCLESIASTICALL AND CIVILL 520–22 (A.R. Waller ed., Cambridge Univ. Press reprint 1935) (1651).

[104] In one ALI draft revised definition of consent, "although silence or passivity does not 'by itself' constitute consent, such inaction is a form of 'conduct' that can be sufficient, in appropriate circumstances, to communicate positive willingness." MODEL PENAL CODE, Reporters' Memorandum, Sexual Assault and Related Offenses at xii (AM. LAW INST., Preliminary Draft No. 5, Sep. 15, 2015) (emphasis omitted).

[105] Rousseau, *supra* note 99, at Book I, Section 7. It is generally thought that Rousseau meant that anyone who refused to obey the general will had to be compelled to do so, which by giving each citizen to the country as a whole, guaranteed him against personal dependence. *Id.*

[106] *See* George E. Buzash, *The "Rough Sex" Defense*, 80 J. CRIM. L. & CRIMINOLOGY 557, 568 (1989).

[107] *Id.* at 558. Buzash also argues that it is "easily perjured." *Id.* at 573.

[108] My research discloses no studies documenting the prevalence of attempts to use "rough sex" as a defense to rape, although a good number of reported cases can be found, and

rape on the view that consent to violent sex is consent to sex, not rape. Although rape shield laws and evidentiary objections may preclude admission of "rough sex" defenses,[109] it is impossible to tell how often this de-

more exist in the press. The case of Robert Chambers appears to have popularized "rough sex" as a defense to murder, not rape, in recent times. He said he strangled Jennifer Levin by accident to keep her from hurting him during "rough sex" that he said she requested after they met in a bar. *See*, Michael Stone, *East Side Story*, N.Y. MAG., Nov. 10, 1986, at 43; BRYNA TAUBMAN, THE PREPPY MURDER TRIAL (1988); Linda Wolfe, *The People Versus Robert Chambers*, N.Y. MAG., Oct. 26, 1987, at 92. Chambers was convicted of manslaughter and served twelve years in prison. For a recent selection of voluminous press reports of the "rough sex" defense in sexual assault cases, see, e.g., *Airport Workers Stop Alleged Rape*, CHARLESTON GAZETTE, June 15, 2011, at C4; M.L. Nestel, *War Machine Mocks Rape Case in Court*, DAILY BEAST (Nov. 26, 2015 1:00 AM), http://www.thedailybeast.com/articles/2015/11/26/war-machine-mocks-rape-case-in-court.html [https://perma.cc/6LBN-EPNH]; Jim Phillips, *Defense Attorney in Rape Case: Alleged Victim Wanted 'Rough Sex'*, ATHENS NEWS (Oct. 29, 2009), http://www.athensnews.com/news/local/defense-attorney-in-rape-case-alleged-victim-wanted-rough-sex/article_c51ddeea-c3f2-5b47-a2ba-9625a4fb8018.html [https://perma.cc/6J3T-UUVK]; Adam Sacasa, *Woman Faces Rape Charge; Lake Worth Resident Accused of Attacking Female Partner*, SUN-SENTINEL, Nov. 1, 2013, at 1B; Joseph P. Smith, *Lawyer at Rape Trial: Rough Sex was Pattern*, DAILY J., Sept. 27, 2008, at A; Brad Wong, *Rape Case Involving Deputy Under Review*, SEATTLE POST-INTELLIGENCER, May 3, 2006, at B2; *Detective's Report Tells How Dating App Hookup Led to Alleged Kidnapping, Rape of Camdenton 19-Year-Old*, LAKEEXPO.COM (Apr. 11, 2016), http://lakeexpo.com/news/crime/detective-s-report-tells-how-dating-app-hookup-led-to/article_ed8fdc72-000a-11e6-bbbd-cb1dc4437d86.html [https://perma.cc/MHL9-8Q8Y]; John Hogan, *Ex-Grand Rapids Cop Guilty of Lesser Sex Offense*, DETROIT FREE PRESS (Mar. 30, 2016 9:24 AM), http://www.freep.com/story/news/local/michigan/2016/03/30/ex-grand-rapids-cop-guilty-lesser-sex-offense/82417798/ [https://perma.cc/VER4-9DXQ]. In the Jian Ghomeshi case in Canada, a former radio host claimed in a now-deleted Facebook post that the three alleged victims consented to rough sex. Ian Austen, *Jian Ghomeshi, Former Canadian Radio Host, Acquitted of Sexual Assault*, N.Y. TIMES (Mar. 24, 2016), http://www.nytimes.com/2016/03/25/world/americas/jian-ghomeshi-former-canadian-radio-host-acquitted-of-sexual-assault-charges.html [https://perma.cc/C4WJ-FCVN]; Alyshah Hasham, *Why the Jian Ghomeshi Trial May Change Nothing for Sexual Assault Survivors*, TORONTO STAR (Jan. 30, 2016), http://www.thestar.com/news/gta/2016/01/30/why-the-jian-ghomeshi-trial-may-change-nothing-for-sexual-assault-survivors.html [https://perma.cc/HRV2-48ZR]; *Judge Rules Jian Ghomeshi Not Guilty on Sexual Assault Charges, Casts Doubt on Alleged Victims' Stories*, MASHABLE.COM (Mar. 24, 2016), http://mashable.com/2016/03/24/jian-ghomeshi-sexual-assault/#nOPr2lk4Vaqq [https://perma.cc/S9HQ-vFFC]. For some reported cases in the United States attempting to use "rough sex" as a defense to rape, see *infra*, note 109.

[109] *See, e.g.*, Buchanan v. Harry, No. 5:07–CV–11630, 2014 WL 1999047, at *5 (E.D. Mich. May 15, 2014) (upholding ruling of circuit court that propensity of couple to engage in "rough" consensual sex was of "scant probative value" when there was no evidence that the woman consented to the assault in question); Gagne v. Booker, 680 F.3d 493, 518 (6th Cir. 2012) (upholding as not "objectively unreasonable" exclusion of propensity evidence of prior consensual group sex that produced injuries); King v. McDaniel, 357 F. App'x 856, 859 (9th Cir. 2009) (holding on habeas corpus writ that defense counsel did not perform ineffectively in failing to call expert to testify injuries of victim of "acute . . . [a]sphyxiation" were consistent with defendant's "rough sex" defense); State v. Bravo, 343 P.3d 306, 315 (Utah Ct. App. 2015) (finding that "without knowing more about what Bravo meant by 'rough sex,' the court could not analyze how probative that history was to show that Victim consented to being held down by her throat, picked up, thrown onto a bed, and flipped over onto her stomach," thus no abuse of discretion occurred in denying Rule 412 motion). One striking decision regarding five counts of first-degree sexual assault found reversible error in admitting evidence of an eight- or nine-month relationship with defendant involving consensual almost daily rough or aggressive sex because "[w]e are satisfied that the implied equivalence of defendant's consensual and alleged nonconsensual sexual encounters . . . was very likely to confuse the jury and invite an emotional response." State v. Gaspar, 982 A.2d 140, 149 (R.I. 2009); *see also* State v.

fense succeeds in derailing prosecutions because the reasons for not prosecuting are not disclosed, or in producing acquittals because acquittals cannot be appealed.

"Rough sex" is essentially a sadomasochism defense, the woman being stereotypically cast as a consensual sexual masochist who is lying in that she desired what she is now charging as an undesired attack. S&M, the infliction or reception of pain or humiliation as a consensual sexual practice, is intrinsically unequal sex in which the power difference constitutes the sexual arousal. Society as a whole sexualizes dominant power over relatively powerless others as its sexual paradigm. Whether S&M is understood as conformity to hierarchy in sex, hence hypernormative, or as sexually transgressive,[110] at the core of misogyny is the notion that women are born masochists who naturally desire to be forced into sex.[111] This virulent convenient ideology of gender inequality in sex is what rape law is centrally up against. So why does it also embody it? However the basic crime of rape should be defined, the ALI Council Draft for "consent to sex with force"[112]

Jensen, 606 N.W.2d 507, 512 (N.D. 2000); State v. Tennant, 678 S.E.2d 812, 818–19 (S.C. Ct. App. 2009), *aff'd as modified*, 714 S.E.2d 297 (S.C. 2011); Meza v. Cate, No. 1:11–cv–01483–AWI–DLB (HC), 2012 WL 1292566, at *6 (E.D. Cal. Apr. 16, 2012) (denying habeas corpus writ as appellate court reasonably found consent theory unavailable as no evidence existed that victim consented to beating by spouse).

[110] Some evidence indicates a disproportion of prior sexual abuse in childhood among S&M practitioners. *See, e.g.*, Niklas Nordling et al., *The Prevalence and Effects of Self-Reported Childhood Sexual Abuse Among Sadomasochistically Oriented Males and Females,* 9 J. CHILD SEXUAL ABUSE 53, 59–60 (2000) (In a Finnish study, "[f]emale participants who reported sexual abuse were significantly more likely to engage in masochistic sexual behavior than those female participants not reporting abuse. . . . In the present sample, 7.9% of the males reported sexual abuse compared to 1–3% in the general population. The corresponding figures for females were 22.7% and 6–8%. . . . It seems that for a subgroup of the sm-sex practitioners sexual abuse in childhood may be a contributory etiological factor."). Only what is recognized as sexual abuse, and not hierarchically abusive behavior more generally, was studied, and the figures relied upon for child sexual abuse in general makes these figures seem unrealistically low. That said, in a social context in which sexuality is hierarchically constructed, severe forms of abuse are not necessary to inculcate that script in forms considered extreme.

A substantial empirical literature aims to recover the practice of BDSM from the stigma of psychological pathology. *See, e.g.*, Brandy Lin Simula, *Does Bisexuality 'Undo' Gender? Gender, Sexuality, and Sexual Behavior Among BDSM Participants*, 12 J. BISEXUALITY 484, 484 (2012) (finding participants both "support and resist gender normativity"). None of this literature is critical of gender hierarchy in sexuality as inequality or sees S&M as an extension of the norms and practices of heterosexuality, hence ultra-normative. One study of practitioners who "privilege the practice of transgressing and transforming gender boundaries by neglecting or marginalizing the conscious engagement with racial transgressions and transformations" finds gender and class transformations successful but "race-based play" not to be. Robin Bauer, *Transgressive and Transformative Gendered Sexual Practices and White Privileges: The Case of the Dyke/Trans BDSM Communities*, 36 WOMEN'S STUD. Q. 233, 233, 247–49 (2008). Perhaps racism is being taken seriously.

[111] *See, e.g.*, ANDREA DWORKIN, *The Root Cause*, *in* OUR BLOOD: PROPHECIES AND DISCOURSES ON SEXUAL POLITICS 96, 104–05 (1976); ANDREA DWORKIN, *Freedom Now: Ending Violence Against Women*, *in* LIFE & DEATH: UNAPOLOGETIC WRITINGS ON THE CONTINUING WAR AGAINST WOMEN 152, 163–64 (1997). *See generally* PAULA J. CAPLAN, THE MYTH OF WOMEN'S MASOCHISM (1985).

[112] This defense per the proposed ALI changes would be a form of reasonable belief. *See* MODEL PENAL CODE § 213.9(1), Appendix, Sexual Assault and Related Offenses at 17 (AM.

is a logical extension of defining sexual assault in terms of consent rather than force. It seems worth asking why or whether the definition of rape should turn on what makes the world safe for S&M,[113] including when a practitioner of it charges rape, and how inequality is the recognized basis of violence against women, including sexual assault, yet is so permissible that the definition of rape should turn on permitting it.

Existing Attempts to Address Inequalities

The problems inequality raises for the law of sexual assault have not gone entirely unnoticed, even if the origin of many of them in sex inequality is virtually never acknowledged. The scholarly literature on sexual assault does sometimes talk about what is in fact situated inequality, typically after what it regards as real rape is defined. The conundra thus posed are backed into at the end of discussions of consent, wherein consent is newly seen as a bit problematic and in need of a little fine tuning in the form of qualifications and exceptions. Suddenly "consent cannot be considered effective when the actor's authority vis-à-vis the person consenting substantially impairs the subordinate individual's ability to choose freely."[114] Really. Or, at the end of discussions of force, it finally emerges that physical force may not have been necessary to coerce the sex that hierarchy did. Exceptions to the usual rules are sometimes made then, presumably to keep the usual rules that deny the existence of such forms of force in place. Here statutory rape, which is nothing but a crime of age-based inequality, or sex-and-age-based inequality, is justified, although the inequalities as such are never mentioned. It is a common refrain that children cannot consent to sex, hence intergenerational sex is rape by statute, but it is never said whether this means that children cannot give a meaningful yes (at age sixteen? seventeen?) or cannot enforce or be expected to sustain the consequences of a meaningful no. Nor is it explained whether and why whatever it is changes at age seventeen plus 366 days.

LAW INST., Council Draft No. 3, Dec. 15, 2015) ("Consent to the Use of Force. It is a defense for the actor to prove by a preponderance of the evidence that he or she reasonably believed that the other person gave explicit prior verbal consent to the use of physical force, threats, or restraint, and/or permission to ignore general expressions of unwillingness, in connection with an act of penetration or sexual contact otherwise proscribed. . . . The defense is unavailable for acts that occur at any point after which the actor knows or recklessly disregards that consent was withdrawn, or if the actor knowingly or recklessly caused serious bodily injury.").

[113] One Australian study using a representative sample of 19,307 respondents aged sixteen to fifty-nine found, through self-reports, that 1.8% of sexually active people (2.2% of men, 1.3% of women) said they had been involved in BDSM in the previous year. *See* Juliet Richters et al., *Demographic and Psychosocial Features of Participants in Bondage and Discipline, "Sadomasochism" or Dominance and Submission (BDSM): Data from a National Survey*, 5 J. SEXUAL MED. 1660, 1662 (2008).

[114] ALI Preliminary Draft No. 4 § 213.2(3), Statutory Commentary at 67. Backing into a provision for "imposition without overt coercion," after lengthy elaboration and defense of consent as foundational to rape law, does not recognize inequality as a serious issue in this area, but is narrowly limited to a substantial authority relationship or the incompetence of the victim to consent. *Id.*

Never is it recognized that age is an inequality tantamount to a form of force, making children's powerlessness relative to adults, sometimes with sex added,[115] the actual but silent justification for statutory rape laws. The same recognition is at once made and elided in statutes that prohibit sex between prisoners and guards, teachers and students, patients and therapists, and lawyers and clients.[116] The point they all recognize in what they do, yet fail to say in their rationales, is that when power is unequal, consent to sex is unlikely to be meaningful, or it becomes impossible to tell. Sex across the lines of these hierarchies is sometimes cognizable as lesser crimes in the criminal canon of sexual assault but the hierarchies are never called what they are: inequalities. Consent is known to become meaningless in exceptional hierarchical settings when acquiescence is the only realistic option. The tabooed question is: when is this not the case?

Instead of grappling with this question in specific cases, two international forums have redefined rape by facilely invoking consent in the name of equality. The European Court of Human Rights held that equality principles require that consent become the core of rape law in *M.C. v. Bulgaria*,[117] despite the considerable physical and other gender-based force used to effectuate the rapes in question. The fourteen-year-old M.C., who had never had sex before, accepted a ride home one night from three young men.[118] They abducted her to an isolated lake area where she was raped as the terrified girl cried, said no, and attempted ineffectively to resist.[119] Later the same night, she was raped again by the relative of a friend to whom she fled for sanctuary.[120] The Court held that Bulgaria failed to enforce its own law in violation of M.C.'s human rights and that an equality approach required putting consent at the core of rape's definition.[121] How exactly it was that the question of

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[115] Statutory rape statutes sometimes combine age with sex. For example, see the California statute as it then was in *Michael M. v. Superior Court*, 450 U.S. 464, 466 (1981) (citing what was then CAL. PENAL CODE § 261.5 (West Supp. 1981)).

[116] Criminal laws against hierarchical superiors and subordinates is documented in United States law and discussed in terms of sexual "imposition without overt coercion." *See* ALI Preliminary Draft No. 4 § 213.2(3), Statutory Commentary at 67–71. Related situations of "nonviolent coercion" applicable in some of these situations are also discussed. *See id.* at 55–67. Professional relationships are discussed in depth in ALI Preliminary Draft No. 4, Statutory Commentary at 67–71.

[117] M.C. v. Bulgaria, 2003-XII Eur. Ct. H.R. 1, 35–36. This opinion contains the statement regarding Commonwealth v. Berkowitz (*Berkowitz II*), 641 A.2d 1161 (Pa. 1994), that "Pennsylvania courts held that the victim's repeated expressions of 'no' were sufficient to prove her non-consent." *Bulgaria*, 2003-XII Eur. Ct. H.R. at 31–32. As to rape, the issue in *M.C. v. Bulgaria*, this is not the case. The Pennsylvania appeals court in the rape case held all her "no"s inadequate to prove "forcible compulsion," as required for rape in Pennsylvania. Commonwealth v. Berkowitz (*Berkowitz I*), 609 A.2d 1338, 1347–48 (Pa. Super. Ct. 1992). The jury conviction for rape was overturned. *See id.* at 1352. The case was remanded for retrial on "indecent assault," which requires nonconsent, a conviction the Pennsylvania Supreme Court reinstated. *Berkowitz II*, 641 A.2d at 1166. No discussion of equality occurred in the case. *See* discussion at text accompanying note 138 and following *infra*.

[118] *See M.C. v. Bulgaria*, 2003-XII Eur. Ct. H.R. at 8–9.

[119] *See id.* at 9.

[120] *Id.* at 10.

[121] *Id.* at 38–39.

consent even arose on the facts of this case, and why all the forms of force that were exercised—from abduction to being outnumbered and physically overpowered to the girl's youth, her tears, cries, sexual inexperience, and flight—were insufficient to make the sexual acts be considered forced, was not clarified. Nor, other than bare invocations of autonomy,[122] was the fit of consent with equality explained.

Similarly, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) Committee, which adjudicates cases brought under the Optional Protocol to CEDAW,[123] opined that consent is the core of an equality approach to sexual assault in *Vertido v. Philippines.*[124] The decision contains a detailed equality critique admirably dissecting the ruling below in terms of its rape myths and misogynistic stereotypes based on the idea of the inferiority of women.[125] This analysis could have framed a definition of rape based on coercion into sex as a form of gender inequality. There, the victim, accepting a ride home from her workplace superior, was abducted, entrapped, and raped by him.[126] She repeatedly indicated she did not want to have sex with him, tried to avoid the rape and escape the rapist without success, including by locking herself in a bathroom, and at times cowered in fear and dissociated.[127] Although there was plenty of evidence of force—in his workplace superiority, gender-based dominance, effective abduction, and physical aggression, pursuit, and overpowering—the CEDAW Committee challenged the force-only law in the Philippines as lacking the "essential element" of rape law: "lack of consent."[128] Consent was defined to mean "unequivocal and voluntary agreement," and the rape law ordered to be reconstructed accordingly.[129] Once again, neither how consent even arose as an issue on the facts of this case nor how it effectuates an equality guarantee, apart from saluting the flag of autonomy,[130] was discussed. It seems that these international adjudicators imagine that if consent is the rule, what the woman says she said or felt at the time will determine the legal outcome—a view that, at minimum, lacks basis in reality.

These cases, in which force was abundant even in its physical forms, unintentionally endorse the socially stereotypical active/passive model of sex and the social conditioning to trauma and the resulting dissociated acquiescence, including saying yes to unwanted sex that goes with it, that is fun-

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[122] *Id.* at 35–36.

[123] *See generally* Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, G.A. Res. 54/4 (Oct. 15, 1999), https://documents-dds-ny.un.org/doc/UNDOC/GEN/N99/774/73/PDF/N9977473.pdf?OpenElement.

[124] Vertido v. Philippines, U.N. Doc. CEDAW/C/46/D/18/2008, ¶¶ 3.3–3.5.8 (July 16, 2010), https://opcedaw.files.wordpress.com/2012/02/vertido-v-the-philippines.pdf [https://perma.cc/2GCX-KAB6]. CEDAW maintains this position in R.P.B. v. Philippines, U.N. Doc. CEDAW/C/57/D/34/2011, ¶¶ 8.8–8.9 (2014).

[125] *Vertido*, *supra* note 124, at ¶¶ 8.4–8.6.

[126] *Id.* ¶¶ 2.1–2.2.

[127] *Id.* ¶ 2.2.

[128] *Id.* ¶¶ 8.7–8.9.

[129] *Id.* ¶¶ 8.9.

[130] *Id.* ¶¶ 8.7–8.9.

damental to consent as a concept, as if embracing it effectuates sex equality guarantees. Under unequal conditions, many women acquiesce in or tolerate sex they cannot as a practical matter avoid or evade. Many initiate sex to stop other abuse and do their best to make it sexy so it will end quickly. That does not make the sex wanted. It certainly does not make it equal. It does make it legally consensual in most jurisdictions.

Seeking consent is essentially asking, "Is it all right if I do this to you?" like a surgeon getting consent to cut. Consent is not an equal model between people, including penetrator and penetrated, and in sex, that is not because of men's superior expertise or curative powers. When a sexual connection is mutual, intimate, desired, and equal, nobody consents in the sense of "mentally accepting without objection the moral or legal boundary crossing."[131] Enthusiasm, not resignation, is typically evident when tolerance of boundary violation is not what is occurring. Defining sex as something men do to, rather than with, women is not a road to equality or sexual liberation. Consent is a pathetic standard of equal sex for a free people.

III. The Inadequacy of Physical Force

This is by no means to defend existing uses of physical force in rape laws, although rape is often physically forced. Force in its physical form has largely defined the kind of force that rape law calls for. Typically an excessive and unrealistic amount of it is required, often with weapons that do not include the penis, in a standard that more often seems to have in mind a fight to the death between two men than a forced sexual interaction. Defining force, the 1962 Model Penal Code, for example, limited forcible rape to compelled submission "by force or by threat of imminent death, serious bodily injury, extreme pain or kidnapping."[132] Apparently when it came to sexual intercourse, threat of death a little later, bodily injury not regarded as serious, pain not considered extreme, or abduction short of kidnapping (perhaps as in *M.C.* and *Vertido*) was not enough.

Fights for sex that a man wins are apparently not rape either. An 1880 case in which a woman testified to being held tight by her hands and feet until she "gave up" saw the defendant's conviction reversed because her will was not shown to have been overpowered by his threat of violence.[133] Not much appeared to have changed in the larger picture a hundred years later when a defendant was not charged with forcible rape who slugged a young woman several times, after which, "I said to myself, 'Forget it,' and I let him

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[131] Westen, *supra* note 36, at 108.

[132] Model Penal Code § 213.1 (Am. Law Inst., Proposed Official Draft 1962). Lesser forms of the offense recognized less brutal forms of violence as well as some non-physical threats. *See generally id.*

[133] Whittaker v. State, 7 N.W. 431, 431, 433 (Wis. 1880).

do what he wanted to do."[134] Apart from not enough force, the evidence in both situations arguably showed legal consent by some standards. These examples also illustrate the tendency to require proof of much resistance as evidence that force existed, including where the law has formally eliminated the resistance requirement.[135] Even as the "rough sex" defense may be expanding, permitting more and more force to be consistent with consent, definitions of prohibited force consistent with acquittal may also be expanding. While few states anymore confine illegal force to the use of significant physical force,[136] standards for forcible compulsion can remain high even in the clear absence of consent.[137]

The much-discussed case of *Commonwealth v. Berkowitz*[138] illustrates these points in further depth. There, the jury conviction of a man student for rape of a woman student by "forcible compulsion" was reversed on appeal for legal inadequacy: not enough force.[139] The victim had gone to Mr. Berkowitz's dorm room looking for someone else while waiting for her boyfriend, after having had a couple of drinks.[140] After various sexual initiatives by Mr. Berkowitz, to which she repeatedly expressed disinclination by saying no and she had to go, Mr. Berkowitz locked the door, pushed her down onto the bed, got on top of her in a straddle position so she could not move, removed her pants and entered her vagina with his penis, during which she said no repeatedly.[141] He then pulled out and ejaculated on her stomach.[142] Both parties testified to the same facts, with the exception of the defendant contending that the victim was moaning no passionately, as if in encouragement.[143] Just prior to withdrawal, the defendant had noticed "a blank look on her face."[144] His appeal contended that "the facts show no more than what legal scholars refer to as 'reluctant submission.'"[145] The court found insufficient force to substantiate sex by forcible compulsion.[146]

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[134] Michael M. v. Superior Court, 450 U.S. 464, 483 n.* (1981) (Blackmun, J., concurring). The defendant was charged with statutory rape instead.

[135] *See* Anderson, *supra* note 76, at 1005.

[136] ALI Preliminary Draft No. 4, Statutory Commentary at 67–71 ("Among the 21 states that recognize implied forms of force or coercion . . . [s]ome states [8] remain focused on physical aggression . . . [h]owever some go further and recognize proxies for force such as size differentials between the accused and the complainant, isolation, or other factors that would suggest physical domination." *Id.* at 33.).

[137] *See* Deborah Tuerkheimer, *Rape On and Off Campus*, 65 Emory L.J. 1, 21–22 (2015).

[138] Commonwealth v. Berkowitz (*Berkowitz I*), 609 A.2d 1338, 1338 (Pa. Super. Ct. 1992).

[139] *Id.* at 1348.

[140] *Id.* at 1339.

[141] *Id.* at 1340.

[142] *Id.*

[143] *Id.* at 1341.

[144] *Id.*

[145] *Id.* at 1342.

[146] *Id.* at 1347–48.

In gendered terms, Mr. Berkowitz clearly felt a sense of entitlement to have sex with the victim.[147] He felt he could proceed unilaterally and use his body to dominate her, deploying the form of power men are considered entitled to use, ignoring her verbal statements, one of the few forms of power women are at times permitted. As he said when the sex act was finished, "Well, I guess we got carried away."[148] As they both testified, she retorted, "No, we didn't get carried, you got carried away."[149] The blank look he noticed on her face was her dissociating—leaving a terrifying and unexpected situation mentally because she could not leave it physically—one standard psychological defense mechanism when a person cannot control what is being done to them.[150] Mr. Berkowitz did notice it. Given the frequency with which women are sexually assaulted,[151] it is not surprising that dissociation is common among women, to the extent that leaving one's body could be seen as one standard dimension of femininity.

By any standard of mutuality, this interaction was not that. In perhaps its ultimate unilaterality, the defendant testified that after he had ejaculated on her stomach, "she saw that it was over."[152] What precisely "was over" was that he came. The case contains not a single description of sexual arousal or desire or satisfaction *by the young woman*. Other than Mr. Berkowitz's defense, turning on his reading of no, the entirety of the sexual interaction was defined by his arousal and satisfaction, and no one seemed to have noticed it. (The jury did, however, convict.) Even in the absence of inequality as a legal standard to shape the factual presentation—for example, the relative height and weight of the parties, given that men are on average larger and heavier than women[153]—there was nothing equal about the proceedings as described by either party. Despite all the gender inequality, not to mention the physical forms of domination used, the lesson typically taken

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[147] *See* Martha R. Burt, *Cultural Myths and Supports for Rape*, 38 J. PERSONALITY & SOC. PSYCHOL. 217, 229 (1980) (defining and measuring rape myths).

[148] *Berkowitz I*, 609 A.2d at 1341.

[149] *Id.*

[150] *See* HERMAN, *supra* note 59, at 42–43. I have long referred to individuals' situations of inequality by a collective plural and am gratified to be permitted to publish this locution. The alternative often imposed of "he or she" is awkward and calls gender to mind when it is not the point. Some survivors of sexual abuse who do not embrace gender labels are increasingly referring to themselves in the singular as "they" rather than as he or she.

[151] *See supra* n.8.

[152] *Berkowitz I*, 609 A.2d at 1341.

[153] Data from the Centers for Disease Control show that, on average for adults age 20 and over, United States men are approximately 30 pounds heavier and 4.7 inches taller than women. CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., ANTHROPOMETRIC REFERENCE DATA FOR CHILDREN AND ADULTS: UNITED STATES 2007–2010 (2012), http://www.cdc.gov/nchs/data/series/sr_11/sr11_252.pdf [https://perma.cc/FN3Y-5YPZ] (For weight, see Table 4 at 8 and Table 6 at 10, showing mean female as 166.2 lbs and mean male as 195.5 lbs. For height, see Table 10 at 14 and Table 12 at 16, showing mean female as 5'3" and mean male as 5'7.7."). Men on average also possess significantly more skeletal muscle than women, even adjusting for height and weight. *See* Ian Janssen et al., *Skeletal Muscle Mass and Distribution in 468 Men and Women Aged 18–88 Yr*, 89 J. APPLIED PHYSIOLOGY 81, 83 (2000).

from the case is that the problem was that the woman's no was not legally respected. True.[154] But that was only one of the gendered forms of force deployed and the gendered stereotypes and myths evidenced as leveraged throughout.

In Pennsylvania, non-exclusive factors at the time that could go to whether specific instances of physical coercion were sufficient to support forcible compulsion included:

> the respective ages of the victim and the accused, the respective mental and physical conditions of the victim and the accused, the atmosphere and physical setting in which the incident was alleged to have taken place, the extent to which the accused may have been in a position of authority, domination or custodial control over the victim, and whether the victim was under duress.[155]

These were found inapplicable. The domination Mr. Berkowitz exercised with his body over and into her body and the atmosphere of intimidation he created with the locked door were not seen as probative in this regard. If sex inequality was regarded as a potential form of force, they could have been, along with her expressions of disinclination. Given the frequency of sexual assault on college campuses, especially by male students against female students,[156] the fact that this attack occurred in a dorm room in the afternoon does nothing to define the physical setting as safe and unthreatening either. The point is not the bare fact that he is male and she is female, but rather that Mr. Berkowitz drew on gendered forms of power to succeed in his sexual aggression in stereotypical ways. With those cumulative forms of compulsion behind him, a push was enough.

Some commentators think it makes no difference whether the prohibited act is defined in terms of nonconsent or force, contending that no sexual

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[154] The disrespect of women's lack of consent in cases finding insufficient force for rape is further shown in other cases in which insufficient force for rape was found, despite nonconsent, in Pennsylvania, see Commonwealth v. Thompson, 2 Pa. D. & C.4th 632, 633–34, 652 (Pa. C.P. 1989) (ruling no forcible compulsion when defendant molested daughter since age twelve, then she awoke to find him inside her vagina), and elsewhere, see, e.g., People v. Carlson, 644 N.W.2d 704, 705 (Mich. 2002) (finding insufficient force when young male engaged young female in sexual intercourse in a car with clear absence of consent and no physical resistance); State v. Magel, 268 P.3d 666, 667–68 (Or. Ct. App. 2011) (reversing conviction of first degree rape finding no implied threat when father had sex with resistant daughter beginning at age nine and threatened to harm her sister if she did not comply). Thanks to Deborah Tuerkheimer for alerting me to these cases.

[155] *Berkowitz I*, 609 A.2d at 1344 (explaining factors introduced by *Commonwealth v. Rhodes*, 510 A.2d 1217 (Pa. 1986)).

[156] *See* Mary P. Koss et al., *The Scope of Rape: Incidence and Prevalence of Sexual Aggression and Victimization in a National Sample of Higher Education Students*, 55 J. Consulting & Clinical Psychol. 162, 163 (1987) (finding nearly one in four women college students raped while in college); David Cantor et al., Ass'n of Am. Univs., Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct 14 (2015), https://www.aau.edu/uploadedFiles/AAU_Publications/AAU_Reports/Sexual_Assault_Campus_Survey/AAU_Campus_Climate_Survey_12_14_15.pdf [https://perma.cc/V466-DCR8] (finding same).

relations legally addressable by force concepts cannot just as well be addressed by nonconsent concepts, and vice versa, reducing the distinction between them to the "rhetorical."[157] While there is something to this observation in the abstract world of concepts, it is only true in application in the real world if the meanings and place of consent and force are accepted and sex inequality is ignored as the gravamen of the offense, as it generally is in legal academic discourse. When rape is recognized as a crime of gender inequality, gender belongs on the list of inequalities that, when drawn upon as a form of power and used as a form of coercion in sexual interactions, make sex rape.

At this point, defining rape in terms of force, including all the forms of force that someone, usually a man, deploys to coerce sex on someone with less power than he has, is not only far more realistic in lived experience. It is also more sensible, more humane, and more workable in legal practice. Coercion, including circumstances of social coercion, tend (with social hierarchies) to build upon and leave forensic tracks in the real world that are subject to investigation, observation, and evidence. There are uniforms, positions of authority, traditions and triggers of dominance, well-worn consequences that flow from refusal of the desires of the dominant. Even the psychological dynamics of coercion are far more externally observable in their referents than are those of consent. A coercion standard does require victims be believed concerning the force used,[158] but the reference point for the evidence supporting them begins in the external physical world, in surrounding conditions, not primarily in the internal psychological one. Its focus is action not passion, him not her.

IV. Rape Redefined: A Proposal

The definition of sexual assault should begin with taking advantage of circumstances of inequality. This is where its basic rules should be developed, not where lower levels or exceptions to rules constructed around physical force and nonconsent should be backed into as an afterthought, as gender hierarchy is elided. On the view that rape is an act of sex inequality, and sex inequality when deployed is a form of force, of compulsion, a useful

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[157] An example is Westen, *supra* note 36, at 3.

[158] The entrenched disbelief in women's reports of rape is, again, admirably illustrated by Rousseau: "Rapes are hardly ever spoken of anymore, since they are so little necessary and men no longer believe in them. [A footnote appended to this sentence reads: "There can be such disproportion of age and strength that real rape takes place; but treating here the relation between the sexes according to the order of nature, I take them both as they ordinarily are in that relation."] By contrast, they are very common in early Greek and Jewish Antiquity, because those old opinions belong to the simplicity of nature, and only the experience of libertinism has been able to uproot them. If fewer acts of rape are cited in our day, this is surely not because men are more temperate but because they are less credulous, and such a complaint, which previously would have persuaded simple peoples, in our days would succeed only in attracting the laughter of mockers. It is more advantageous to keep quiet." Jean-Jacque Rousseau, Emile: or, on Education 360 (Allan Bloom trans., Basic 1979) (1762).

legal starting point for definition is the *Akayesu* decision of the International Criminal Tribunal for Rwanda. There, rape was defined internationally for the first time: "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."[159] Nonconsent is absent from the definition because it is redundant: coercion is present because consent is absent. Coercion can be circumstantial as well as physical: "Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances."[160]

The *Akayesu* definition is on the force side of rape definitions, consent not being mentioned, but the force it recognizes is not limited to the physical. In international criminal law, when a nexus with war or genocide or campaigns of crimes against humanity is established for a sex act, such that sexual assault is weaponized for these purposes, circumstances of coercion can vitiate consent of operative meaning. Being a captive in a concentration camp relative to a guard, or a child soldier relative to adult soldiers, or a member of an occupied population relative to a member of an occupying army can provide obvious examples.[161] In settings outside recognized zones of armed conflict or genocide, circumstances of coercion in domestic so-called peacetime could, by analogy, include psychological, economic, racial, and other hierarchical circumstances of compulsion.

The concern that arises here—calling it desperate would not be overstated—is how heterosexual sex (in particular but not alone) can take place under conditions of inequality, yet not all of it can be unequal. One unusually calm reflection on this alarm supposes that taking unequal power seriously in the law of rape would require prohibiting sex categorically between

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[159] Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶ 598 (Sept. 2, 1998).

[160] *Id.* ¶ 688. There, examples of coercive circumstances were given as "armed conflict or the military presence of Interahamwe among refugee Tutsi women at the bureau communal." *Id.*

[161] The impression should not be left that international courts uniformly or fully grasp and apply the *Akayesu* breakthrough, understanding the irrelevance of consent in contexts of extreme inequality, including pervasive violence. The ICTY in particular adheres to nonconsent, although it acquiesces in the Appeals Chamber's ruling that this be determined circumstantially. *See* Prosecutor v. Kunarac, Case No. IT-96-23 & 23/1-A ¶¶ 127–33 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002) ("The coercive circumstances in this case made consent to the instant sexual acts . . . impossible."); *see also* Prosecutor v. Karadzic, Case No. IT-95-5/18-T, ¶¶ 511–13 (Int'l Crim. Trib. for the Former Yugoslavia Mar. 24, 2016). The International Criminal Court has been more contextually realistic in its treatment of its distinct statute, noting that since nonconsent is not an element of rape as an act of genocide, crime against humanity, or war crime under the Rome Statute, nonconsent need not be proven by the prosecution. Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, ¶¶ 105–06 (Mar. 21, 2016) ("The Chamber notes that the victim's lack of consent is not a legal element of the crime of rape under the Statute. The preparatory works of the Statute demonstrate that the drafters chose not to require that the Prosecution prove the non-consent of the victim beyond reasonable doubt, on the basis that such a requirement would, in most cases, undermine efforts to bring perpetrators to justice. Therefore, where "force", "threat of force or coercion", or "taking advantage of coercive environment" is proven, the Chamber considers that the Prosecution does not need to prove the victim's lack of consent.").

"parties who are in some way unequal in legal, economic, or social leverage."[162] The alternative of redefining the underlying offense in terms of the leveraging of all the inequalities that make it possible, including age, rather than imposing yet another categorical prohibition, seems not to have been considered. Considering it could resolve conundra surrounding "the freedom to pursue genuinely *wanted* intimacy with partners who are equally willing"[163] that categorical prohibitions are incapable of addressing, such as girls and boys who are close in age or nearing age 18. All that fumbling around might be the most equal sex they will ever have in their lives. But contemplating the possibility that a person with less structural power would have to bring a rape charge for the criminal law to be activated in such instances seems to generate panic among some dominant group members.

Despite gender being an inequality, not all sex acts under conditions of this inequality are unequal on the basis of gender, just as despite race being an inequality, friendship—an intrinsically equal concept—is possible with conscious work, however complex or fraught, across racial lines.[164] As noted in the discussion of *Berkowitz*, some jurisdictions already recognize as contextual determinants in the criminal sexual assault setting relations that are hierarchical inequalities, and life goes on. Some forms of coercion beyond physical force or domination, at times including psychological force or intimidation, are already penalized by a number of states.[165] One of the strongest is North Dakota, which defines coercion as the use of "fear or anxiety through intimidation, compulsion, domination, or control with the intent to compel conduct or compliance."[166] Gender, if deployed, can work in all these ways.

In the criminal context, the relation mediating a pervasive collective social context of inequality and the individual interactions within it, in this case sexual ones, is illuminated by consideration of a parallel with genocidal rape. Rape that is an act of genocide is a crime, but not all sex acts that take place during genocides are genocidal, even those between individuals who are members of the targeted and targeting groups respectively. Yet when women are rounded up for rape on an ethnic basis, told they will be killed if they resist, then are raped and many are murdered, the rapes have been found genocidal.[167]

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[162] ALI Preliminary Draft No. 4, Statutory Commentary at 67.

[163] *Id.*

[164] Speaking of friendship, a good start on an equality model can be found in Pat Parker's poem: "The first thing you do is to forget that i'm Black. Second, you must never forget that i'm Black." Pat Parker, *For the White Person Who Wants to Know How to be My Friend*, *in* MOVEMENT IN BLACK: THE COLLECTED POETRY OF PAT PARKER, 1961–1978 68 (1978).

[165] These are collected *supra* at note 162, at 34.

[166] *See id.* n.89.

[167] In addition to the legal discussion in Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment ¶¶ 730–34 (Sept. 2, 1998), see, e.g., Gacumbitsi v. Prosecutor, Case No. ICTR-2001-64-A ¶¶ 606–11 (Sept. 29, 2014). On consent in defining rape as a crime against humanity, see Gacumbitsi, *id.* ¶¶ 147–57.

The difference is not only in the degree of violence inflicted. In the more analytically challenging case of *Rukundo*, a military chaplain with a documented history of genocidal attitudes and behaviors against Tutsi, for many of which he was convicted,[168] was also charged with genocide for sexually assaulting Witness CCH, a young woman Tutsi refugee, who approached him to hide her to avoid extermination.[169] Using a racist epithet,[170] he stated she deserved to be killed, took her inside the seminary to a room, locked the door, put his gun on the table, forced her onto a bed, put his body on top of hers, and forcibly touched her sexually, attempting to spread her legs and lift her dress until he ejaculated.[171] For this, he was charged with genocide in the form of serious bodily or mental harm to a member of a racial or ethnic group with intent to destroy the group, in whole or in part.[172] The trial court found this sexual assault to be genocidal.[173]

The Court of Appeals reversed, finding that while Rukundo possessed a genocidal mentality toward Tutsi, and sexual assault can be a genocidal act, this particular act of sexual assault was not genocidal because it was not committed with the requisite intent to destroy Tutsi as a group, but rather was an opportunistic abuse of CCH's vulnerability.[174] Dissenting, Judge Fausto Pocar argued that Rukundo's genocidal intent was evident from his statement that CCH's family should be killed because they were cockroaches, uttered moments before the sexual assault, in light of his pattern of genocidal conduct, and that the rape was legally indistinguishable from the murders for which he was convicted.[175] It seems evident that CCH's assault was trivialized and individuated because it did not look as violent and violating as the rapes the ICTR has repeatedly found genocidal and was reduced to a personal sexual act rather than contextualized as part of the genocide, despite Rukundo's clear genocidal mentality and the accepted destructiveness of sexual assault, including on an ethnic basis.[176]

Calling what Rukundo did opportunistic, not genocidal, ignores that the genocide created the opportunity. But for fleeing for her life from genocidal murder, from all that appears, CCH would never have approached this pastor for refuge or followed him into the seminary room. Nor is it persuasive to say that the sexual assault was not genocidal because he was merely abusing

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[168] Prosecutor v. Rukundo, Case No. ICTR-2001-70-T, Judgment, ¶¶ 4, 573 (Feb. 27, 2009).

[169] *Id.* ¶ 365–66.

[170] *Id.* ¶ 365 ("Rukundo responded that he could not help her because her entire family had to be killed, since her relative was an *Inyenzi*.").

[171] *Id.* ¶ 366.

[172] *Id.* ¶ 379.

[173] *Id.* ¶¶ 574–76.

[174] Rukundo v. Prosecutor, Case No. ICTR-2001-70-A, Judgment, ¶¶ 236–38 (Oct. 20, 2010).

[175] *Id.* ¶¶ 3–4 (Pocar, J., partially dissenting).

[176] For discussion of the role of sexual assault in genocides, see generally CATHARINE A. MACKINNON, *Genocide's Sexuality*, *in* ARE WOMEN HUMAN? AND OTHER INTERNATIONAL DIALOGUES 209 (2006).

her helplessness and desperation. She was desperate and helpless because she was Tutsi fleeing murder in a genocide against people like her. If the contextual factors that situated the relevant collectivities are properly applied to the individuals involved, this sexual assault is not merely interpersonal; its dynamics follow and depend upon the lines of force of the genocide.

To be found criminal, the unequal factors argued to effectuate the sexual overpowering need to be accepted as functioning as a form of force between two individuals. Done here, the trial court in *Rukundo* was correct. However, it may be reassuring to skeptics that the nexus between an individual sexual assault and the collective basis that has to be shown in any case claiming inequality can be so difficult to prove. That Rukundo's actions would more readily have been seen as gender-based, had that made them criminal, seems evident though.[177] This case is chosen for this discussion precisely because it can be made to look individual or collective, and because it is the least overtly physically violent in the entire jurisprudence of genocidal rape cases. However resolved, *Rukundo* illustrates that, as with all cases of discrimination, proof of the connection between the group-based inequality and the individual acts depends on the evidence—in this case, that the collective form of force coerced the individual act at issue. Notably, even in finding CCH's assault non-genocidal, there was no talk of her consent.

Further illustrating the criminally unequal beyond sites of war or genocide, survivors of prostitution outside recognized war zones often cogently describe their experience in the sex industry as serial rape.[178] Commercial sex is sex in which the conditions of inequality between the parties, including sex and gender as well as frequently age, race, and class or caste, are blatantly exploited. The sex is unwanted for its own sake, coerced by the multiple circumstances of inequality on which the institution feeds.[179] The Palermo Protocol's international definition of sex trafficking, the destination

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[177] Rukundo was not charged with a crime against humanity or a war crime for this rape.

[178] Many survivors have said this to me. *See, e.g.*, Evelina Giobbe, *Prostitution: Buying the Right to Rape*, *in* RAPE AND SEXUAL ASSUALT III: A RESEARCH HANDBOOK 144 (Ann Wolbert Burgess ed., 1991) ("Prostitution is like rape . . . it felt like rape. It was rape to me."); Melissa Farley, *Prostitution Is Sexual Violence*, PSYCHIATRIC TIMES (Oct. 1, 2004), http://www.psychiatrictimes.com/sexual-offenses/prostitution-sexual-violence [https://perma.cc/8589-ESN9] (referring to prostitution as "'paid rape,' as one survivor described it"); *see also* Sigma Huda (Report of the Special Rapporteur on the human rights aspects of the victims of trafficking in persons, especially women and children), *Integration of the Human Rights of Women and a Gender Perspective*, at 12, U.N. Doc. E/CN.4/2006/62 (Feb. 20, 2006) ("By engaging in the act of commercial sex, the prostitute-user is thereby directly inflicting an additional and substantial harm upon the trafficking victim, tantamount to rape. . . ."), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G06/108/06/PDF/G0610806.pdf?OpenElement; *Frequently Asked Questions*, COALITION AGAINST TRAFFICKING IN WOMEN AUSTRALIA (2007), http://catwa.org.au/?q=faq [https://perma.cc/9AS9-8GNM] ("Prostitution cannot eliminate rape when it is itself bought rape."); Warren Kinsella, Opinion, *Prostitution Isn't Sex, It's Bought Rape*, TORONTO SUN (Jan. 11, 2014), http://www.torontosun.com/2014/01/10/prostitution-isnt-sex-its-bought-rape [https://perma.cc/3N7B-Y7CC] ("[S]o say former prostitutes themselves.").

[179] These inequalities are detailed throughout *Trafficking*, *supra* note 62.

of which is prostitution, captures its relevant dimensions: prohibiting inter alia "the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability" for purposes of sexual exploitation.[180] Where any of these means is used, "the consent of a victim . . . shall be irrelevant."[181]

It appears to be difficult to think about sexuality in equal terms. Consent moves into this void. The Swedish model of prostitution breaks through this vacuum boundary by recognizing that sex under conditions of inequality—there, a transaction between someone who pays and someone who is paid—is unequal sex, criminal for the purchaser not the purchased, setting a global standard for what sexual violence against women includes.[182] Commercial sex is one form of unequal sex. Consent is irrelevant.

In light of the foregoing analysis, the transnational definitions of sexual assault that take inequality into account can be combined to redefine rape domestically as:

> a physical invasion of a sexual nature under circumstances of threat or use of force, fraud, coercion, abduction, or of the abuse of power, trust, or a position of dependency or vulnerability.

The definition includes but is not limited to penetration. Psychological, economic, and other hierarchical forms of force—including age, mental and physical disability, and other inequalities, including sex, gender, race, class, and caste *when deployed as forms of force or coercion* in the sexual setting, that is, when used to compel sex in a specific interaction—would have to be expressly recognized as coercive. Conditions including drunkenness and unconsciousness, along with other forms of incapacity, would be positions of vulnerability. Fraud is a strong form of deception. Expression of disinclination would be among the evidence that the listed means were used to secure compliance. As in the international context of war and genocide, for a criminal conviction, it would be necessary to show the exploitation of inequalities—their direct use—not merely the fact that they contextually existed. This proposal would also avoid having one definition of rape for the prosti-

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[180] Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime art. 3(a)–(c), Nov. 15, 2000, TIAS 13127, 2237 U.N.T.S. 319, https://www.unodc.org/documents/middleeastandnorthafrica/organised-crime/united_nations_convention_against_transnational_organized_crime_and_the_protocols_thereto.pdf [https://perma.cc/A52H-TNX4].

[181] *Id.*

[182] For documentation and discussion of the Nordic Model, see SEX EQUALITY, *supra* note 1, at 1683–87. France adopted this model in April, 2016. Loi visant á renforcer la lute contre le système prostitutionnel et á accompagner les personnes prostituées, Loi n° 2016-444 du 13 avril 2016 [Law to Strengthen the Fight Against the System of Prostitution and to Support Persons in Prostitution, Law 2016-444 of April 13, 2016], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], April 14, 2016, http://www.senat.fr/dossier-legislatif/ppl13-207.html [https://perma.cc/K5KK-RQ8B].

tuted and another for everyone else. For anyone, where any of the listed means was used, the consent of the victim would be expressly irrelevant.

One illustration of the male dominant ideology of essentialist sexuality that continues to underlie much rape law appeared in the first English translation of a text by Sigmund Freud, where this is said of coitus: "[T]he achievement of the biological aim is entrusted to the aggressiveness of the male, and is to some extent independent of the co-operation of the female."[183] The Strachey translation renders the same lines "independent of women's consent."[184] He aggresses; she need not cooperate or consent. Intercourse's "biological aim," which in context is broadly sexual in nature, not limited to pregnancy, is achieved whether she goes along with it or not. It remains coitus. The basic idea is that sexual intercourse, by nature, is an injury, an intrinsic violation of the woman by the man, a take-over not only natural but permissible as well as inevitable. Coitus, here biologically, is a transgression of the woman by the man.[185] It is quite a vision of sex.

The fact that consent is also used as a concept in biomedical ethics for agreement to intrusions into one's body by another that otherwise would be intrinsically injurious, as in surgery, tells a similar tale. It unmasks a notion of sexual intercourse, apparently not foreign to lawmakers at least, as intrinsically violative as well. Perhaps those who have made the laws think that permission for sexual penetration (the central fixation of rape law and of male sexuality) transforms an intrinsic violation into something else in the same way that permission for surgery changes what would otherwise be assault and maiming into medical care. If sexual penetration is not seen, in essentialist terms, as intrinsically violating, consent is not what makes a violation into one of life's little joys, because it was not necessarily a violation in the first place. As Leo Bersani analyzes Foucault's description of why Athenians could not accept the authority of a male leader who was sexually

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[183] SIGMUND FREUD, NEW INTRODUCTORY LECTURES ON PSYCHO-ANALYSIS 180 (W. J. H. Sprott trans., W. W. Norton & Co., Inc. 1933).

[184] SIGMUND FREUD, NEW INTRODUCTORY LECTURES ON PSYCHOANALYSIS 131 (James Strachey et al. trans., The Hogarth Press 1964) (1933). The relevant word is "Zustimmung," which can also mean approval.

[185] In case anyone missed it, this is a critique, not my personal notion of sex. Larry Alexander's concept of consent as "waiving her right that the conduct not occur," Alexander, *Ontology of Consent*, *supra* note 75, at 107, could be criticized in similar terms. Granted he is analyzing consent in all settings. But when applied in the substantive heterosexual context, presuming circumstances of sex inequality, sex becomes an ontological state of women, mainly, walking through life being entitled to keep sex from happening in the moment one relinquishes this right. Sex is thus an abdication by women at some times of their right to keep men from having sex with them at all other times. This prophylactic view is consistent with the social meaning of consent but also with a very male definition of women in terms of sex—here, something that is always already not happening until the magic moment the right not to have it happen is abandoned. Must women be either sex or not sex, i.e. consent or nonconsent? Are the presumptive not-happening of sex and sex happening our only options? While his definition is an improvement over women being sex walking, women becoming not-sex walking, with consent framing exceptions to the latter condition, is quite a vision of women, not to mention sex. Maybe it is a stop-gap in a context of inequality, where its opposite prevails, but whether it is an equality approach is not a question he theorizes.

penetrated as an adolescent, "[t]o be penetrated is to abdicate power."[186] Now who sees sexual penetration as intrinsically violating, sex as rape? Consider what an aspiring woman leader is up against.

My point is, when a sexual interaction is equal, consent is not needed and does not occur because there is no transgression to be redeemed. Call it sex. And when a sexual incursion is not equal, no amount of consent makes it equal, hence redeems it from being violative. Call it sexual assault. This statement does not end here. If sex is equal between partners who socially are not, it is mutuality, reciprocity, respect, trust, desire—as well as sometimes fly-to-the-moon hope and a shared determination to slip the bonds of convention and swim upstream together—not one-sided acquiescence or ritualized obeisance or an exchange of sex for other treasure that makes it intimate, interactive, moving, communicative, warm, personal, loving. If this seems complicated or out of reach or all a bit heavy, sex equality across society will make it simple and light. Actually, it is inequality of power that makes it seem like a grim political project, complex and distant.

This concept paper reframes a debate that seldom reaches into the social bedrock of the relevant concepts and realities.[187] The analysis here builds upon a sub-counter-trend in rape law reform that "widen[s]" the kinds of force considered sufficient "from aberrational violence to other kinds of force, intimidation, and coercion."[188] The contrasting response to the well-recognized ineffectuality of rape law has been to pursue a liberty-based analysis, emphasizing an ever-decontextualized autonomy-fixated notion of consent, ignoring the reality that the behavior in question is an unequal one, often on multiple grounds. How autonomy can be effective under conditions of inequality is (again) not addressed, including not in the tenacious fetishism of "agency."[189] Law being ham-handed at addressing dynamics of interpersonal space—relating—it resorts to the billiard-ball mechanistic atomism of who does what to whom. Embracing existing conditions, many apparently prefer believing they are already free to becoming equal so they can be.

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[186] Leo Bersani, *Is the Rectum a Grave?*, 43 OCTOBER 197, 212 (1987) (emphasis omitted). The same observation has been made of the Roman man, who was always willing to "express his dominion over others, male or female, by means of sexual penetration" whereas men who received sexual penetration were seen "to have assimilated themselves to the inferior status of women." CRAIG A. WILLIAMS, ROMAN HOMOSEXUALITY: IDEOLOGIES OF MASCULINITY IN CLASSICAL ANTIQUITY 18 (1999).

[187] This is my general reading of the body of literature by legal scholars on rape. With exceptions, while the work can be analytically sharp, it is neither philosophically informed nor practically engaged. Most authors seem unaware that "autonomy" doesn't just sound good but comes from a distinct philosophical tradition bringing assumptions and limitations, including individuation and decontextualization. Most legal commentators on this topic uncritically take the philosophical assumptions of liberalism for granted. WESTEN, *supra* note 36, for example. Little social reality, again with exceptions, tends to bother the discussion except in the precooked form of the facts of cases or hypotheticals that raise more questions than they permit answering.

[188] ALI Preliminary Draft No. 4, General Commentary at 14.

[189] Katharine Baker contends this fixation (my term, not hers) is a reason that changes in rape law (few and largely superficial in my view) have not been effective. *See* Baker, *Why Rape Should Not (Always) Be a Crime*, *supra* note 41, at 250, 261–62.

To those concerned with potential overbreadth in this proposal, its goal is not to define more acts of sex as rape, but to redefine the fundamental crime in terms of the actual forces it draws upon for its realization, and to recognize the real injuries it inflicts to individuals and communities, as well as to society as a whole. Those with more power who abuse it would, finally, be its focus. The real point of law is not incarceration or damage awards anyway but voluntary compliance, otherwise known as legal socialization or education. Nor would this be the first time criminal law was subjected to equality scrutiny with resulting reconfiguration.[190]

The purpose of civil law is generally regarded as prohibiting and compensating individual injury, criminal law as deterring and punishing harm and risk to the community. Transcending this distinction by converging the two in the collective group-based concept of equality, human rights does both at once, here in the criminal context.[191] Sexual abuse is beginning to be understood on the international level as the crime of inequality to and by individuals on the collective basis—gender hierarchy—that it is. The proposal advanced here embodies that concept for domestic law in language that forges a path toward making rape exceptional, then extinct.

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[190] During Reconstruction, African Americans and supporters reconceptualized crimes like assault and murder to take account of the vulnerability of one group to targeted violence perpetrated by another on a racial basis. *See, e.g.*, Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13 (1871) ("Ku Klux Klan Act" eventually partly codified civilly as 42 U.S.C. § 1985(3)). As explained by Representative Samuel Shellabarger, "The object of the [legislation] is . . . to [prevent] deprivations which shall attack the equality of rights of American citizens; that any violation of the right, the *animus* and effect of which is to strike down the citizen, to the end that he may not enjoy equality of rights as contrasted with his and other citizens' rights . . . ." CONG. GLOBE, 42nd Cong., 1st Sess. 478 (1871). All the Reconstruction statutes enacted in response to racial discrimination used criminal law to promote equality rights. *See* Will Maslow & Joseph B. Robinson, *Civil Rights Legislation and the Fight for Equality, 1862–1952*, 20 U. CHI. L. REV. 363, 369–70 (1953). In the late nineteenth and early twentieth centuries, African Americans, including prominently Black women like Ida B. Wells, reframed lynching in particular as largely an act of "race prejudice," one that used rape of white women as one pretext among others. *See* Ida B. Wells, *Lynching and the Excuse for It*, *in* LYNCHING & RAPE: AN EXCHANGE OF VIEWS 34–35 (Bettina Aptheker ed., Occasional Paper No. 25, 1977) (originally published in THE INDEPENDENT, May 16, 1901). Thanks to Lisa Cardyn for assistance with the historical materials.

[191] *See* KATHRYN SIKKINK, THE JUSTICE CASCADE 162–88 (2011) (presenting empirical analysis supporting the view that human rights prosecutions work to reduce the occurrence of atrocities).